PART II

# 7 Plaint and Written Statement

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## 1. GENERAL

THIS CHAPTER discusses two important topics, namely, (*i*) plaint; and (*ii*) written statement and the matters incidental thereto.

Rules 1 to 8 of Order 7 relate to particulars in a plaint. Rule 9 lays down procedure on plaint being admitted. Whereas Rules 10 to 10-B provides for return of plaint, and appearance of parties. Rules 11 to 13 deal with rejection of plaint. Rules 14 to 17 contain provisions relating to production of documents. Order 7 should be read with Section 26 of the Code.

Order 3 enables a party to appear in a court either in person, or through a recognized agent or through a pleader.

Order 5 deals with summons to a defendant. It contains provisions regarding issuance and service of summons. This order should be read with Sections 27 to 29 of the Code.

Order 8 enacts law relating to a written statement. Rules 1 to 5 and 7 to 10 require particulars to be stated in written statement, grounds of defence and production of documents. Rules 6 and 6-A to 6-G deal with doctrines of set-off and counterclaim respectively.

## 2. PLAINT: ORDER 7

### (a) Meaning

The expression "plaint" has not been defined in the Code. However, it can be said to be a statement of claim, a document, by presentation

of which the suit is instituted. Its object is to state the grounds upon which the assistance of the court is sought by the plaintiff. It is a pleading of the plaintiff.[1]

**(b) Particulars[2]; Rules 1-8**

Every plaint should contain the following particulars:

(*i*) The name of the court in which the suit is brought;[3]

(*ii*) The name, description and place of residence of the plaintiff;[4]

(*iii*) The name, description and place of residence of the defendant.[5]

(*iv*) Where the plaintiff or defendant is a minor or a person of unsound mind, a statement to that effect;[6]

(*v*) The facts constituting the cause of action and when it arose;[7]

(*vi*) The facts showing that the court has jurisdiction;[8]

(*vii*) A statement of the value of the subject-matter of the suit for the purpose of jurisdiction and court fees;[9]

(*viii*) The reliefs claimed by the plaintiff, simply or in the alternative;[10]

(*ix*) Where the plaintiff files a suit in a representative capacity, the facts showing that the plaintiff has an actual existing interest in the subject-matter and that he has taken steps that may be necessary to enable him to file such a suit;[11]

(*x*) Where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished;[12]

(*xi*) Where the suit is for recovery of money, the precise amount claimed;[13]

(*xii*) Where the suit is for accounts or *mesne profits* or for movables in the possession of the defendant or for debts which cannot be determined, the approximate amount or value thereof;[14]

1 Or. 6 R. 1; see also *Girija Bai* v. *Thakur Das*, AIR 1967 Mys 217.
2 For a Model plaint *see*, Appendix 'A'.
3 R. 1(*a*).
4 R. 1(*b*).
5 R. 1(*c*).
6 R. 1(*d*).
7 R. 1(*e*).
8 R. 1(*f*).
9 R. 1(*i*).
10 R. 1(*g*); *see also*, Rr. 7, 8.
11 R. 4.
12 R. 1(*h*).
13 R. 2.
14 R. 2.

(*xiii*) Where the subject-matter of the suit is immovable property a description of the property sufficient to identify it, e.g. boundaries, survey numbers, etc.;[15]

(*xiv*) The interest and liability of the defendant in the subject-matter of the suit;[16]

(*xv*) Where the suit is time-barred, the ground upon which the exemption from the law of limitation is claimed.[17]

Let us consider some important aspects in detail:

(*i*) *Parties to suit*

There must be two parties in every suit, namely, the plaintiff and the defendant. There may, however, be more than one plaintiff or more than one defendant. But there must be at least one plaintiff and one defendant in every suit. All particulars, such as name, father's name, age, place of residence, etc., which are necessary to identify the parties, must be stated in the plaint.

(*ii*) *Cause of action*

Every suit presupposes the existence of a cause of action against the defendant because if there is no cause of action, the plaint will have to be rejected.[18]

Even though the expression "cause of action" has not been defined in the Code, it may be described as "a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed"[19], or "which gives the plaintiff right to relief against the defendant".[20] Thus, "cause of action" means every fact, which it is necessary to establish to support a right or obtain a judgment.[21] To put it differently, cause of action gives occasion for and forms the foundation of the suit.[22]

The classic definition of the said expression is found in the case of *Cooke* v. *Gill*[23], wherein Lord Brett observed:

[15] R. 3.

[16] R. 5.

[17] R. 6. (The proviso, however, empowers the court to permit the plaintiff to rely on a new ground for exemption, if it is not inconsistent with the ground shown in the plaint.) *See also supra*, Or. 6 Rr. 2, 3, 4, 9, 10, 14, 14-A & 15.

[18] R. 11(*a*).

[19] *Ganesh Trading Co.* v. *Moji Ram*, (1978) 2 SCC 91: AIR 1978 SC 484; *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies*, (1989) 2 SCC 163; *Bloom Dekor Ltd.* v. *Subhash Himatlal Desai*, (1994) 6 SCC 322 at p. 328; *Alchemist Ltd.* v. *State Bank of Sikkim*, (2007) 11 SCC 335: AIR 2007 SC 1812; *Laxman Prasad* v. *Prodigy Electronics Ltd.*, (2008) 1 SCC 618; *Dadu Dayalu Mahasabha, Jaipur (Trust)* v. *Mahant Ram Niwas*, (2008) 11 SCC 753: AIR 2008 SC 2187.

[20] *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies*, (1989) 2 SCC 163 at p. 170: AIR 1989 SC 1239 at p. 1243; *Swamy Atmananda* v. *Sri Ramakrishna Tapovanam*, (2005) 10 SCC 51.

[21] *Sadanandan* v. *Madhavan*, (1998) 6 SCC 514 at p. 518: AIR 1998 SC 3043.

[22] *Ibid*, see also *Sidramappa* v. *Rajashetty*, (1970) 1 SCC 186 at p. 189: AIR 1970 SC 1059 at p. 1061.

[23] (1873) 8 CP 107 at p. 116: 21 WR 334: 28 LT 32: 42 LJ CP 98.

"Cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."[24]

Cause of action has nothing to do with the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour.[25] It must be antecedent to the institution of the suit[19] and on the basis of that cause of action the suit must have been filed. Whether any particular facts constitute a cause of action has to be determined with reference to the facts of each case, taking into consideration the substance of the matter rather than the form of action.[26]

It is also necessary for the plaintiff to state specifically when such cause of action arose. This will enable the defendant as well as the court to ascertain from the plaint whether in *fact* and in *law* the cause of action as alleged by the plaintiff in the plaint did arise or not.

In *Kuldeep Singh* v. *Ganpat Lal*[27], the Supreme Court stated, "The object underlying Order 7 Rule 1(*e*), which requires that the plaint shall contain the particulars about the facts constituting the cause of action and when it arose, is to enable the court to find out whether the plaint discloses the cause of action because the plaint is liable to be rejected under Order 7 Rule 11 CPC if it does not disclose the cause of action. The purpose behind the requirement that the plaint should indicate when the cause of action arose is to help the court in ascertaining whether the suit is not barred by limitation. Any error on the part of the plaintiff in indicating the date on which the cause of action arose would be of little consequence if the cause of action had arisen on the date on which the suit was filed and the suit was within limitation from the said date. The error in mentioning the date on which the cause of action had arisen in the plaint in such a case would not disentitle the plaintiff from seeking relief from the court in the suit."[28]

Thus, in a suit for possession against the tenant on the ground of non-payment of rent, the period for which the tenant has been in de-

[24] *Ibid*, at p. 116 (CP). See also *State of Madras* v. *C.P. Agencies*, AIR 1960 SC 1309; *A.K. Gupta and Sons Ltd.* v. *Damodar Valley Corpn.*, AIR 1967 SC 96: (1966) 1 SCR 796; *Ganesh Trading Co.* v. *Moji Ram*, *supra*; *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies*, (1989) 2 SCC 163; *Bloom Dekor Ltd.* v. *Subhash*, *supra*; *Alchemist Ltd.* v. *State Bank of Sikkim*, (2007) 11 SCC 335: AIR 2007 SC 1812; *Laxman Prasad* v. *Prodigy Electronics Ltd.*, (2008) 1 SCC 618.

[25] *Chand Kour* v. *Partab Singh*, (1889) 16 Cal 98 at p. 102; *State of Madras* v. *C.P. Agencies*, *supra*; *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies*, (1989) 2 SCC 163.

[26] *L. Janakirama Iyer* v. *P.M. Nilakanta Iyer*, AIR 1962 SC 633: 1962 Supp (1) SCR 206.

[27] (1996) 1 SCC 243: AIR 1996 SC 729.

[28] *Ibid*, at pp. 246-47 (SCC); at p. 731 (AIR).

fault must be stated. So also in a suit on a promissory note on demand, it must be stated that in spite of the demand being made, no payment was made by the promisee-defendant. Similarly, in a suit for damages for breach of contract, it must be stated that the contract was entered into between the plaintiff and the defendant and that the defendant had committed breach thereof. Likewise, in a suit for specific performance of an agreement the plaintiff must state that he was and is ready and willing to perform his part of the agreement. Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, he should state them as far as possible separately and distinctly.[29]

But for deciding whether the facts averred by the plaintiff would or would not constitute cause of action, partly or wholly, the court must consider whether such facts constitute material, essential or integral part of the cause of action. If it is, it forms a cause of action, but if it is not, it does not form a cause of action. In determining the said question, the substance of the matter and not the form thereof has to be considered. *"It is no doubt true that even if a small fraction of the cause of action arises within the jurisdiction of the court, the court would have territorial jurisdiction to entertain the suit. Nevertheless it must be a 'part of cause of action', nothing less than that."*[30] (emphasis supplied)

*(iii) Jurisdiction of court*

The plaint must state all the facts showing how the court has pecuniary and territorial jurisdiction over the subject-matter of the suit.[31] When the jurisdiction of a court to entertain the suit is disputed by the defendant, the court may frame the issue to that effect and decide the same before deciding other issues.[32]

*(iv) Valuation*

The plaintiff must state in the plaint the valuation of the subject-matter of the suit for the purposes of pecuniary jurisdiction of the court and court fees. Sometimes, the valuation of the subject-matter for both the purposes may be the same, as, for example, in a suit for recovery of money. But sometimes, two valuations may differ, as, for example, in a suit for declaration or in a suit for injunction or for possession of immovable property. In such a case, the plaintiff should *distinctly* state the valuation of the suit for the purpose of jurisdiction of the court and for the purpose of court fees.[33]

[29] R. 8.

[30] *Alchemist Ltd.* v. *State Bank of Sikkim*, (2007) 11 SCC 335 at p. 346: AIR 2007 SC 1812 (*per* Thakker, J.)

[31] For detailed discussion of "Jurisdiction of court", *see supra*, Chap. 4.

[32] Or. 14 R. 2(2). *See infra*, Chap. 10.

[33] For detailed discussion, *see supra*, Chap. 4.

*(v) Limitation: Rule 6*

Rule 6 provides that where the suit is barred by limitation, it is necessary for the plaintiff to show the ground of exemption in the plaint. But the proviso added by the Amendment Act of 1976 empowers the court to permit the plaintiff to rely on a new ground for exemption if it is not inconsistent with the grounds mentioned in the plaint.

*(vi) Relief: Rules 7-8*

Every plaint must state specifically the relief claimed by the plaintiff either simply or in the alternative. Where the relief is founded on separate and distinct grounds, they should be so stated.[34] Where the plaintiff is entitled to more than one relief in respect of the same cause of action, it is open to him to claim all or any of such reliefs. But if he omits, except with the leave of the court, to sue for any particular relief, he will not afterwards be allowed to sue for the relief so omitted.[35]

It is not necessary to ask for general or other relief.[36] But the general relief is usually prayed for by the plaintiff in the plaint in the following terms:

> "The plaintiff prays for such further or other relief as the nature of the case may require."

Strictly speaking, this type of prayer is not necessary since such relief may be granted by the court as if it has been asked for, provided it is not inconsistent with the specific claim raised in the pleadings.[37] The same rule applies to any relief claimed by the defendant in his written statement.[38]

The court must have regard for all the relief and look at the substance of the matter and not at its form.[39] As, for example, prayer for costs need not be added in the plaint since as a general rule costs follow the event[40], and the court is bound to decide the point. Similarly,

[34] Rr. 1(9), 7, 8; see also *Kedar Lal* v. *Hari Lal*, AIR 1952 SC 47: 1952 SCR 179; *V.R. Subramanyam* v. *B. Thayappa*, AIR 1966 SC 1034: (1961) 3 SCR 663; *Om Prakash* v. *Ram Kumar*, (1991) 1 SCC 441: AIR 1991 SC 409; *Gitarani Paul* v. *Dibyendra Kundu*, (1991) 1 SCC 1: AIR 1991 SC 395; *Lakshmi Ram* v. *Hari Prasad*, (2003) 1 SCC 197: AIR 2003 SC 351.

[35] Or. 2 R. 2(3), *see supra*, Chap. 5.

[36] R. 7. See also *Kedar Lal. Hari Lal*, AIR 1952 SC 47 at p. 52: 1952 SCR 179; *Hindalco Industries Ltd.* v. *Union of India*, (1994) 2 SCC 594 at p. 598.

[37] *Rajendra Tiwary* v. *Basudeo Prasad*, (2002) 1 SCC 90 at p. 94.

[38] R. 7.

[39] *Hindalco Industries Ltd.* v. *Union of India*, (1994) 2 SCC 594 at p. 598; *L. Janakirama Iyer* v. *P.M. Nilakanta Iyer*, AIR 1962 SC 633: 1962 Supp (1) SCR 206; *Bhagwati Prasad* v. *Chandramaul*, AIR 1966 SC 735: (1966) 2 SCR 286; *State of Haryana* v. *Haryana Coop. Transport Ltd.*, (1977) 1 SCC 271: AIR 1977 SC 237.

[40] S. 35, *see also infra*, Chap. 15.

in a suit for possession and mesne profits, the court can grant future mesne profits even if they are not specifically asked for.[41]

The plaintiff should state specifically the relief which he claims either simply or in the alternative.[42] As stated above, it is open to the plaintiff to pray for an alternative relief even though it may be inconsistent, provided that it is maintainable and not prohibited by any law.[43] Where a question arises as to whether the plaintiff has asked for a particular relief in his plaint, the plaint must be read as a whole and the substance of the matter and not the form thereof should be considered.[44]

In *Bhagwati Prasad* v. *Chandramaul*[45], the Supreme Court explained the principle thus:

> "The general rule, no doubt, is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. *To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the court cannot do injustice to another.*"[46] (emphasis supplied)

The suit cannot be dismissed merely on the ground that the plaintiff has claimed a larger relief than he is entitled to. But the lesser relief to which the plaintiff is entitled will be granted in his favour.[47] But the

[41] *Gopalakrishna Pillai* v. *Meenakshi Ayal*, AIR 1967 SC 155: 1966 Supp SCR 128.

[42] R. 7, see also *Kedar Lal* v. *Hari Lal*, AIR 1952 SC 47: 1952 SCR 179; *Rajendra Tiwary* v. *Basudeo Prasad*, (2002) 1 SCC 90 at p. 94.

[43] *Ibid*. For detailed discussion, *see supra*, "Alternative and inconsistent pleadings": Chap. 6.

[44] *L. Janakirama Iyer* v. *P.M. Nilakanta Iyer*, AIR 1962 SC 633: 1962 Supp (1) SCR 206; *Bhagwati Prasad* v. *Chandramaul*, AIR 1966 SC 735 at p. 738: (1966) 2 SCR 286; *Corpn. of the City of Bangalore* v. *M. Papaiah*, (1989) 3 SCC 612: AIR 1989 SC 1809.

[45] AIR 1966 SC 735: (1966) 2 SCR 286.

[46] *Ibid*, at p. 738 (AIR) (*per* Gajendragadkar, C.J.).

[47] *Vishram Arjun* v. *Irukulla Shankariah*, AIR 1957 AP 784 at p. 792; *Makhan Lal* v. *Mahaluxmi Bank Ltd.*, AIR 1968 Cal 90; *Kedar Lal* v. *Hari Lal*, *supra*; *B.R. Ramabhadriah* v. *Food & Agricultural Deptt.*, (1981) 3 SCC 528: AIR 1981 SC 1653; *Udhav Singh* v. *Madhav*

court cannot grant a larger relief to the plaintiff than that claimed by him even if he is entitled to it unless he gets his plaint amended with the leave of the court.[48]

### (c) Events happening after institution of suit

The basic rule is that the rights of the parties should be determined on the basis of the date of filing of the suit.[49] Thus, where the plaintiff has no cause of action on the date of the filing of the suit, he will not ordinarily be allowed to take advantage of the cause of action arising subsequent to the filing of the suit.[50] Similarly, no relief will be refused to the plaintiff by reason of any subsequent event if at the date of the institution of the suit, he has a substantive right.[51]

*Rao Scindia*, (1977) 1 SCC 511: AIR 1976 SC 744; *Krishna Priya* v. *University of Lucknow*, (1984) 1 SCC 307: AIR 1984 SC 186; *Hindalco Industries Ltd.* v. *Union of India*, (1994) 2 SCC 594.

[48] *Putta Kannayya* v. *Rudrabhatla Venkata*, AIR 1918 Mad 998 (2) at p. 1002 (FB). See also *Subhas Chandra* v. *Ganga Prosad*, AIR 1967 SC 878: (1967) 1 SCR 331; *Krishna Priya* v. *University of Lucknow*, (1984)1 SCC 307: AIR 1984 SC 186; *Trojan & Co.* v. *RM.N.N. Nagappa Chettiar*, AIR 1953 SC 235 at p. 240: 1953 SCR 789; *Thakamma Mathew* v. *M. Azamathulla Khan*, 1993 Supp (4) SCC 492: AIR 1993 SC 1120; *Sidramappa* v. *Rajashetty*, (1970) 1 SCC 186: AIR 1970 SC 1059; *Om Prakash* v. *Ram Kumar*, (1991) 1 SCC 441: AIR 1991 SC 409; *State of Bihar* v. *Dr. Radha Krishna*, (2002) 6 SCC 308: AIR 2002 SC 2755.

[49] *Lachmeshwar Prasad* v. *Keshwar Lal*, AIR 1941 FC 5: 1940 FCR 84; *Pasupuleti Venkateswarlu* v. *Motor & General Traders*, (1975) 1 SCC 770: AIR 1975 SC 1409; *Mahalinga Thambiran* v. *Arulnandi Thambiran*, (1974) 1 SCC 150 at pp. 166-67: AIR 1974 SC 199 at p. 209; *Rameshwar* v. *Jot Ram*, (1976) 1 SCC 194 at pp. 199-200: AIR 1976 SC 49 at p. 52; *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165 at p. 1178: (1968) 3 SCR 163; *Ramji Dayawala & Sons (P) Ltd.* v. *Invest Import*, (1981) 1 SCC 80 at p. 98-99: AIR 1981 SC 2085 at p. 2096; *Satish Chand Makhan* v. *Govardhan Das*, (1984) 1 SCC 369 at pp. 373-74: AIR 1984 SC 143 at p. 145; *Vineet Kumar* v. *Mangal Sain*, (1984) 3 SCC 352 at pp. 359-60: AIR 1985 SC 817 at p. 820; *Kanaya Ram* v. *Rajender Kumar*, (1985) 1 SCC 436 at pp. 440-41: AIR 1985 SC 371 at pp. 374-75; *Nand Kishore Marwah* v. *Samundri Devi*, (1987) 4 SCC 382 at pp. 389-90; *P. Sriramamurthy* v. *Vasantha Raman*, (1997) 9 SCC 654; *Jai Mangal Oraon* v. *Mira Nayak*, (2000) 2 SCC 141; *Lekh Raj* v. *Muni Lal*, (2001) 2 SCC 762: AIR 2001 SC 996; *Om Prakash* v. *Ranbir B. Goyal*, (2002) 2 SCC 256: AIR 2002 SC 665; *Ram Nibas* v. *Debojyoti Das*, (2003) 1 SCC 472; *Rajesh D. Darbar* v. *Narasingrao Krishnaji*, (2003) 7 SCC 219.

[50] *Rameshwar* v. *Jot Ram*, (1976) 1 SCC 194 at pp. 199-200: AIR 1976 SC 49 at p. 52; *Shikharchand Jain* v. *Digamber Jain Praband Karini Sabha*, (1974) 1 SCC 675: AIR 1974 SC 1178.

[51] *Pasupuleti Venkateswarlu* v. *Motor & General Traders*, (1975) 1 SCC 770: AIR 1975 SC 1409; *Mahalinga Thambiran* v. *Arulnandi Thambiran*, (1974) 1 SCC 150 at pp. 166-67: AIR 1974 SC 199 at p. 209; *Rameshwar* v. *Jot Ram*, (1976) 1 SCC 194 at pp. 199-200: AIR 1976 SC 49 at p. 52; *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165 at p. 1178: (1968) 3 SCR 163; *Ramji Dayawala & Sons (P) Ltd.* v. *Invest Import*, (1981) 1 SCC 80 at pp. 98-99: AIR 1981 SC 2085 at p. 2096; *Satish Chand Makhan* v. *Govardhan Das*, (1984) 1 SCC 369 at pp. 373-74: AIR 1984 SC 143 at p. 145; *Vineet Kumar* v. *Mangal Sain*, (1984) 3 SCC 352 at pp. 359-60: AIR 1985 SC 817 at p. 820; *Kanaya Ram* v. *Rajender Kumar*, (1985) 1 SCC 436 at pp. 440-41: AIR 1985 SC 371 at pp. 374-75; *Nand Kishore Marwah* v. *Samundri Devi*, (1987) 4 SCC 382 at pp. 389-90.

This, however, does not mean that no events happening after the institution of a suit can be taken into account at all. In appropriate cases, it is not only the right but the duty of the court to consider the changed circumstances. Where it is shown that the original relief claimed by the plaintiff has, by reason of subsequent change in the circumstances, become useless or inappropriate or where it is necessary to take notice of changed circumstances to shorten litigation, a new relief may serve the purpose better or that a relief is required to be reshaped or moulded in the light of change in facts or in law to do full and complete justice between the parties, the court is bound to depart from the above rule and mould the relief in the light of altered circumstances.[52] In *Amarjit Singh* v. *Khatoon Quamarain*[53], the Supreme Court observed, "Administration of justice demands that any change either in fact or in law must be taken cognizance of by the court but that must be done in a cautious manner of relevant facts. Therefore, *subsequent events can be taken cognizance of if they are relevant and material.*" (emphasis supplied)

In the leading case of *Pasupuleti Venkateswarlu* v. *Motor & General Traders*[54], Krishna Iyer, J. rightly propounded:

> "It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the *lis* has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice—subject, of course, to the absence of other disentitling factors or just circumstances. Nor can the court contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent of other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. *We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious*

[52] *Shikharchand Jain* v. *Digamber Jain Praband Karini Sabha, supra; Pasupuleti Venkateswarlu* v. *Motor & General Traders, supra; Rameshwar* v. *Jot Ram, supra; Laxmi & Co.* v. *Dr. Anant R. Deshpande*, (1973) 1 SCC 37 at p. 45: AIR 1973 SC 171 at p. 177; *Vineet Kumar* v. *Mangal Sain, supra.*

[53] (1986) 4 SCC 736 at p. 743: AIR 1987 SC 741.

[54] (1975) 1 SCC 770: AIR 1975 SC 1409.

*cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."*[55] (emphasis supplied)

It is submitted that the following observations in *Ramji Lal* v. *State of Punjab*[56], lay down correct law on the point and are, therefore, worth quoting:

"It is true that courts do very often take notice of events that happen subsequent to the filing of suits and at times even those that have occurred during the appellate stage and permit pleadings to be amended for including a prayer for relief on the basis of such events but this is ordinarily done to avoid multiplicity of proceedings or when the original relief claimed has, by reason of change in the circumstances, become inappropriate and *not when the plaintiff's suit would be wholly displaced by the proposed amendment and a fresh suit by him would be so barred by limitation."*[57] (emphasis supplied)

Thus, where during the pendency of a suit for permanent injunction, the plaintiff is dispossessed by the defendant, the court can grant relief for restoration of possession also. Similarly, in a suit for partition by *A* against his brothers *B* and *C*, if *C* dies, *A* can claim one-half share instead of one-third. Again, where the proceedings under the Rent Control Act for permission to evict a tenant were pending, subsequent events affecting the right of the landlord to evict have been taken into account even in revision.[58] So also, pending an appeal in the Supreme Court, the defendant, Head of the Mutt, who nominated the plaintiff as his successor died, the Supreme Court took notice of that event, and declared the plaintiff as the successor of the defendant under the will alleged to have been revoked by the deceased defendant.[59]

But where the rights of the parties have already crystallised and the decision has reached finality, the concluded controversy cannot be

[55] *Ibid*, at pp. 772-73 (SCC): at p. 1410 (AIR). See also *Vineet Kumar* v. *Mangal Sain*, *supra*.

[56] AIR 1966 Punj 374: ILR (1966) 2 Punj 125 (FB).

[57] *Ibid*, at pp. 378-79 (AIR). See also *Rameshwar* v. *Jot Ram*, *supra*, at p. 201 (SCC): at p. 52 (AIR); *Variety Emporium* v. *V.R.M. Mohd. Ibrahim*, (1985) 1 SCC 251: AIR 1985 SC 207; *Hasmat Rai* v. *Raghunath Prasad*, (1981) 3 SCC 103: AIR 1981 SC 1711; *Chandavarkar* v. *Ashalata*, (1986) 4 SCC 447: AIR 1987 SC 117; *Gulabbai* v. *Nalin Narsi Vohra*, (1991) 3 SCC 483: AIR 1991 SC 1760; *Ramesh Kumar* v. *Kesho Ram*, 1992 Supp (2) SCC 623: AIR 1992 SC 700.

[58] *Pasupuleti Venkateswarlu* v. *Motor & General Traders*, *supra*. See also *M.M. Quasim* v. *Manohar Lal*, (1981) 3 SCC 36: AIR 1981 SC 1113; *Gulabbai* v. *Nalin Narsi Vohra*, *supra*; *P.V. Papanna* v. *K. Padmanabhaiah*, (1994) 2 SCC 316: AIR 1994 SC 1577; *Super Forgings and Steels Sales (P) Ltd.* v. *Thyabally Rasuljee*, (1995) 1 SCC 410.

[59] *Mahalinga Thambiran* v. *Arulnandi Thambiran*, (1974) 1 SCC 150 at pp. 166-67: AIR 1974 SC 199; *M.M. Quasim* v. *Manohar Lal*, *supra*.

reopened on the basis of subsequent events by divesting a party of the benefit of the right which accrued to him.[60]

**(d) Admission of plaint: Rule 9**

Rule 9 lays down the procedure when the plaint is admitted by the court. It provides for filing of copies of the plaint by the plaintiff and also requires him to pay requisite fees for the service of summons on the defendants within seven days.

**(e) Return of plaint: Rules 10–10-B**

Where at any stage of the suit, the court finds that it has no jurisdiction, either territorial or pecuniary or with regard to the subject-matter of the suit, it will return the plaint to be presented to the proper court in which the suit ought to have been filed.[61]

Rule 10-A prescribes the procedure to be followed by a court before the plaint is ordered to be returned to be presented to the proper court. It is inserted to obviate the necessity of serving the summons on the defendants where the return of plaint is made after the appearance of the defendants in the suit. An appellate court can also return the plaint to be presented to the proper court.[62]

The judge returning the plaint should make endorsements on it regarding (*i*) the date of presentation; (*ii*) the date of return; (*iii*) the name of the party presenting it; and (*iv*) reasons for returning it.[63]

But at the stage of consideration of return of plaint, the averments in the plaint alone should be looked into. Moreover, the plaint should be read in a meaningful manner and as a whole so as to find out the real intention behind the suit.[64]

When the plaint is filed in the proper court, after getting it back from the wrong court, it cannot be said to be a continuation of the suit and the suit must be deemed to commence when a plaint is filed in the proper court.[65] The order returning the plaint is appealable.[66]

[60] *Bhajan Lal* v. *State of Punjab*, (1971) 1 SCC 34; *Rameshwar* v. *Jot Ram*, (1976) 1 SCC 194: AIR 1976 SC 49; *Syed Asadullah* v. *ADJ, Allahabad*, (1981) 3 SCC 483: AIR 1981 SC 1724; *P.V. Papanna* v. *K. Padmanabhaiah*, (1994) 2 SCC 316: AIR 1994 SC 1577.

[61] R. 10(1).

[62] R. 10-B.

[63] R. 10(2).

[64] *Moolji Jaitha and Co.* v. *Khandesh Spg. and Wvg. Mills Co. Ltd.*, AIR 1950 FC 83; *T. Arivandanam* v. *T.V. Satyapal*, (1977) 4 SCC 467: AIR 1977 SC 2421; *Begum Sabiha* v. *Nawab Mohd. Mansur*, (2007) 4 SCC 343: AIR 2007 SC 1636.

[65] *Amar Chand* v. *Union of India*, (1973) 1 SCC 115: AIR 1973 SC 313; *Ram Ujarey* v. *Union of India*, (1999) 1 SCC 685: AIR 1999 SC 309; *Harshad Chimanlal Modi* v. *DLF Universal Ltd.*, (2006) 1 SCC 364: AIR 2006 SC 646.

[66] Or. 43 R. 1(*a*). *See also infra*, Pt. III, Chap. 4.

**(f) Rejection of plaint: Rule 11**

The plaint will be rejected in the following cases:[67]

(i) *Where plaint does not disclose cause of action?*

If the plaint filed by the plaintiff does not disclose any cause of action, the court will reject it. But in order to reject the plaint on this ground, the court must look at the plaint and at nothing else.[68]

The power to reject a plaint on this ground should be exercised only if the court comes to the conclusion that even if all the allegations set out in the plaint are proved, the plaintiff would not be entitled to any relief. In that case, the court will reject the plaint without issuing summons to the defendants. The reading of the plaint should be meaningful and not formal.[69] But where the plaint does not disclose cause of action, clever drafting, ritual of repeating words or creation of an illusion cannot insert a cause of action in a plaint.[70]

Again, there is a difference between a plea that the plaint does not disclose a cause of action and a plea that there is no cause of action for instituting a suit. For determining whether the plaint discloses the cause of action or not, averments in the plaint alone are relevant and material.[71]

Finally, the plaint can be rejected as a whole if it does not disclose the cause of action. A part of it cannot be rejected.[72]

(ii) *Where relief claimed is undervalued?*

Where the relief claimed by the plaintiff is undervalued and the valuation is not corrected within the time fixed or extended by the court, the plaint will be rejected.

In considering the question whether the suit is properly valued or not, the court must confine its attention to the plaint only and should not look at the other circumstances which may subsequently influ-

[67] R. 11.

[68] *Abdulla Bin Ali* v. *Galappa*, (1985) 2 SCC 54: AIR 1985 SC 577; *Commercial Aviation & Travel Co.* v. *Vimla Pannalal*, (1988) 3 SCC 423: AIR 1988 SC 1636; *Begum Sahiba* v. *Nawab Mohd. Mansur, supra.*

[69] *Ibid*, see also *T. Arivandanam* v. *T.V. Satyapal*, (1977) 4 SCC 467 at p. 470: AIR 1977 SC 2421 at p. 2423.

[70] *Ibid*, see also *I.T.C. Ltd.* v. *Debts Recovery Appellate Tribunal*, (1998) 2 SCC 70: AIR 1998 SC 634; *Church of North India* v. *Lavajibhai*, (2005) 10 SCC 760: AIR 2005 SC 2544; *Hardesh Ores (P) Ltd.* v. *Hede and Co.*, (2007) 5 SCC 614.

[71] *State of Orissa* v. *Klockner & Co.*, (1996) 8 SCC 377: AIR 1996 SC 2140; *Raptakos Brett & Co.* v. *Ganesh Property*, (1998) 7 SCC 184: AIR 1998 SC 3085; *Begum Sahiba* v. *Nawab Mohd. Mansur, supra.*

[72] *Roop Lal* v. *Nachhattar Singh*, (1982) 3 SCC 487 at pp. 499-500: AIR 1982 SC 1559 at pp. 1565-66; *Church of North India* v. *Lavjibhai, supra.*

ence the judgment of the court as to the true value of the relief prayed for.[73]

*(iii) Where plaint is insufficiently stamped?*

Sometimes the relief claimed by the plaintiff is properly valued, but the plaint is written upon a paper insufficiently stamped and the plaintiff fails to pay the requisite court fees within the time fixed or extended by the court. In that case, the plaint will be rejected. However, if the requisite court fee is paid within the time extended by the court, the suit or appeal must be treated as instituted from the date of presentation of plaint or memorandum of appeal for the purpose of limitation as well as payment of court fee.[74]

If the plaintiff cannot pay the court fees, he may apply to continue the suit as an indigent person.[75]

*(iv) Where suit is barred by law?*

Where the suit appears from the statements in the plaint to be barred by any law, the court will reject the plaint.

For instance, where in a suit against the government, the plaint does not state that a "notice" as required by Section 80 of the Code has been given, the plaint will be rejected under this clause.[76] But where waiver of such notice is pleaded, the court cannot reject the plaint without giving the plaintiff an opportunity to establish that fact.[77] Likewise, if the plaint itself shows that the claim is barred by limitation, the plaint can be rejected.[78] But if the question of limitation is connected with the merits of the case, the matter requires to be decided along with other issues.[79]

*(v) Where plaint is not in duplicate?*

The plaint has to be filed in duplicate.[80] If the said requirement is not complied with the plaint will be rejected.[81]

[73] *Meenakshisundaram* v. *Venkatachalam*, (1980) 1 SCC 616: AIR 1979 SC 989; *Tara Devi* v. *Sri Thakur Radha Krishna Maharaj*, (1987) 4 SCC 69: AIR 1987 SC 2085.

[74] *Mannan Lal* v. *Chhotaka Bibi*, (1970) 1 SCC 769 at pp. 776-77: AIR 1971 SC 1374.

[75] Or. 33. *See infra*, Chap. 16.

[76] *Bhagchand* v. *Secy. of State*, AIR 1927 PC 176: (1926-27) 54 IA 338; *Beohar Rajendra Sinha* v. *State of M.P.*, (1969) 1 SCC 796: AIR 1969 SC 1256; *Tej Kiran* v. *N. Sanjiva Reddy*, (1970) 2 SCC 272: AIR 1970 SC 1573. For detailed discussion, *see infra*, Chap. 16.

[77] *B.L. Chopra* v. *Punjab State*, AIR 1961 Punj 150; *Lakshmi Narain* v. *Union of India*, AIR 1962 Pat 64; *Beohar Rajendra Sinha* v. *State of M.P.*, (1969) 1 SCC 796: AIR 1969 SC 1256; *Tej Kiran* v. *N. Sanjiva Reddy*, (1970) 2 SCC 272: AIR 1970 SC 1573; *Ebrahimbhai* v. *State of Maharashtra*, AIR 1975 Bom 13.

[78] *Ibid*, see also *Gangappa Gurupadappa* v. *Rachawwa*, (1970) 3 SCC 716: AIR 1971 SC 442.

[79] *Arjan Singh* v. *Union of India*, AIR 1987 Del 165.

[80] Or. 4 R. 1(1).

[81] Or. 7 R. 11(*e*).

(*vi*) *Where there is non-compliance with statutory provisions?*
Where the plaintiff fails to comply with the provisions of Rule 9, the plaint will be rejected.[82]

(*vii*) *Other grounds*
The grounds for rejection of plaint specified in Rule 11 of Order 7 are not exhaustive. On other relevant grounds also a plaint can be rejected. Thus, if the plaint is signed by a person not authorised by the plaintiff and the defect is not cured within the time granted by the court, the plaint can be rejected.[83] Likewise, where the plaint is found to be vexatious and meritless, not disclosing a clear right to sue, the court may reject the plaint under this rule.[84]

(*viii*) *Procedure on rejection of plaint: Rule 12*
Where a plaint is rejected by a court, the judge will pass an order to that effect and will record reasons for such rejection.[85]

(*ix*) *Effect of rejection of plaint: Rule 13*
If the plaint is rejected on any of the above grounds, the plaintiff is not thereby precluded from presenting a fresh plaint in respect of the same cause of action.[86]

(*x*) *Appeal*
An order rejecting a plaint is a deemed "decree" within the meaning of Section 2(2) of the Code, and, therefore, is appealable.[87]

**(g) Documents relied on in plaint: Rules 14-17**
Rules 14 to 17 deal with the production of documents by the plaintiff. Rule 14 enjoins the plaintiff to produce at the time of the presentation of a plaint copies of all documents on which he sues or seeks to rely. It also provides for the consequences of non-production of documents. It lays down that a document which ought to be produced in the court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint, and is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit.

[82] Or. 7 R. 11(*f*).

[83] *Radakishen* v. *Wali Mohammed*, AIR 1956 Hyd 133: ILR 1956 Hyd 514.

[84] *T. Arivandanam* v. *T.V. Satyapal*, (1977) 4 SCC 467: AIR 1977 SC 2421; *Mayar H.K. Ltd.* v. *Owners & Parties, Vessel M.V. Fortune Express*, (2006) 3 SCC 100: AIR 2006 SC 1828.

[85] R. 12.

[86] R. 13.

[87] S. 96. *See infra*, Pt. III.

The object underlying Rule 14 is to exclude the production of documents of a doubtful nature at a later stage.[88] The court has wide discretion to allow or disallow production of documents at a later stage having regard to the facts and circumstances of each case.[89] This provision, however, does not apply to the following documents:

(*i*) Documents reserved for the purpose of cross-examination of the defendant's witnesses; or

(*ii*) Documents handed over to a witness merely to refresh his memory.[90]

## 3. AGENTS AND PLEADERS: ORDER 3

### (a) Appearance of parties: Rule 1

Generally any appearance, application or act in or to any court may be made or done (*i*) by a party in person; or (*ii*) by his agent; or (*iii*) by a pleader appearing, applying or acting on his behalf. No doubt, a court can direct any party to appear in person.[91] Except for good reasons, however, a court will not direct the party to appear in person.[92] But once such a direction is issued by a court and even then the party fails to appear, the court may dismiss the suit or proceed *ex parte*.[93]

The primary object of Rule 1 is to facilitate the proceedings before the court, to afford an opportunity to the party and to enable him to perform certain acts through recognized agent or pleader which otherwise he would have to perform.[94]

### (b) Recognized agents: Rule 2

(*i*) *Agent: Meaning*

An agent is a person having express or implied authority to act on behalf of another person, called principal.

Recognized agent is a person allowed to speak or conduct proceedings in a court of law.[95]

[88] *Sudhir Kumar* v. *Bank of India*, AIR 1991 Pat 267; *Ramachandra Das* v. *Hiralal Modi*, AIR 1978 Ori 172.

[89] *Kanda* v. *Waghu*, AIR 1950 PC 68: (1949-50) 77 IA 15; *Gopika Raman Roy* v. *Atal Singh*, AIR 1929 PC 99: (1928-29) 56 IA 119; *Budhey Ram* v. *Hira Lal*, AIR 1953 HP 52.

[90] R. 14(4).

[91] Or. 3 R. 1; see also *Jagraj Singh* v. *Birpal Kaur*, (2007) 2 SCC 564: AIR 2007 SC 2083.

[92] *Sarla Rani* v. *Bhushanlal*, AIR 1976 J&K 12; *Pandu* v. *Hira*, AIR 1936 Nag 85.

[93] Or. 9 R. 12, see also *Jagraj Singh* v. *Birpal Kaur*, *supra*.

[94] *Nadella Satyanarayana* v. *Yamanoori Venkata Subbiah*, AIR 1957 AP 172 (FB): ILR 1957 AP 1 (FB).

[95] *Chamber's Twentieth Century Dictionary* (1992) at p. 1080.

(*ii*) *Recognized agents under CPC*

The following persons have been considered as recognized agents by the Code:

(*i*) Persons holding power of attorney;[96]

(*ii*) Persons carrying on trade or business for parties;[97]

(*iii*) Persons specially appointed by the government to prosecute or defend on behalf of foreign rulers;[98] and

(*iv*) Persons authorized to act for Government.[99]

**(c) Pleaders: Rule 4**

(*i*) *Pleader: Definition*

"Pleader" is defined in the Code as "any person entitled to appear and plead for another in court and includes an advocate, a vakil and an attorney of a High Court".[100]

(*ii*) *Appointment of pleader: Rule 4*

Rule 4 prescribes the manner of the appointment of a pleader and also the limit up to which such appointment remains in force. It provides that a pleader can be appointed by a document in writing, known as *vakalatnama* or *vakalatpatra*, signed by the party or by his recognized agent or by some other person, duly authorised by him. Every such appointment shall be filed in court and deemed to be in force until the determination of all proceedings in the suit; or until determined by the client or the pleader, or until the client or pleader dies; or until the duration for which he is engaged is over.[101]

(*iii*) *Status of pleader*

The legal profession is essentially a service-oriented profession. The ancestor of today's lawyer was a spokesman who rendered service to needy members of society without regard to remuneration. The relationship between a lawyer and his client is of trust and confidence. Being a responsible officer of the court, a lawyer owes responsible conduct not only to his client but also to the other side and to the court and to society at large. He is essentially an adviser to his client and is rightly called a "counsel" in some jurisdictions. *He demeans himself if he acts merely as a mouthpiece of his client.*[102] (emphasis supplied)

[96] Or. 3 R. 2.

[97] *Ibid.*

[98] S. 85.

[99] Or. 27 R. 2.

[100] S. 2(15).

[101] R. 4.

[102] *State of U.P.* v. *U.P. State Law Officers Assn.*, (1994) 2 SCC 204 at p. 216: AIR 1994 SC 1654. See also *Vinay Chandra Mishra, In re*, (1995) 2 SCC 584: AIR 1995 SC 2348; *Ministry of Information & Broadcasting, In re*, (1995) 3 SCC 619.

*(iv) Authority of pleader*

A pleader stands on the same footing in regard to his authority to act on behalf of his clients.[103] There is inherent in the position of counsel an implied authority to do all that is expedient, proper and necessary for the conduct of the suit and the settlement of disputes.[104] This power, however, must be exercised *bona fide* and for the benefit of his client.[105] Secondly, power is one thing and prudence is another and indeed the latter sometimes bears upon the former.[106] The lawyer must be above board, especially if he is to agree to an adverse verdict.[107] It is prudent and proper to consult his client and take his consent if there is time and opportunity.[108] He should not act on implied authority except when warranted by exigency of circumstances and a signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise.[109] Again, ordinarily when a junior and senior appear in the case, it would be risky on the part of the junior to report a compromise without consulting his senior.[110]

*(v) Duties of pleader*

Lawyers are custodians of civilisation. They have to discharge their duties with dignity, decorum and discipline.[111] They are not mere agents of their clients but are officers of the court and they are expected to assist in the administration of justice. As it is said, a counsel has a tripartite relationship: one with the public, another with the court and the third with his client. That is a unique feature.[112] Other professions or callings may include one or two of these relationships but no other has the triple duty. Counsel's duty to the public is unique in that

[103] *Jamilabai Abdul Kadar* v. *Shankarlal*, (1975) 2 SCC 609 at p. 615: AIR 1975 SC 2202 at pp. 2205-06.

[104] *Ibid*, at p. 618 (SCC): at p. 2207 (AIR). See also *Laxmidas* v. *Savitabai*, AIR 1956 Bom 54; *Surendra Shankar* v. *Laxman Shankar*, AIR 1960 Bom 20; *Manoharbahal Colliery* v. *K.N. Mishra*, (1975) 2 SCC 244: AIR 1975 SC 1632.

[105] *Ibid*, at p. 623 (SCC): at p. 2210 (AIR).

[106] *Ibid*, at pp. 621-22 (SCC): at p. 2210 (AIR).

[107] *Ibid*, at p. 624 (SCC): at p. 2211 (AIR). See also *Manoharbahal Colliery* v. *K.N. Mishra*, (1975) 2 SCC 244: AIR 1975 SC 1632; *State of U.P.* v. *U.P. State Law Officers Assn.*, (1994) 2 SCC 204: (1994) 26 ATC 906; *Vinay Chandra Mishra, In re*, (1995) 2 SCC 584: AIR 1995 SC 2348; *Ministry of Information & Broadcasting, In re*, (1995) 3 SCC 619.

[108] *Ibid*, at p. 623 (SCC): at pp. 2210-11 (AIR).

[109] *Byram Pestonji* v. *Union Bank of India*, (1992) 1 SCC 31 at pp. 46-47: AIR 1991 SC 2234 at p. 2244.

[110] *Jamilabai Abdul Kadar* v. *Shankarlal*, *supra*, at p. 624 (SCC): at p. 2211 (AIR).

[111] *Hargovind Dayal* v. *G.N. Verma*, (1977) 1 SCC 744 at p. 746: AIR 1977 SC 1334 at p. 1335.

[112] *Chengan Souri Nayakam* v. *A.N. Menon*, AIR 1968 Ker 213 at p. 216 (FB) (*per* Mathew, J.); see also *Jamilabai Abdul Kadar* v. *Shankarlal*, *supra*; *Byram Pestonji* v. *Union Bank of India*, *supra*.

he has to accept all work from all clients in courts in which he holds himself out as practising, however unattractive the case or his client.[113] A counsel has the duty and right to speak freely and independently without fear of authority, without fear of the judges and also without fear of a stab in the back from his own client. *To some extent, he is a Minister of Justice.*[114] (emphasis supplied)

A counsel has no right to go on strike or to remain absent from court when the case of his client comes up for hearing. He is duty-bound to attend the case in court or to make an alternative arrangement. The mere fact that he was busy in some other court is not a good and sufficient ground for his non-appearance in the court when his case is called for hearing. Such absence is not only unfair to his client but is also unfair and discourteous to the court and should be severely discountenanced.[115]

Lord Atkin rightly states, "The advocate is to conduct the cause of his client to the utmost of his skill and understanding. He must in the interests of his client be in the position, hour by hour, almost minute by minute, to advance his argument, to withdraw that; he must make the final decision whether the evidence is to be given or not on any question of fact; skill in advocacy is largely the result of discrimination... *often the decision must be made at once.*"[116] (emphasis supplied) There are a few black sheep in every profession, nay, in every walk of life. But few as they are, they tarnish the fair name of age-old institutions.[117] The Bar must sternly screen to extirpate the black sheep among them, for Caesar's wife must be above suspicion, if the profession is to command the confidence of the community and the court.[118] It is also the duty of lawyers to protect the dignity and decorum of the judiciary. If

[113] *Per* Mathew, J. *in Chengan Souri Nayakam* v. *A.N. Menon*, AIR 1968 Ker 213 at p. 216 (FB). See also *Jamilabai Abdul Kadar* v. *Shankarlal, supra; Byram Pestonji* v. *Union Bank of India, supra.*

[114] *Per* Lord Denning in *Rondel* v. *Worsley*, (1969) 1 AC 191: (1967) 1 QB 443 at p. 502: (1967) 3 WLR 1666: (1967) 3 All ER 993 (HL). See also *Jamilabai Abdul Kadar* v. *Shankarlal, supra; State of Punjab* v. *Satya Pal*, AIR 1969 SC 903 at p. 915; *T. Arivandanam* v. *T.V. Satyapal*, (1977) 4 SCC 467 at pp. 469-70: AIR 1977 SC 2421 at p. 2423; *K. Sankaranarayana* v. *Mysore Fertiliser Co.*, AIR 1979 Ker 167.

[115] *Sita Bai* v. *Vidhyawati*, AIR 1972 MP 198 at p. 199; *Rafiq* v. *Munshilal*, (1981) 2 SCC 788: AIR 1981 SC 1400; *Goswami Krishna* v. *Dhan Prakash*, (1981) 4 SCC 574; *Lachi Tewari* v. *Director of Land Records*, 1984 Supp SCC 431: AIR 1984 SC 41; *Salil Dutta* v. *T.M. & M.C. (P) Ltd.*, (1993) 2 SCC 185; *Mahabir Prasad* v. *Jacks Aviation (P) Ltd.*, (1999) 1 SCC 37: AIR 1999 SC 287; *see also infra*, "Strike by lawyers".

[116] *Sourendra Nath* v. *Tarubala Dasi*, AIR 1930 PC 158 at p. 161: (1929-30) 57 IA 133.

[117] *Per* Chandrachud, C.J. in *Satyendra Narain* v. *Ram Nath*, (1984) 4 SCC 217 at p. 219: AIR 1984 SC 1755 at p. 1756.

[118] *Per* Krishna Iyer, J. in *Jamilabai Abdul Kadar* v. *Shankarlal, supra*, at p. 623 (SCC): at p. 2211 (AIR).

lawyers fail in their duty the faith of the people in the judiciary will be undermined to a large extent.[119]

*(vi) Responsibilities of pleader*

No one expects a lawyer to be subservient to the Court while presenting the case of his client and not to put forward his arguments merely because the court is against him. On the contrary, that is the moment when he is expected to put forth his best efforts to persuade the Court. But if the lawyer finds, in spite of his efforts, that the Court is against him, he should not be discourteous to the Court nor should he use disrespectful or derogatory language. *The lawyer is not entitled to indulge in unbecoming conduct either by showing his temper or using unbecoming language.*[120] (emphasis supplied)

The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the Court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of civilised society. *Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behaviour.*[121] (emphasis supplied)

*(vii) Strike by pleaders*

A lawyer or pleader cannot go on strike nor boycott a court. It is the duty of every lawyer to attend trial even if it may go on for a prolonged period. He cannot refuse to attend the court on the ground that the Bar Association or Bar Council has given a call for strike or boycott of court. A court also cannot adjourn matters merely because lawyers are on strike. If lawyers resort to strike, they are answerable for consequences. Only in "the rarest of rare cases", involving dignity, integrity and independence of the Bar or the Bench, abstention of court work may not be taken seriously. But it is for the court to decide whether the issue calls for such action. Normally, in such cases, the President of the Bar should first consult the Chief Justice or the District Judge whose decision would be final.[122]

[119] *Per* Ray, C.J. in *T. Arivandanam* v. *T.V. Satyapal*, (1977) 4 SCC 467 at pp. 470-71: AIR 1977 SC 2421 at p. 2423.

[120] *Vinay Chandra Mishra, In re*, (1995) 2 SCC 584 at p. 614: AIR 1995 SC 2348.

[121] *Ministry of Information & Broadcasting, In re*, (1995) 3 SCC 619 at p. 634.

[122] *Ex. Capt. Harish Uppal* v. *Union of India*, (2003) 2 SCC 45: AIR 2003 SC 739; *Supreme Court Employees' Welfare Assn.* v. *Union of India*, (1989) 4 SCC 187; *Indian Council of Legal*

*(viii) Appearance by proxy*

It is a recognized practice in almost all courts that counsel for parties are allowed to be represented by other counsel. Representations made by them are usually taken as representations by counsel on record unless it is shown to be otherwise.[123]

### (d) Service of process: Rules 3, 5-6

A process served on the recognized agent or a pleader of the party or left at the office or residence of the pleader will be considered as valid and proper.[124]

## 4. SUMMONS: SECTIONS 27-29; ORDER 5

### (a) Summons: Meaning

When the plaintiff files a suit, the defendant has to be informed that the suit has been filed against him, and that he is required to appear in the court to defend it. The intimation which is sent to the defendant by the court is technically known as "summons".

Though the said expression (summons) has not been defined in the Code, according to the dictionary meaning,[125] "A summons is a document issued from the office of a court of justice, calling upon the person to whom it is directed to attend before a judge or officer of the court for a certain purpose."

### (b) Object of issuing summons

When a suit is filed by the plaintiff against the defendant and a relief is claimed, the defendant must be given an opportunity as to what he has to say against the prayer made by the plaintiff. This is in consonance with the principle of natural justice as no one can be condemned unheard (*audi alteram partem*)[126]. If the defendant is not served with the summons, a decree passed against him will not bind him.

*Aid & Advice* v. *Bar Council of India*, (1995) 1 SCC 732: AIR 1995 SC 691; *C. Ravichandran* v. *A.M. Bhattacharjee*, (1995) 5 SCC 457.

[123] *Jayant Madhav* v. *Garware Wall Ropes Ltd.*, AIR 1997 Bom 126: (1997) 1 Mah LJ 261: (1997) 2 Mah LR 255: (1997) 2 Bom CR 427.

[124] Rr. 3, 5, 6; See also *Nilkantha Sidramappa* v. *Kashinath Somanna*, AIR 1962 SC 666 at p. 668: (1962) 2 SCR 551.

[125] Earl Jowitt, *The Dictionary of English Law* (1972) at p. 1700; see also *Concise Oxford English Dictionary* (2002) at p. 1435.

[126] For detailed discussion of *audi alteram partem*, *see* Author's *Lectures on Administrative Law* (2008) Lecture VI.

**(c) Essentials of summons: Rules 1-2**

Every summons shall be signed by the judge or such officer appointed by him and shall be sealed with the seal of the court[127], and must be accompanied by a plaint.[128]

**(d) Form of summons**

Every summons should be in the Forms prescribed in Appendix B to the (First) Schedule of the Code.

**(e) Summons to defendant: Section 27; Order 5 Rule 1**

Order 5 deals with summons to a defendant while Order 16 deals with summons to witnesses.[129] When a suit has been duly filed by presentation of a plaint, the court must issue summons to the defendant calling upon him to appear and answer the claim of the plaintiff by filing a written statement within thirty days from the date of service of summons.[130] No summons, however, will be issued by the court if, at the time of presentation of a plaint, the defendant is present and admits the plaintiff's claim.[131]

**(f) Appearance in person: Rule 3**

A defendant to whom a summons has been issued, may appear (1) in person; or (2) by a pleader duly instructed and able to answer all material questions relating to the suit; or (3) by a pleader accompanied by some person able to answer all such questions.[132] The court, however, may order the defendant or plaintiff to appear in person.[133]

**(g) Exemption from appearance in person: Sections 132-33; Rule 4**

No party shall be ordered to appear in person:

(*a*) unless he resides (*a*) within the local limits of the court's ordinary original jurisdiction; or (*b*) outside such limits, but at a place less than (*i*) 50 miles; or (*ii*) 200 miles (where public conveyance is available) from the courthouse;[134] or

(*b*) who is a woman not appearing in public;[135] or

(*c*) who is entitled to exemption under the Code.[136]

[127] Or. 5 R. 1(3).
[128] R. 2.
[129] For "Summons to witnesses", *see infra*, Chap. 14.
[130] S. 27, Or. 5 R. 1(1).
[131] First Proviso to R. 1(1).
[132] R. 1(2).
[133] R. 3.
[134] R. 4.
[135] S. 132.
[136] S. 133.

**(h) Contents of summons: Rules 5-8**

The summons must contain a direction whether the date fixed is for settlement of issues only or for final disposal of the suit.[137] In the latter case, the defendant should be directed to produce his witnesses.[138] The court must give sufficient time to the defendant to enable him to appear and answer the claim of the plaintiff on the day fixed.[139] The summons should also contain an order to the defendant to produce all documents or copies thereof in his possession or power upon which he intends to rely on in support of his case.[140]

**(i) Mode of service of summons: Rules 9-30**

The service of summons is of primary importance as it is a fundamental rule of the law of procedure that a party must have a fair and reasonable notice of the legal proceedings initiated against him so that he can defend himself. The problem of service of summons is one of the major causes of delay in the progress of the suit. It is common knowledge that defendants try to avoid service of summons. The Law Commission considered the problem and it was felt that certain amendments were necessary in that direction and a defendant can be served by a plaintiff or through modern means of communication. Accordingly, amendments were made in the Code in 1976, 1999 and 2002.[141]

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

(*1*) *Personal or direct service: Rules 10-16, 18*

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

(*i*) Wherever it is practicable, the summons must be served to the defendant in person or to his authorised agent.[142]

(*ii*) Where the defendant is absent from his residence at the time of service of summons and there is no likelihood of him being found at his residence within a reasonable time and he has no authorised agent, the summons may be served on any adult male or female member of the defendant's family residing with him.[143]

[137] R. 5.

[138] R. 8.

[139] R. 6.

[140] R. 7.

[141] *Salem Advocate Bar Assn. (II)* v. *Union of India,* (2005) 6 SCC 344: AIR 2005 SC 3353.

[142] R. 12.

[143] R. 15.

A servant, however, cannot be said to be a family member.[144]

(*iii*) In a suit relating to any business or work against a person, not residing within the territorial jurisdiction of the court issuing the summons, it may be served to the manager or agent carrying on such business or work.[145]

(*iv*) In a suit for immovable property, if the service of summons cannot be made on the defendant personally and the defendant has no authorised agent, the service may be made on any agent of the defendant in charge of the property.[146]

(*v*) Where there are two or more defendants, service of summons should be made on each defendant.[147]

In all the above cases, service of summons should be made by delivering or tendering a copy thereof.[148] Where the serving officer delivers or tenders a copy of summons to the defendant personally or to his agent or other person on his behalf, the person to whom the copy is delivered or tendered must make an acknowledgment of service of summons.[149] The serving officer, thereafter, must make an endorsement on the original summons stating the time and manner of service thereof and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of summons.[150]

(2) *Service by court: Rule 9*

Summons to defendant residing within the jurisdiction of the court shall be served through court officer or approved courier service.[151] Summons can also be served by registered post, speed post, acknowledgment due (RPAD), courier service, fax, message, e-mail service or by any other permissible means of transmission.[152] Where the defendant is residing outside the jurisdiction of the court, the summons shall be served through an officer of the court within whose jurisdiction the defendant resides.[153] The court shall treat refusal of acceptance as a valid service.[154] Where summons is properly addressed, prepaid and duly sent by registered post acknowledgment due (RPAD) there will

[144] Explanation to R. 15.
[145] R. 13.
[146] R. 14.
[147] R. 11.
[148] R. 10.
[149] R. 16.
[150] R. 18.
[151] R. 9(1), (2).
[152] R. 9(3).
[153] R. 9(4).
[154] R. 9(5).

be a presumption of valid service of summons even in the absence of an acknowledgement slip.[155]

Though there can be no objection in giving an opportunity to the plaintiff to serve summons on the defendant, there should be sufficient safeguards to avoid false report of service of summons. High Courts should make appropriate rules or issue practice directions to ensure that the provisions are properly implemented and there is no abuse of process of law.[156]

(3) *Service by plaintiff: Rule 9-A*

The court may also permit service of summons by the plaintiff in addition to service of summons by the court.[157]

(4) *Substituted service: Rules 17, 19-20*

"Substituted service" means the service of summons by a mode which is substituted for the ordinary mode of service of summons.

There are two modes of substituted service. They are:

(*a*)(*i*) where the defendant or his agent refuses to sign the acknowledgment; or (*ii*) where the serving officer, after due and reasonable diligence, cannot find the defendant who is absent from his residence at the time of service of summons and there is no likelihood of him being found at his residence within a reasonable time and there is no authorised agent nor any other person on whom service can be made, the service of summons can be made by affixing a copy on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain. The serving officer shall then return the original to the court from which it was issued with a report endorsed thereon stating the fact about affixing the copy, the circumstances under which he did so, and the name and address of the person, if any, by whom the house was identified and in whose presence the copy was affixed.[158] If the court is satisfied, either on the affidavit of the serving officer or on his examination on oath, that the summons has been duly served, it may either declare that the summons has been duly served or may make further enquiry in the matter as it thinks fit.[159]

Thus, in the second mode of service of summons as provided by Rule 17, the service is effected *without an order of the court* by affixing

[155] Proviso to R. 9(5).

[156] *Salem Advocate Bar Assn. (II)* v. *Union of India, supra.*

[157] R. 9-A; see also supra, *Salem Advocate Bar Assn. (II)* v. *Union of India.*

[158] R. 17.

[159] R. 19.

a copy of the summons on the house of the defendant and therefore the *declaration by the court* about the due service of the summons is essential.[160] If the provisions of Rule 19 have not been complied with, the service of summons cannot be said to be in accordance with law.[161]

(*b*) Where the court is satisfied that there is reason to believe that the defendant avoids service or for any other reason the summons cannot be served in the ordinary way, the service may be effected in the following manner:

(*i*) by affixing a copy of the summons in some conspicuous place in the courthouse; and also upon some conspicuous part of the house in which the defendant is known to have last resided, carried on business or personally worked for gain; or

(*ii*) in such manner as the court thinks fit.[162]

It, however, must be remembered that this is not a regular mode of service and hence, it should not normally be allowed and can be effected only as a last resort.[163]

Before more than a century ago, in *Cohen* v. *Nursing Dass*[164], it was stated, "It is true that you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make enquiries and, if necessary, follow him. You should make enquiries to find out when he is likely to be at home, and go to the house at a time when he can be found. Before service like this can be effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found—not as seems to be done in this country, to go to his house in a perfunctory way, and because he has not been found there, to affix a copy of the summons on the outer door of his house."

Where the court orders service by an advertisement in a newspaper, the newspaper should be a daily newspaper circulating in the locality in which the defendant is last known to have actually or voluntarily resided, carried on business or personally worked for gain.[165] Such

[160] *Parasurama Odayar* v. *Appadurai Chetty*, AIR 1970 Mad 271 (FB); *CIT* v. *Thayaballi Mulla Jeevaji*, (1968) 1 SCJ 91; *Laxmibai* v. *Keshrimal Jain*, AIR 1995 MP 178.

[161] *State of J&K* v. *Haji Wali Mohammed*, (1972) 2 SCC 402 at p. 408-09: AIR 1972 SC 2538 at p. 2543.

[162] R. 20(1).

[163] *Yallawwa* v. *Shantavva*, (1997) 11 SCC 159: AIR 1997 SC 35; *CIT* v. *Thayaballi Mulla Jeevaji*; *Parasurama Odayar* v. *Appadurai Chetty, supra*; *Bondla Ramlingam* v. *Shiv Balasiddah*, AIR 1979 AP 180; *Dina Nath* v. *Upendra Nandan Das*, AIR 1924 Cal 1004; *G. Shanmukhi* v. *Utakur Venkatarami Reddi*, AIR 1957 AP 1 (FB); *Basant Singh* v. *Roman Catholic Mission*, (2002) 7 SCC 531: AIR 2002 SC 3557.

[164] (1892) 19 Cal 201 at pp. 202-203; see also *Kuldip Rai* v. *Sharan Singh*, AIR 1989 P&H 319.

[165] R. 20(1-A).

service is an effective service, even if the defendant is not the subscriber of the newspaper or is not reading it.[166]

Under Rule 20, the service of summons is effected *by the order of the court* only after the court is satisfied that the defendant avoids service of summons or it cannot be served in the ordinary way.[167] Such satisfaction must be recorded by the court in writing.[168] Substituted service is as effective as personal service.[169] The court must fix a time for the appearance of the defendant and give him a reasonable time to appear before the court.[170]

(5) *Service by post*

When an acknowledgment purporting to be signed by the defendant or his agent is received by the court, or the defendant or his agent refused to take delivery of summons when tendered to him, the court issuing the summons shall declare that the summons had been duly served on the defendant.[171] The same principle applies in a case where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgment due; and the acknowledgment is lost or not received by the court within thirty days from the date of issue of the summons. Where the summons sent by registered post is returned with an endorsement "refused", the burden is on the defendant to prove that the endorsement is false.[172]

**(j) Refusal of summons**

Where the defendant refuses to accept summons. He is deemed to have been served. Similarly, where an acknowledgment or receipt purported to have been signed by the defendant (or his agent) is received by the court that the defendant (or his agent) has refused to take the delivery of summons, the court will proceed treating the defendant as served.[173]

[166] *Sunil Poddar* v. *Union Bank of India*, (2008) 2 SCC 326.

[167] *G. Shanmukhi* v. *Utakur Venkatarami Reddi*, AIR 1957 AP 1 (FB); *Ram August Tewari* v. *Bindheshwari Tewari*, AIR 1972 Pat 142.

[168] *Kuldip Rai* v. *Sharan Singh*, AIR 1989 P&H 319.

[169] R. 20(2).

[170] R. 20(3); see also *S.V.P. Chockalingam Chettiar* v. *C. Rajarathnam*, AIR 1964 Mad 415.

[171] *Puwada Venkateswara* v. *Chidamana Venkata*, (1976) 2 SCC 409: AIR 1976 SC 869; *Jagdish Singh* v. *Natthu Singh*, (1992) 1 SCC 647: AIR 1992 SC 1604; *Basant Singh* v. *Roman Catholic Mission*, (2002) 7 SCC 531; *Bhagwan Gold and Silver Store* v. *H.I.M. Works*, AIR 1970 P&H 393; *Suresh Chandra* v. *Gosaidas Pal*, AIR 1976 Cal 87; *Meghji Kanji* v. *Kundanmal*, AIR 1968 Bom 387; *Nawabzada Mohd. Ishaq Khan* v. *Delhi Iron & Steel Co. Ltd.*, AIR 1979 All 366; *Adambhai* v. *Ramdas*, AIR 1975 Guj 54: (1974) 15 Guj LR 655 (FB).

[172] *Mariammal* v. *Lakshmanan*, AIR 1959 Ker 297; *Prakash Chander* v. *Sunder Bai*, AIR 1979 Raj 108.

[173] R. 9; see also supra, *Puwada Venkateswara* v. *Chidamana Venkata*.

**(k) Objection as to service of summons**

An objection as to service of summons should be raised at the earliest possible opportunity. If it is not taken at that stage, it is deemed to have been waived.[174]

**(l) Service of summons in special cases: Rules 21-30**

(*i*) Where the defendant resides within the jurisdiction of another court or in another State, the summons may be sent to the court where he resides. Such court will serve summons on the defendant.[175]

(*ii*) Service of foreign summons may be effected by sending them to the courts in the territories in which the provisions of this Code apply and served as if they were *summonses* issued by such courts.[176]

(*iii*) Where the summons is to be served within the Presidency Towns of Bombay, Madras and Calcutta, it may be sent to the Court of Small Causes within whose jurisdiction it is to be served.[177]

(*iv*) Where the defendant resides out of India and has no authorised agent in India to accept service, the summons should be addressed to the defendant at the place where he is residing and sent to him by post, or courier service, or fax message, or Electronic Mail Service, or by any other appropriate means, if there is postal communication between such place and the place where the court is situate.[178]

(*v*) Where the defendant resides in a foreign country, the service of summons may be effected through the political agent there or a court established there with authority to serve summons.[179]

(*vi*) Where the defendant is a public officer (not belonging to the Indian Military, Naval or Air Forces), or is a servant of the railway company or local authority, the summons may be served through the head of the department in which the defendant is employed.[180]

(*vii*) Where the defendant is a soldier, sailor or airman, the court shall send the summons for service to his commanding officer.[181]

(*viii*) Where the defendant is in prison, the service of summons is to be made on the officer in charge of the prison.[182]

(*ix*) Where the defendant is a corporation, the summons may be served on the secretary, or on any director or other principal officer of the corporation; or by leaving it or sending it by post addressed to the

[174] *Bheru Lal* v. *Shanti Lal*, AIR 1985 Raj 53: 1984 Raj LR 102: 1984 Raj LW 62.
[175] Rr. 21, 23, S. 28.
[176] S. 29.
[177] R. 22.
[178] R. 25.
[179] Rr. 26, 26-A.
[180] R. 27; *see also*, R. 29.
[181] R. 28; *see also*, R. 29.
[182] R. 24; *see also*, R. 29.

corporation at the registered office or if there is no registered office, then at the place where the corporation carries on business.[183]

(*x*) Where the defendants are partners in any firm, the summons should be served upon any one or more of the partners; or upon any person having the control or management of the partnership business at its principal place of business in India. But if the plaintiff knows that the partnership firm has been dissolved before the institution of the suit, the summons shall be served upon every person sought to be held liable in India.[184]

(*xi*) A court may substitute for a summons, a letter of request which may contain all particulars required to be stated in a summons. This step may be taken by the court keeping in view the office held or position occupied by the defendant.[185]

## 5. WRITTEN STATEMENT: ORDER 8

### (a) Meaning

Though the expression "written statement" has not been defined in the Code, it is "a term of specific connotation ordinarily signifying a reply to the plaint filed by the plaintiff".[186] In other words, a written statement is the pleading of the defendant wherein he deals with every material fact alleged by the plaintiff in his plaint and also states any new facts in his favour or takes legal objections against the claim of the plaintiff.[187]

### (b) Who may file written statement?

A written statement may be filed by the defendant or by his duly constituted agent. Where there are several defendants and a common written statement is filed by them, it must be signed by all of them. It is, however, sufficient if it is verified by one of them who is aware of the facts of the case and is in a position to file an affidavit. But a written statement filed by one defendant does not bind other defendants.[188]

[183] Or. 29 R. 2.

[184] Or. 30 R. 3.

[185] R. 30.

[186] *Food Corpn. of India* v. *Yadav Engineer & Contractor*, (1982) 2 SCC 499 at p. 509: AIR 1982 SC 1302 at p. 1307; *achappa Gurudappa* v. *Gurudiddappa Nurandappa*, (1989) 3 SCC 245 at p. 250: AIR 1989 SC 635 at p. 639.

[187] *See supra*, Chap. 6.

[188] *Jugeshar Tiwari* v. *Sheopujan Tiwary*, AIR 1986 Pat 35: 1986 BLJ 460.

**(c) When written statement may be filed?**

A defendant should, within thirty days from the service of summons on him, present a written statement of his defence. The said period, however, can be extended up to ninety days.[189]

**(d) Outer limit for filing written statement**

Proviso to Rule 1 as inserted by the Amendment Act, 2002 prescribes outer limit of ninety days of filing written statement from the date of service of summons on the defendant.

In *Kailash* v. *Nanhku*[190], the Supreme Court was called upon to consider whether the time-limit of ninety days prescribed by the proviso to Rule 1 of Order 8 for filing written statement by the defendant was mandatory or merely directory.

Considering the provision of the Code as originally enacted, recommendations of the Law Commission, anxiety of Parliament to ensure speedy disposal of cases but without sacrificing fairness of trial and principles of natural justice inbuilt in all procedural laws, the court held the provision directory and permissive and not mandatory and imperative.

"The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried."[191]

The Court rightly stated, "All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."[192]

The Court concluded, "Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form."[193]

[189] R. 1.

[190] (2005) 4 SCC 480: AIR 2005 SC 2441.

[191] *Ibid*, at p. 495 (SCC): at p. 2449 (AIR).

[192] *Ibid*, at p. 495 (SCC): at p. 2449 (AIR).

[193] *Ibid*, at p. 495 (SCC): at p. 2450 (AIR); *see also*, the following observations of Krishna Iyer, J. in *Sushil Kumar* v. *State of Bihar*, (1975) 1 SCC 774: AIR 1975 SC 1185;

In the leading decision of *Salem Advocate Bar Assn. (II)* v. *Union of India*[194], harmoniously construing Rules 1, 9 and 10 of Order 8, the Supreme Court observed:

"In construing this provision, support can also be had from Order 8 Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order 8, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order 8 Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1."[195]

"The morality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer".

[194] (2005) 6 SCC 344: AIR 2005 SC 3353.

[195] *Ibid*, at p. 364 (SCC): at pp. 3360-61 (AIR); see also *Rani Kusum* v. *Kanchan Devi*, (2005) 6 SCC 705: AIR 2005 SC 2304; *Sk. Salim Haji* v. *Kumar*, (2006) 1 SCC 46: AIR 2006 SC 396; *R.N. Jadi & Bros.* v. *Subhashchandra*, (2007) 6 SCC 420: AIR 2007 SC 2571; *Sumtibai* v. *Paras Finance Co.*, (2007) 10 SCC 82: AIR 2007 SC 3166.

**(e) Particulars[196]: Rules 1-5 & 7-10**

A written statement should be drafted carefully and artistically.[196] All the general rules of pleadings discussed in Chap. 6, apply to a written statement also. Before proceeding to draft a written statement it is absolutely necessary to examine the plaint carefully. Like a plaintiff, a defendant may also take a number of defences, either simply or in the alternative, even though they may be inconsistent, provided they are maintainable at law and are not embarrassing.

**(f) Special rules of defence**

Over and above the general defences, Rules 2 to 5 and 7 to 10 deal with special points regarding filing of a written statement:

(1) New facts, such as the suit is not maintainable, or that the transaction is either void or voidable in law, and all such grounds of defence as, if not raised, would take the plaintiff by surprise, or would raise issues of fact not arising out of the plaint, such as fraud, limitation, release, payment, performance or facts showing illegality, etc. must be raised.[197]

"The effect of the rule is, for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that, the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give leave to amend by raising it and protect the other party. If necessary, by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. *It leaves the party at the mercy of the Court and the Court will deal with him as is just.*"[198] (emphasis supplied)

If the plea is not taken, it may lead the plaintiff to believe that the defendant has waived his right by not relying on that point. And the defendant will not be entitled, as of right, to rely on any ground of defence which he has not taken in his written statement.[199] Whether

[196] For a Model Written Statement, *see*, Appendix B.

[197] R. 2. See also *Kalyanpur Lime Works Ltd.* v. *State of Bihar*, AIR 1954 SC 165 at pp. 168-69: 1954 SCR 958; *Badat & Co.* v. *East India Trading Co., infra*; *Bhagat Singh* v. *Jaswant Singh*, AIR 1966 SC 1861 at pp. 1862-63; *Union of India* v. *Surjit Singh*, (1979) 1 SCC 520 at p. 524: AIR 1979 SC 1701 at p. 1703.

[198] *Robinson's Settlement, In re*, (1912) 1 Ch D 717 (CA) at p. 728; *Udhav Singh* v. *Madhav Rao Scindia*, (1977) 1 SCC 511: AIR 1976 SC 744 at p. 749.

[199] *Udhav Singh* v. *Madhav Rao Scindia, supra*. See also *Surasaibalini Debi* v. *Phanindra Mohan*, AIR 1965 SC 1364 at p. 1370: (1965) 1 SCR 861; *Shipping Corpn. of India Ltd.* v. *Nisar Export Corpn.*, (1981) 1 SCC 564: AIR 1981 SC 1212 at p. 1214.

such a plea has been raised in the written statement or not is a matter of construction of the written statement.[200]

Again, if the plea or ground of defence raises an issue arising out of admitted facts or is otherwise apparent from the plaint itself, no question of prejudice or surprise to the plaintiff arises.[201] This rule does not require the defendant to take such a plea nor debars him from setting it up at a later stage of the suit when it does not depend on evidence but raises a pure question of law, like a plea of limitation.[202] Similarly, where the defendant has stated in his pleadings all the facts on which he bases his defence without stating the legal effect thereof, the defence cannot be rejected on the ground that the legal effect of the facts was not stated.[203]

(2) The denial must be specific. It is not sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but he must deal specifically with each allegation of fact which he does not admit, except damages.[204]

(3) The denial should not be vague or evasive. Where a defendant wants to deny any allegation of fact in the plaint, he must do so clearly, specifically and explicitly and not evasively or generally. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received.[205]

(4) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person under disability. The court may, however, require proof of any such fact otherwise than by such admission. When the defendant has not filed a written statement the court may either pronounce the judgment on the basis of the facts stated in the plaint (except as against a person under disability), or may require any such fact to be proved.[206]

[200] *C. Abdul Shukoor* v. *A.P. Rao,* AIR 1963 SC 1150 at p. 1153: 1963 Supp (2) SCR 55; *Udhav Singh* v. *Madhav Rao Scindia, supra,* at p. 750 (AIR); *Sk. Abdul Sattar* v. *Union of India,* (1970) 3 SCC 845 at p. 847: AIR 1970 SC 479 at p. 482; *Jahuri Sah* v. *Dwarika Prasad,* AIR 1967 SC 109 at p. 111: 1966 Supp SCR 280.

[201] *Udhav Singh* v. *Madhav Rao Scindia, supra,* at p. 749 (AIR); *Rama Shankar* v. *Shyamlata Devi,* AIR 1970 SC 716 at p. 717: (1969) 2 SCR 360.

[202] *Ibid,* See also *Scott* v. *Brown Doering, McNab & Co.,* (1892) 2 QB 724 at p. 729: (1891-1894) All ER Rep 654 (CA); *Edler* v. *Auerbach,* (1950) 1 KB 359 at p. 371: (1949) 2 All ER 692; *Surasaibalini Debi* v. *Phanindra Mohan, supra,* at p. 1370 (AIR).

[203] *Ibid,* See also *C. Abdul Shukoor* v. *A.P. Rao,* AIR 1963 SC 1150 at p. 1153: 1963 Supp (2) SCR 55.

[204] R. 3. See also infra, *Badat & Co.* v. *East India Trading Co.*

[205] R. 4. See also infra, *Badat & Co.* v. *East India Trading Co.*

[206] R. 5. *Ibid.*

If a judgment is pronounced by the court, a decree shall be drawn up in accordance with it.[206]

The combined effect of Rules 3, 4 and 5 has been considered by Subba Rao, J. (as he then was) in the case of *Badat & Co.* v. *East India Trading Co.*[207] in the following words:

> "These three rules form an integral code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. *If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted.* In such an event, the admission itself being proof, no other proof is necessary."[208] (emphasis supplied)

A few illustrative cases will make the position clear:

In an action against a lessee to set aside the lease, the plaintiff alleges in his plaint that the defendant offered to the manager of the plaintiff a bribe of Rs 5000 at the defendant's office on 15 January 1997; and the defendant in his written statement states that he did not offer to the plaintiff's manager a bribe of Rs 5000 at the defendant's office on 15 January 1997; the denial is evasive. Here the point of substance is that a bribe was offered (neither the day nor the amount) and that is not met. The defendant might have offered any other amount on another day at a different place. Since the point of substance is the offer of bribe, it must be clearly and specifically denied and the defendant should state that he never offered a bribe of Rs 5000 or of any other sum, on any day, at any place, to the plaintiff's manager as alleged or at all.[209]

Similarly, if the plaintiff asserts:

> The defendant broke and entered into the shop of the plaintiff and seized, took and carried away all the furniture, stock-in-trade, and other effects which were therein.

[207] AIR 1964 SC 538: (1964) 4 SCR 19.

[208] *Ibid*, at p. 545 (AIR). See also *Munshi Dass* v. *Mal Singh*, (1977) 4 SCC 65 at p. 67: AIR 1977 SC 2002 at p. 2004; *Sk. Abdul Sattar* v. *Union of India*, (1970) 3 SCC 845: AIR 1970 SC 479; *Modula India* v. *Kamakshya Singh*, (1988) 4 SCC 619 at p. 643: AIR 1989 SC 162 at p. 176; *Lohia Properties (P) Ltd.* v. *Atmaram Kumar*, (1993) 4 SCC 6; *Balraj Taneja* v. *Sunil Madan*, (1999) 8 SCC 396: AIR 1999 SC 3381. [*See also*, the following observations: "To say that a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of the existence of that fact, not even an implied denial." *Jahuri Sah* v. *Dwarika Prasad*, AIR 1967 SC 109 at p. 111: 1966 Supp SCR 280] (*per* Mudholkar, J.).

[209] *Tildesley* v. *Harper*, (1878) 10 Ch D 393: (1874-80) All ER Rep Ext 1612 (CA). See also supra, *Badat & Co.* v. *East India Trading Co.*

The correct traverse will be:

> The defendant never broke or entered into the shop of the plaintiff or seized, took or carried away any of the furniture, stock-in-trade, and other effects which were therein.[210]

Again, when a compound allegation, consisting of several distinct facts, is made in the plaint, and it is intended to deny each of such facts, a single denial of the whole allegation should not be made. The defendant should break up the allegation into separate parts and deny each of them separately. For instance, if the plaintiff alleges that the defendant took possession of the plaintiff's house and the defendant wants to deny both the allegations of having taken possession of the house as well as the plaintiff's ownership of the house, he must do so expressly by saying:

(1) The defendant never took possession of the house.

(2) The said house is not of the plaintiff.

A single traverse, "the defendant denies that he took possession of the plaintiff's house", would not be specific since it may mean that the defendant only denies having taken possession of the house and not the ownership of the plaintiff.[211]

But if the plaintiff makes general allegations in the plaint and they are answered by equally general denials, no complaint can be made by the plaintiff on the ground that they are not specific.[212] Thus, where the plaintiff alleges in the plaint that the order of his removal from service was violative of Articles 14 and 16 of the Constitution of India since he was arbitrarily picked up, the denial in the written statement of the allegation that there had been a violation of Articles 14 and 16 of the Constitution of India is sufficient. In the absence of particulars in the plaint, all that the defendant could do would be simply to deny that there had been discrimination.[213] Again, express or numerical denial of a particular para of the plaint is only a matter of *form* and not of *substance*, and the written statement must be read as a whole and it would be sufficient if the allegations made in the plaint have been specifically denied even if denial of a particular para of the plaint is omitted in the defence.[214]

[210] Bullen, Leake and Jacob, *supra*, at p. 665.

[211] *Mogha*, *supra*, at p. 327.

[212] *Munshi Dass* v. *Mal Singh*, (1977) 4 SCC 65: AIR 1977 SC 2002.

[213] *Ibid*, see also *Union of India* v. *Pandurang*, AIR 1962 SC 630: (1961) 2 LLJ 427; *Surendra Nath* v. *Stephen Court Ltd.*, AIR 1966 SC 1361 at p. 1363: (1966) 3 SCR 458; *Bhagat Singh* v. *Jaswant Singh*, *supra*.

[214] *Shipping Corpn. of India Ltd.* v. *Nisar Export Corpn.*, (1981) 1 SCC 564 at p. 566: AIR 1981 SC 1212 at p. 1214. See also *Union of India* v. *Khas Karanpura Colliery Co. Ltd.*, AIR 1969 SC 125 at p. 127: (1968) 3 SCR 784; *K.C. Kapoor* v. *Radhika Devi*, (1981) 4 SCC 487 at

Moreover, old and traditional system of pleading has been given up. As stated by Lord Denning,[215] at one time, general denial was held insufficient and embarrassing. But that is not the position today. Sometimes, the pleader "denies", sometimes, he "does not admit" each and every allegation; but whatever phrase is used it all comes back to the same thing. The allegation is to be regarded "as if it were specifically set out and traversed seriatim." *In short, it is a traverse, no more and no less.* (emphasis supplied)

(5) Where the defendant relies upon several distinct grounds of defence or set-off or counterclaim founded upon separate and distinct facts, they should be stated separately and distinctly.[216]

(6) Any new ground of defence which has arisen after the institution of the suit or presentation of a written statement claiming a set-off or counterclaim may be raised by the defendant or plaintiff, as the case may be, in his written statement.[217] Here the court is empowered to take notice of subsequent events.[218]

(7) No pleading after the written statement of the defendant other than by way of defence to a set-off or counterclaim can be filed. The court may, however, allow any party to file his pleading upon such terms as it thinks fit.[219]

(8) If the defendant fails to present his written statement within the time permitted or fixed by the court, the court will pronounce the judgment against him or pass such order in relation to the suit as it thinks fit and a decree will be drawn up according to the said judgment.[220]

The court, however, cannot proceed to pass a judgment blindly merely because no written statement is filed by the defendant traversing the averment made by the plaintiff in his plaint.[221]

In *Modula India* v. *Kamakshya Singh Deo*[222], explaining the ambit and scheme of Rules 1, 5 and 10 of Order 8, the Supreme Court observed, "Rule 1 merely requires that the defendant should present a written statement of his defence within the time permitted by the Court. Under Rule 5(2), where the defendant has not filed a pleading it shall be lawful for the Court to pronounce judgment on the basis of the facts

pp. 499-500: AIR 1981 SC 2128; *Badat & Co.* v. *East India Trading Co., supra*, at pp. 544-45 (AIR).

[215] *Warner* v. *Sampson*, (1959) 2 WLR 109 at p. 114.

[216] R. 7.

[217] R. 8. See also *Sk. Abdul Sattar* v. *Union of India, supra.*

[218] For detailed discussion, *see supra*, "Events happening after institution of suit".

[219] R. 9.

[220] R. 10. See also *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425 at pp. 432-33: (1955) 2 SCR 1; *Modula India* v. *Kamakshya Singh, infra.*

[221] *Balraj Taneja* v. *Sunil Madan; Badat & Co.* v. *East India Trading Co., supra; Modula India* v. *Kamakshya Singh, infra.*

[222] (1988) 4 SCC 619: AIR 1989 SC 162.

contained in the plaint except against a person under disability but the court may at its discretion require any such fact to be proved. Again under Rule 10 when any party from whom a written statement is required fails to present the same within the time permitted or fixed by the Court, the Court 'shall pronounce judgment against him or make such order in relation to the suit as it thinks fit'. It will be seen that these rules are only permissive in nature. They enable the Court in an appropriate case to pronounce a decree straightway on the basis of the plaint and the averments contained therein. Though the present language of Rule 10 says that the Court 'shall' pronounce judgment against him, it is obvious from the language of the rule that there is still an option with the Court either to pronounce judgment on the basis of the plaint against the defendant or to make such other appropriate order as the Court may think fit. Therefore, *there is nothing in these rules, which makes it mandatory for the Court to pass a decree in favour of the plaintiff straightway because a written statement has not been filed.*"[223]

(emphasis supplied)

It is submitted that the following observations of the Supreme Court in *Balraj Taneja* v. *Sunil Madan*[224] lay down correct law on the point. Considering the relevant provisions of Orders 8 and 20 and referring to leading decisions on the point, the Court stated:

> "[T]he court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which needs to be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment

[223] *Ibid*, at p. 643 (SCC): at p. 176 (AIR); see also *Balraj Taneja* v. *Sunil Madan*, (1999) 8 SCC 396: AIR 1999 SC 3381.

[224] (1999) 8 SCC 396: AIR 1999 SC 3381.

without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression 'the court may, in its discretion, require any such fact to be proved' used in sub-rule (2) of Rule 5 of Order 8, or the expression 'may make such order in relation to the suit as it thinks fit' used in Rule 10 of Order 8."[225]

### (g) Documents relied on in written statement: Rule 1

Like a plaintiff, a defendant is also bound to produce all the documents in support of his defence, or claim for set-off or counterclaim which are in his possession. If the defendant fails to produce them, they will not be received in evidence except with the leave of the court. This provision, however, does not apply to the following documents;

(*i*) documents reserved for cross-examination of the plaintiff's witnesses; or

(*ii*) documents handed over to a witness merely to refresh his memory.[226]

## 6. SET-OFF: RULE 6

### (a) Meaning

"Set-off" means a claim set up against another. It is a cross-claim which partly offsets the original claim. It is an extinction of debts of which two persons are reciprocally debtors to one another by the credits of which they are reciprocally creditors to one another. Where there are mutual debts between the plaintiff and the defendant, one debt may be settled against the other.[227] It is a plea in defence, available to the defendant. By adjustment, set-off either wipes out or reduces the plaintiff's claim in a suit for recovery of money.

### (b) Doctrine explained

Where in a suit for recovery of money by the plaintiff, the defendant finds that he has also a claim of some amount against the plaintiff, he can claim a set-off in respect of the said amount. The doctrine of set-off may be defined as "the extinction of debts of which two persons

[225] *Ibid*, at p. 410 (SCC): at pp. 3387-88 (AIR); see also *Sushila Jain* v. *Rajasthan Financial Corpn.*, AIR 1979 Raj 215: 1979 Raj LW 208.

[226] R. 1-A. See also infra, *Balraj Taneja* v. *Sunil Madan*, (1999) 8 SCC 396: AIR 1999 SC 3381; and, Chap. 10.

[227] *Chamber's 21st Century Dictionary* (1997) at p. 1283; *Concise Oxford English Dictionary* (2002) at p. 1312; *Stroud's Judicial Dictionary* (1986) Vol. 5 at p. 2387; P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. 4 at pp. 4312-13; *Union of India* v. *Karam Chand Thapar and Bros. (Coal Sales) Ltd.*, (2004) 3 SCC 504.

are reciprocally debtors to one another by the credits of which they are reciprocally creditors to one another".[228]

A plea of set-off is "a plea whereby a defendant acknowledges the justice of the plaintiff's demand, but sets up another demand of his own, to counterbalance that of the plaintiff; either in whole or in part". Thus, it is a "reciprocal acquittal of debts between two persons". The right of a defendant to claim set-off has been recognised under Rule 6. It obviates the necessity of filing a fresh suit by the defendant.

**(c) Illustrations**

Let us see a few illustrations to understand the doctrine:

(*a*) *A* bequeaths Rs 2000 to *B* and appoints *C* his executor and residuary legatee. *B* dies and *D* takes out administration to *B's* effects. *C* pays Rs 1000 as surety for *D*; then *D* sues *C* for the legacy. *C* cannot set-off the debt of Rs 1000 against the legacy, for neither *C* nor *D* fills the same character with respect to the legacy as they fill with respect to the payment of Rs 1000.

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

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

(*d*) *A* sues *B* on a bill of exchange for Rs 500. *B* holds a judgment against *A* for Rs 1000. The two claims being both definite, pecuniary demands may be set-off.

(*e*) *A* sues *B* for compensation on account of trespass. *B* holds a promissory note for Rs 1000 from *A* and claims to set-off that amount against any sum that *A* may recover in the suit. *B* may do so, for, as soon as *A* recovers, both sums are definite pecuniary demands.

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

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

(*h*) *A* owes the partnership firm of *B* and *C* Rs 1000. *B* dies, leaving *C* surviving. *A* sues *C* for a debt of Rs 1500 due in his separate character. *C* may set-off the debt of Rs 1000.

(*i*) *A* sues *B* for Rs 20,000. *B* cannot set-off the claim for damages for breach of contract for specific performance.

[228] *Jyanti Lal* v. *Abdul Aziz*, AIR 1956 Pat 199 at p. 200; *B. Seshaiah* v. *B. Veerabhadrayya*, AIR 1972 AP 134 (FB).

(*j*) *A* sues *B* for Rs 10,000. *B* cannot set-off any amount due to him on a promissory note executed by *A* before five years.

(*k*) *A* sues *B* for Rs 10,000. *B* cannot claim set-off of any amount due to him towards salary for performing illegal or immoral activities of *A*.

(*l*) *A* sues *B* for Rs 15,000. *B* cannot set-off an amount of Rs 30,000 if the court in which the suit filed by *A* has pecuniary jurisdiction up to Rs 20,000 only.

**(d) Types**

The law recognises two types of set-off.

(*i*) Legal set-off; and

(*ii*) Equitable set-off.

Order 8 Rule 6 deals with legal set-off. But the said provision is not exhaustive and does not take away the power of the court to allow such adjustment independent of Rule 6 of Order 8. It is known as "equitable set-off".[229]

**(e) Conditions**

A defendant may claim a set-off, if the following conditions are satisfied:

(*i*) The suit must be for the recovery of money; [*see* Illustration (*i*)]

(*ii*) The sum of money must be ascertained; [*see* Illustrations (*c*), (*d*) and (*e*)]

(*iii*) Such sum must be legally recoverable; [*see* Illustrations (*j*) and (*k*)]

(*iv*) It must be recoverable by the defendant or by all the defendants, if more than one; [*see* Illustration (*g*)]

(*v*) It must be recoverable by the defendant from the plaintiff or from all the plaintiffs, if more than one; [*see* Illustration (*f*)]

(*vi*) It must not exceed the pecuniary jurisdiction of the court in which the suit is brought; [*see* Illustration (*l*)] and

(*vii*) Both the parties must fill, in the defendant's claim to set-off, the same character as they fill in the plaintiff's suit; [*see* Illustrations (*a*), (*b*) and (*h*)].

**(f) Effect of set-off**

When a defendant pleads set-off, he is put in the position of a plaintiff as regards the amount claimed by him. There are two suits, one by the plaintiff against the defendant and the other by the defendant against the plaintiff; and they are tried together. A separate suit number, however, is not given to a set-off. Where the plaintiff does not appear and

[229] For detailed discussion, *see infra*, "Equitable set-off".

his suit is dismissed for default, or he withdraws his suit, or he fails to substantiate his claim at the trial and his suit is dismissed, it does not affect the claim for a set-off by the defendant and a decree may be passed in favour of the defendant if he is able to prove his claim.[230]

**(g) Equitable set-off**

Rule 6 deals with legal set-off only. It was allowed by the Court of Common Law in England. It is always in respect of an ascertained sum of money. But there may be cases in which the defendant may be allowed a set-off in respect of an unascertained sum of money. The provisions of Rule 6 are, however, not exhaustive. In addition to legal set-off, equitable set-off, as allowed by the Courts of Equity in England, may be claimed by the defendant in respect of even an unascertained sum of money, provided that both the cross-demands arise out of one and the same transaction or are so connected, in the nature and circumstances, that they can be looked upon as parts of one transaction.[231] In such a case, it would be *inequitable* to drive the defendant to a separate suit. As it is, Order 20 Rule 19(3) of the Code recognises an equitable set-off.

Thus, where *A* sues *B* to recover Rs 50,000 under a contract, *B* can claim set-off towards damages sustained by him due to breach of the same contract by *A*.[232] Likewise, in a suit by a servant against his master for salary, the latter can claim set-off for loss sustained by him because of negligence or misconduct by the former since such claim arises out of the same relationship.[233] Again, in a suit by a washerman for his wages, the defendant-employer may set-off the price of the clothes lost by the plaintiff.[234]

**(h) Legal and equitable set-off: Distinction**

(*a*) Legal set-off must be for an ascertained sum of money. Equitable set-off may be allowed even for an unascertained sum of money.

(*b*) Legal set-off can be claimed of as right and the court is bound to entertain and adjudicate upon it. Equitable set-off, on the

[230] Or. 20 R. 19(1); see also *Malladi Seetharama* v. *Vijayawada Municipality*, AIR 1957 AP 896; *Dayaram* v. *Jokhuram*, AIR 1960 MP 393; *Jamnadas* v. *Behari*, AIR 1941 Nag 258: 1941 Nag LJ 382.

[231] *Stephen Clark* v. *Ruthnavaloochetti*, (1865) 2 Mad HC 296; *Bhupendra Narain* v. *Bahadur Singh*, AIR 1952 SC 201: 1952 SCR 782; *Govt. of United State of Travancore & Cochin* v. *Bank of Cochin Ltd.*, AIR 1954 TC 243: ILR 1953 TC 1161 (FB); *Union of India* v. *Karam Chand Thapar and Bros. (Coal Sales) Ltd.*, (2004) 3 SCC 504.

[232] *Harischandra Dwarkadas Cloth Market* v. *Firm Murlidhar Chironjilal*, AIR 1957 MB 53.

[233] *Chishtom* v. *Gopal Chander*, (1889) 16 Cal 711.

[234] *Maiden* v. *Bhondu*, (1910) 7 IC 1006.

other hand, cannot be claimed as of right and the court has discretion to refuse to adjudicate upon it.

(*c*) In a legal set-off, it is not necessary that the cross-demands arise out of the same transaction. Equitable set-off can be allowed only when the cross-demands arise out of the same transaction.

(*d*) In a legal set-off, it is necessary that the amount claimed as set-off must be legally recoverable and must not be time-barred. A claim by way of equitable set-off may be allowed even if it is time-barred when there is a fiduciary relationship between the parties.

Thus, a trustee in possession of the trust estate may by way of equitable set-off claim to be indemnified out of the trust estate when called upon to account even though such claim of indemnity is time-barred. It must, however, be noted that even in case of equitable set-off, if at the date of the written statement, the defendant's claim is time-barred, though not barred at the date of the suit, it will be allowed only to the extent of the plaintiff's claim, but a decree will not be passed in his favour for the balance found due to him.

(*e*) A legal set-off requires a court fee, but no court fee is required in the case of an equitable set-off.

**(i) Set-off and counterclaim: Distinction**[235]

## 7. COUNTERCLAIM: RULES 6-A - 6-G

### (a) Meaning

"Counterclaim" may be defined as "a claim made by the defendant in a suit against the plaintiff". It is a claim independent of, and separable from, the plaintiff's claim which can be enforced by a cross-action. It is a cause of action in favour of the defendant against the plaintiff.[236]

### (b) Doctrine explained

One of the pleas open to a defendant to defeat the relief sought by the plaintiff against him is a counterclaim. Counterclaim may be defined as "a claim made by the defendant in a suit against the plaintiff".[237] Therefore, a defendant in a suit may, in addition to his right to plead a set-off, set up a counterclaim. It may be set up only in respect of a

[235] *See infra*, "Counterclaim".

[236] *Concise Oxford English Dictionary* (2002) at p. 325; *Black's Judicial Dictionary* (1999) at p. 348; *Stroud's Judicial Dictionary*, (1986) Vol. 5 at p. 2388; P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. I at p. 1093.

[237] *Concise Oxford English Dictionary* (2002) at p. 325; P.R. Aiyar, *supra*.

claim for which the defendant can file a separate suit.[238] Thus, a counterclaim is substantially a cross-action.[239]

Before the Amendment Act of 1976, there was no specific provision for counterclaim in the Code. The Supreme Court, however, held the right to make a counterclaim statutory.[240] It was held that the court has power to treat the counterclaim as a cross-suit and hear the original suit and counterclaim together if the counterclaim is properly stamped.

In the leading case of *Laxmidas* v. *Nanabhai*[241], the Supreme Court observed, "The question has therefore to be considered on principle as to whether there is anything in law—statutory or otherwise—which precludes a court from treating a counterclaim as a plaint in a cross-suit. It is difficult to see any. No doubt, the Code of Civil Procedure prescribes the contents of a plaint and it might very well be that a counterclaim which is to be treated as a cross-suit might not conform to all these requirements but this by itself is not sufficient to deny to the court the power and the jurisdiction to read and construe the pleadings in a reasonable manner. If, for instance, what is really a plaint in a cross-suit is made part of a written statement either by being made an annexure to it or as part and parcel thereof, though described as a counterclaim, there could be no legal objection to the counter treating the same as a plaint and granting such relief to the defendant as would have been open if the pleading had taken the form of a plaint... . *To hold otherwise would be to erect what in substance is a mere defect in a form of pleading into an instrument for denying what justice manifestly demands.*"[242] (emphasis supplied)

### (c) Object

Before the Amendment Act of 1976, no counterclaim or set-off could be claimed except in money suits. The Law Commission of India, however, recommended to avoid multiplicity of proceedings, right to the defendant to raise a plea of set-off in addition to a counterclaim in the same suit.[243] The provisions relating to counterclaim thus seek to save time of courts, exclude inconvenience to the parties to litigation,

[238] *Munshi Ram* v. *Radha Kishan*, AIR 1975 Punj 112 at pp. 113-14.

[239] *Amichand Pyarelal* v. *Union of India*, (1977) 79 Bom LR 1; *Jyanti Lal* v. *Abdul Aziz*, AIR 1956 Pat 199.

[240] *Laxmidas* v. *Nanabhai*, AIR 1964 SC 11: (1964) 2 SCR 567; *Mohinder Singh Jaggi* v. *Data Ram*, (1972) 4 SCC 495: AIR 1972 SC 1048.

[241] AIR 1964 SC 11: (1964) 2 SCR 567.

[242] *Ibid*, at p. 17 (AIR). See also *Bhim Sain* v. *Laxmi Narain*, AIR 1982 Punj 155; *Munshi Ram* v. *Radha Kishan*, AIR 1975 Punj 112; *Gupta (P) Loan Committee* v. *Moti Ram*, AIR 1984 J&K 38; *Nav Samaj Ltd.* v. *Shamrao Tukaramji*, AIR 1984 Bom 23.

[243] Law Commission of India (27th report) at pp. 150-51; *Gurbachan Singh* v. *Bhag Singh*, (1996) 1 SCC 770: AIR 1996 SC 1087; *Jag Mohan* v. *Dera Radha Swami Satsang*, (1996)

decide all disputes between the same parties avoiding unnecessary multiplicity of judicial proceedings and prolong trials.[244]

**(d) Nature and scope**

By the Amendment Act of 1976, a specific provision has been made for counterclaims by inserting Rules 6-A to 6-G. Under sub-rule (1) of Rule 6-A, the defendant may set up by way of counterclaim against the claim of the plaintiff any right or claim in respect of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time fixed for delivery of his defence has expired. Such counterclaim, however, should not exceed the pecuniary limits of the jurisdiction of the court. In other words, by laying the counterclaim, pecuniary jurisdiction of the court cannot be ousted and the power to try the suit already entertained cannot be taken away by accepting the counterclaim beyond its pecuniary jurisdiction.

When *A* has a claim of any land against *B* and brings an action to enforce that claim, and *B* has a cross-claim of any kind against *A* which by the law he is entitled to raise and have disposed of in the action brought by *A*, then *B* is said to have a right of counterclaim.[245] Similarly, in a suit for injunction, a counterclaim for possession can be allowed.[246]

**(e) Modes of setting up counterclaim**

There are three modes of pleading or setting up a counterclaim in a civil suit:

(*i*) In the written statement filed under Order 8 Rule 1;
(*ii*) By amending written statement with the leave of the court and setting up counterclaim; and
(*iii*) In a subsequent pleading under Order 8 Rule 9.[247]

**(f) Who may file counterclaim?**

Normally, it is the defendant who may file a counterclaim against the plaintiff. But incidentally and along with the plaintiff, the defendant may also claim relief against the co-defendants in the suit. But a counterclaim *solely* against co-defendants is not maintainable.[248]

4 SCC 699: AIR 1996 SC 2222; *Ramesh Chand* v. *Anil Panjwani*, (2003) 7 SCC 350: AIR 2003 SC 2508; *Rohit Singh* v. *State of Bihar*, (2006) 12 SCC 734: AIR 2007 SC 10.

[244] *Ramesh Chand* v. *Anil Panjwani*, (2003) 7 SCC 350 at pp. 367-68: AIR 2003 SC 2508.

[245] *Halsbury's Laws of England*, (4th Edn.) Vol. 42, para 407.

[246] *Gurbachan Singh* v. *Bhag Singh*, (1996) 1 SCC 770.

[247] *Ramesh Chand* v. *Anil Panjwani*, (2003) 7 SCC 350 at p. 367: AIR 2003 SC 2508.

[248] *Rohit Singh* v. *State of Bihar*, (2006) 12 SCC 734 at p. 744: AIR 2007 SC 10.

**(g) When counterclaim may be set up?**

A counterclaim may be set up by a defendant against a plaintiff in respect of cause of action accruing either before or after filing of the suit, provided such claim is not barred by limitation.[249]

**(h) Effect of counterclaim**

Such counterclaim has the effect of a cross-suit and the court can pronounce a final judgment both on the original claim and the counterclaim.[250] The counterclaim of the defendant will be treated as a plaint[251] and the plaintiff has a right to file a written statement in answer to the counterclaim of the defendant.[252]

The effect of the counterclaim is that even if the suit of the plaintiff is stayed, discontinued, dismissed or withdrawn, the counterclaim will be decided on merits,[253] and the defendant will have a right to get a decree for a counterclaim as claimed in the written statement.[254] If the plaintiff does not file any reply to the counterclaim made by the defendant, the court may pronounce the judgment against the plaintiff in relation to the counterclaim made against him or make such order in relation to the counterclaim as it thinks fit.[255] The counterclaim shall be treated as a plaint and will be governed by the rules applicable to plaints.[256] Similarly, a reply filed in answer to a counterclaim shall be treated as a written statement and governed by rules applicable to written statements.[257]

**(i) Set-off and counterclaim: Distinction**[258]

The distinction between a set-off and a counterclaim is very important and, therefore, must be carefully considered:

(*a*) Set-off is a statutory defence to a plaintiff's action, whereas a counterclaim is substantially a cross-action.

(*b*) Set-off must be for an ascertained sum or it must arise out of the same transaction; a counterclaim need not arise out of the same transaction.

[249] *Mahendra Kumar* v. *State of M.P.*, (1987) 3 SCC 265: AIR 1987 SC 1395; *Jag Mohan* v. *Dera Radha Swami Satsang, supra*; *Shanti Rani* v. *Dinesh Chandra*, (1997) 8 SCC 174.

[250] R. 6-A(2).

[251] R. 6-A(4).

[252] R. 6-A(3).

[253] R. 6-D. See also *Daga Films* v. *Lotus Production*, AIR 1977 Cal 312 (317).

[254] R. 6-F.

[255] R. 6-E.

[256] R. 6-A(4).

[257] R. 6-G.

[258] *Munshi Ram* v. *Radha Kishan*, AIR 1975 Punj 112; *Amichand Pyarelal* v. *Union of India*, (1977) 79 Bom LR 1.

(*c*) Set-off is a ground of defence to the plaintiff's action. In other words, the former is a ground of defence, a shield, which if established, would afford an answer to the plaintiff's claim *in toto* (as a whole) or *pro tanto* (in proportion); the latter is a weapon of offence, a sword, which enables the defendant to enforce the claim against the plaintiff effectually as an independent action.

(*d*) In the case of a legal set-off, the amount must be recoverable at the date of the suit, while in the case of a counterclaim the amount must be recoverable at the date of the written statement.

(*e*) When the defendant demands in a plaintiff's suit an amount below or up to the suit claim, it is a set-off *stricto sensu*, but when it is for a larger amount, the claim for excess amount is really a counterclaim.[259]

[259] *Ibid*, see also *A.Z. Mohd. Farooq* v. *State Govt.*, AIR 1984 Ker 126 (FB); *Anand Enterprises* v. *Syndicate Bank*, AIR 1990 Kant 175: (1989) 2 Kant LJ 117.

PART II

# 8 Appearance & Non-appearance of Parties

SYNOPSIS


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## 1. GENERAL

THE PROVISIONS of the Code of Civil Procedure are based on a general principle that, as far as possible, no proceeding in a court of law should be conducted to the detriment of any party in his absence. Order 9 of the Code enacts the law with regard to the appearance of

the parties to the suit and the consequences of their non-appearance. It also provides a remedy for setting aside an order of dismissal of the suit as also the setting aside of an *ex parte* decree passed against the defendant.

### 2. APPEARANCE OF PARTIES: RULES 1 & 12

Rule 1 requires the parties to the suit to attend the court in person or by their pleaders on the day fixed in the summons for the defendant to appear. Rule 12 provides that where a plaintiff or a defendant, who has been ordered to appear in person, does not appear in person or show sufficient cause for non-appearance, the court may dismiss the suit, if he is the plaintiff, or proceed *ex parte* if he is the defendant.

### 3. WHERE NEITHER PARTY APPEARS?: RULE 3

Where neither the plaintiff nor the defendant appears when the suit is called out for hearing, the court may dismiss it.[1] The dismissal of the suit under Rule 3, however, does not bar a fresh suit in respect of the same cause of action.[2] The plaintiff may also apply for an order to set aside such dismissal. And if the court is satisfied that there was sufficient cause for his non-appearance, it shall pass an order setting aside the dismissal of the suit and shall fix a day for proceeding with the suit.[3]

### 4. WHERE ONLY PLAINTIFF APPEARS?: RULES 6, 10

Where the plaintiff appears and the defendant does not appear, the plaintiff has to prove service of summons on the defendant. If the service of summons is proved, the court may proceed *ex parte* against the defendant and may pass a decree in favour of the plaintiff, if the plaintiff proves his case.[4] This provision, however, is confined to first hearing and does not *per se* apply to subsequent hearings.[5]

Where there are two or more plaintiffs and one or more of them appear and the others do not appear, the court may permit the suit to proceed as if all the plaintiffs had appeared, or make such order as it thinks fit.[6]

### 5. WHERE ONLY DEFENDANT APPEARS?: RULES 7-11

Where the defendant appears and the plaintiff does not appear, and the defendant does not admit the plaintiff's claim, wholly or partly,

[1] Or. 9 R. 3.
[2] R. 4.
[3] R. 4.
[4] R. 6.
[5] *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425: (1955) 2 SCR 1.
[6] R. 10.

the court shall pass an order dismissing the suit.[7] But if the defendant admits the plaintiff's claim as a whole or a part thereof, the court will pass a decree against the defendant upon such admission and dismiss the suit for the rest of the claim.[7]

It may be noted that this rule (Rule 8) will apply to a case where there is only one plaintiff and he does not remain present, or there are two or more plaintiffs and all of them remain absent. Where there are more plaintiffs than one, and one or more of them appear, Rule 10 will apply.[8]

It is, however, a serious matter to dismiss the plaintiff's suit without hearing him and *that course ought not to be adopted unless the court is really satisfied that justice so requires.*[9] (emphasis supplied) But the Court has no power to dismiss the suit where the plaintiff does not appear owing to death. Such an order is a nullity inasmuch as this rule applies to a defaulter and not to a dead man.[10]

Rule 9 precludes the plaintiff thereafter from filing a fresh suit on the same cause of action. He may, however, apply for an order to set aside the order of dismissal. And if the court is satisfied that there was sufficient cause for his non-appearance the court may set aside the order of dismissal and fix a day for proceeding with the suit.[11]

In deciding whether a suit dismissed for default be restored, what has really to be considered is whether the plaintiff was really trying to appear on the day fixed. If he honestly intended to appear though in a stupid way, he should not be deprived of hearing.[12] If sufficient cause is shown by the plaintiff for his non-appearance, reopening is *mandatory*, but when sufficient cause is not shown, it is *directory*.[13]

What is sufficient cause depends upon facts and circumstances of each case and liberal and generous construction should be adopted

[7] R. 8; see also *Calcutta Port Trust* v. *Shalimar Tar Product Ltd.*, 1991 Supp (2) SCC 513: AIR 1991 SC 684.

[8] *Kulendra Kishore* v. *Rai Kishori Shaha*, AIR 1921 Cal 176: ILR (1921) 48 Cal 57.

[9] *Per* Beaumont, C.J. in *Shamdasani* v. *Central Bank of India Ltd.*, AIR 1938 Bom 199 at p. 202: 40 Bom LR 238 (SB); see also *Arunachala Iyer* v. *Subramaniah*, AIR 1923 Mad 63: (1923) 46 Mad 60; *see also*, the following observation of Ferrers, J.C. in *Dayalmal* v. *Naraindas*, MCA 24 of 1930 & Rev. Appln. 29 of 1930, decided on 17 March 1932: "By the order we are about to make, we do not intend to condone procrastination or to encourage indolence. Some litigants are apt to be unpunctual, for this they must suffer condign punishment. But on the other hand, some Judges are prone to inconsiderate haste and unseemly impatience. *This is the fault in which all Judges should be very careful not to fall.*" (emphasis supplied).

[10] *Raja Debi Baklish* v. *Habib Shah*, (1912-1913) 40 IA 151 (PC); *P.M.M. Pillayathiri Amma* v. *K. Lakshmi Amma*, AIR 1967 Ker 135.

[11] *Lachi Tewari* v. *Director of Land Records*, 1984 Supp SCC 431: AIR 1984 SC 41; *Madhumilan Syntex Ltd.* v. *Union of India*, (2007) 11 SCC 297: AIR 2007 SC 1481.

[12] *Motichand* v. *Ant Ram*, AIR 1952 Bho 33.

[13] *P.K.P.R.M. Raman Chettyar* v. *K.A.P. Arunachalam Chettyar*, AIR 1936 Rang 335.

to advance the cause of justice and restoration should not ordinarily be denied.[14] Where a party against whom an order is made appears on the same day and prays for recalling of order, *normally*, the prayer should be granted by the court.

In *Chhotalal* v. *Ambalal Hargovan*[15], the High Court of Bombay observed that when a party arrives late and finds that his suit or application is dismissed, *he is entitled to have his suit or application restored* on payment of costs.

In a subsequent case in *Currimbhai* v. *N.H. Moos*,[16] the same High Court held that it would be difficult to agree with *Chhotalal* in principle as a proposition of law. "If such a rigid rule is laid down, it might mean this, that a defendant could successively prevent his suit ever being heard. All that he would have to do would be to appear late on successive dates, and allowed the suit to be heard *ex parte* and then to apply at the end of each day to have the suit restored for hearing. *That obviously is a course which no court would allow.*" (emphasis supplied)

It is submitted that the latter view is correct.

Before such order is passed by the court, notice must be served to the opposite party.[17]

Where there are two or more defendants and one or more of them appear and the others do not appear, the suit will proceed and at the time of pronouncement of the judgment, the court may make such order as to the absent defendants as it thinks fit.[18] In such a case, a decree may be contested as one against some of the defendants and *ex parte* against the rest.[19]

Where the court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, the court may hear him upon such terms as it directs as to the costs or otherwise.[20] In that case, the defendant might have the earlier proceedings recalled, "set the clock back", and have the suit heard in his presence. On the other hand, he might fail to show good cause. Even in such a case, he is not penalised in the sense of being forbidden to take part in the further proceedings of the suit or whatever might still remain of the trial; only he cannot claim to be relegated to the position that he occupied at the commence-

[14] *Motichand* v. *Ant Ram*, *supra*; *Lakshmi Commercial Bank Ltd.* v. *Hans Raj*, AIR 1981 P&H 228.

[15] AIR 1925 Bom 423 at p. 426: (1925) 27 Bom LR 685: 89 IC 225.

[16] AIR 1929 Bom 250 at p. 251: (1929) 31 Bom LR 468: 119 IC 187 (*per* Marten, C.J.).

[17] R. 9(2).

[18] R. 11.

[19] *Venutai* v. *Sadashiv*, AIR 1975 Bom 68: 1974 Mah LJ 951.

[20] R. 7.

ment of the trial.[21] The underlying principle is that until the suit is finally decided, the defendant has a right to come in and defend the suit. This rule, therefore, should be liberally construed.[22]

### 6. WHERE SUMMONS IS NOT SERVED?: RULES 2 & 5

It is a fundamental rule of the law of procedure that a party must have a fair and reasonable opportunity to represent his case. And for that purpose, he must have a notice of the legal proceedings initiated against him. The service of summons on the defendant is, therefore, a condition precedent to a fair trial. If the summons is not served on the defendant or it does not give him sufficient time to represent his case effectively, no decree can be passed against him.[23]

Rule 2 of Order 9 enacts that the suit may be dismissed where the summons is not served on the plaintiff's failure to pay costs for service of summons to defendant or to present copies of the plaint. No such order, however, can be passed in spite of such failure by the plaintiff if the defendant appears in person or by his authorised agent on the day fixed for him to appear. The plaintiff may file a fresh suit even after the dismissal of the suit under Rule 2 in respect of the same cause of action or may apply for an order to set aside such dismissal. And if the court is satisfied that there was sufficient cause for such failure, the court shall set aside such order of dismissal and shall fix a day for proceeding with the trial.[24]

Where the plaintiff fails to apply for a fresh summons for seven days after the summons on the defendant or one of the defendants (where there are two or more defendants) is returned unserved, the court will dismiss the suit as against the defendant or such defendants. But if within that period, the plaintiff satisfies the court that (*i*) he has failed, in spite of his best efforts to discover the residence of the defendant who has not been served; or (*ii*) such defendant is avoiding service of process; or (*iii*) there is any other sufficient cause for extension of time, the court may extend the time for such period as it thinks fit. If the suit of the plaintiff is dismissed by the court within the period of limitation, he can file a fresh suit also.[25]

Where it is not proved that the summons is duly served on the defendant, the court will direct a fresh summons to be issued and served on the defendant.[26] Where it is proved that the summons is duly served on the defendant but there was not sufficient time to en-

[21] *Arjun Singh* v. *Mohindra Kumar*, AIR 1964 SC 993 at p. 1004: (1964) 5 SCR 946.
[22] *East India Cotton Mfg. Co. Ltd.* v. *S.P. Gupta*, 1985 DLT 22.
[23] *See also supra*, Chap. 7; *Begum Para* v. *Luiza Matilda Fernandes*, (1984) 2 SCC 595.
[24] R. 4.
[25] R. 5.
[26] R. 6(1)(*b*).

able him to appear and answer on the day fixed in the summons, the court shall postpone the hearing of the suit to a future day and give notice of such day to the defendant.[27] Where the summons is not duly served or is not served in sufficient time due to the plaintiff's default, the court shall order the plaintiff to pay the costs occasioned by such postponement.[28]

## 7. EX PARTE DECREE

### (a) Meaning

An *ex parte* decree is a decree passed in the absence of the defendant (*in absenti*). Where the plaintiff appears and the defendant does not appear when the suit is called out for hearing and if the defendant is duly served, the court may hear the suit *ex parte* and pass a decree against him. Such a decree is neither null and void nor inoperative but is merely voidable and unless and until it is annulled on legal and valid grounds, it is proper, lawful, operative and enforceable like a *bi-parte* decree and it has all the force of a valid decree.[29]

### (b) Remedies

The defendant, against whom an *ex parte* decree has been passed, has the following remedies available to him:

(1) to apply to the court by which such decree is passed to set it aside: Order 9 Rule 13; or
(2) to prefer an appeal against such decree: Section 96(2) (or to file a revision under Section 115 where no appeal lies);
(3) to apply for review: Order 47 Rule 1; or
(4) to file a suit on the ground of fraud.[30]

The above remedies are concurrent and they can be prosecuted simultaneously or concurrently.[31] "Where two proceedings or two remedies are provided by a statute, one of them must not be taken as operating in derogation of the other."[32]

[27] R. 6(1)(*c*).

[28] R. 6(2).

[29] *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.

[30] *Rupchand Gupta* v. *Raghuvanshi (P) Ltd.*, AIR 1964 SC 1889: (1964) 7 SCR 760; *Rani Choudhury* v. *Suraj Jit Choudhury*, (1982) 2 SCC 596: AIR 1982 SC 1393; *P. Kiran Kumar* v. *A.S. Khadar*, (2002) 5 SCC 161: AIR 2002 SC 2286.

[31] *Bhanu Kumar Jain* v. *Archana Kumar*, (2005) 1 SCC 787: AIR 2005 SC 626; *Arjun Singh* v. *Mohindra Kumar*, AIR 1964 SC 993: (1964) 5 SCR 946. *Mahesh Yadav* v. *Rajeshwar Singh*, (2009) 2 SCC 205.

[32] *Ajudhia Prasad* v. *Balmukund*, (1886) 8 All 354 at p. 361 (FB); *Rani Choudhury* v. *Suraj Jit Choudhury*, (1982) 2 SCC 596: AIR 1982 SC 1393; *Archana Kumar* v. *Purendu Prakash*,

"Where two proceedings or two remedies are provided by a statute, one of them should not be taken as operating in derogation of the other."[33]

### (c) Setting aside ex parte decree: Rule 13

*(i) Who may apply?*

The defendant against whom *ex parte* decree has been passed may apply for setting it aside. Where there are two or more defendants, any one or more of them may also make such application.[34]

The expression "defendant" is wide enough to include a person who is adversely affected by the decree. A purchaser of mortgaged property, hence, may make an application under Order 9 Rule 13 of the Code.[35] But a defendant against whom the suit has been dismissed cannot be said to be "aggrieved" by the decree and cannot apply under this rule.[36]

*(ii) Where application lies?*

An application for setting aside *ex parte* decree may be made to the court which passed the decree. Where such decree is confirmed, reversed or modified by a superior court, an application may be filed in a superior court.[37]

*(iii) Grounds*

This rule requires an application by the defendant to set aside an *ex parte* decree passed against him if there exist sufficient grounds for it. If the defendant satisfies the court that (*i*) the summons was not duly served; or (*ii*) he was prevented by any sufficient cause from appearing when the suit was called out for hearing, the court will set aside the decree passed against him and appoint a day for proceeding with the suit.

*(iv) Summons not duly served*

As provided in Rule 6, the suit may proceed *ex parte* against the defendant only when it is proved by the plaintiff to the satisfaction of the court that the defendant did not appear even though the summons was duly served. In that case, an *ex parte* decree may be passed against him. Therefore, if the defendant satisfies the court that the summons

(2000) 2 MP LJ 491 (FB).

[33] *Ajudhia Prasad* v. *Balmukund*, (1866) 8 All 354 at p. 361 (FB).

[34] *Sultan Husain* v. *Satnarain Lal*, AIR 1953 Hyd 191: ILR 1953 Hyd 114; *Bhagaban* v. *Suleman*, (1973) 39 Cut LT 998.

[35] *Man Singh* v. *Dal Chand*, AIR 1934 All 163: ILR (1934) 56 All 578; *Santosh Chopra* v. *Teja Singh*, AIR 1977 Del 110: 1976 Rajdhani LR 578.

[36] *(Matte) Narayanamurthi* v. *(Parankusam) Venkatayya*, AIR 1927 Mad 227.

[37] *Official Receiver* v. *Sellamma*, AIR 1973 Mys 154.

was not duly served upon him, the court must set aside the *ex parte* decree passed against him.

*(v) Sufficient cause*

The expression "sufficient cause" has not been defined anywhere in the Code. It is a question to be determined in the facts and circumstances of each case.[38] The words "sufficient cause" must be liberally construed to enable the court to exercise powers *ex debito justitiae*.[39] A party should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part.[40] Necessary materials should be placed on record to show that the applicant was diligent and vigilant.[41] Improper advice of advocate may be a good ground to set aside *ex parte* decree but it cannot be accepted as a sufficient cause in all cases.

Whether or not it was a sufficient cause would depend upon facts and circumstances of the case.[42] If there are delaying tactics and non-cooperation on the part of the party, he cannot seek indulgence of the court.[41] Where the lower court declines to allow *ex parte* decree to be set aside, the Supreme Court will not interfere with such order.[43] The test to be applied is whether the party honestly intended to remain present at the hearing of the suit and did his best to do so.[44]

*(vi) "Good cause" and "sufficient cause": Distinction*

There is no material difference between the two expressions, "good cause" and "sufficient cause".[45]

*(vii) Grounds: Whether exhaustive*

The language of the rule is plain, express and unambiguous and the grounds mentioned therein are exhaustive.[46]

[38] *UCO Bank* v. *Iyengar Consultancy Services (P) Ltd.*, 1994 Supp (2) SCC 399; *Payal Ashok Kumar* v. *Capt. Ashok Kumar*, (1992) 3 SCC 116; *Salil Dutta* v. *T.M. & M.C. (P) Ltd.*, (1993) 2 SCC 185; *Vijay Kumar* v. *Kamlabai*, (1995) 6 SCC 148.

[39] *Ibid*, see also *Shamdasani* v. *Central Bank of India Ltd., supra*; *State of W.B.* v. *Howrah Municipality*, (1972) 1 SCC 366: AIR 1972 SC 749; *East India Cotton Mfg. Co. Ltd.* v. *S.P. Gupta, supra*; *G.P. Srivastava* v. *R.K. Raizada*, (2000) 3 SCC 54: AIR 2000 SC 1221; *Salil Dutta* v. *T.M. & M.C. (P) Ltd.*, (1993) 2 SCC 185.

[40] *Ibid*, see also *Sudha Devi* v. *M.P. Narayanan*, (1988) 3 SCC 366: AIR 1988 SC 1381.

[41] *Vijay Kumar* v. *Kamlabai*, (1995) 6 SCC 148 at p. 149.

[42] *Salil Dutta* v. *T.M. & M.C. (P) Ltd.*, (1993) 2 SCC 185.

[43] *Vijay Kumar* v. *Kamlabai, supra*.

[44] *Arunachala Iyer* v. *Subramaniah*, AIR 1923 Mad 63: (1923) 46 Mad 60; *UCO Bank* v. *Iyengar Consultancy Services (P) Ltd.*, 1994 Supp (2) SCC 399; *Payal Ashok Kumar* v. *Capt. Ashok Kumar*, (1992) 3 SCC 116.

[45] R. 7; see also *Arjun Singh* v. *Mohindra Kumar*, AIR 1964 SC 993 at p. 999: (1964) 5 SCR 946.

[46] *G.P. Srivastava* v. *R.K. Raizada*, (2000) 3 SCC 54: AIR 2000 SC 1221; *Ananda Behera* v. *Nilkamal Behera*, AIR 1975 Ori 173; *Bishan Singh* v. *Amarjit Singh*, (1975) 77 Punj LR 825; *Radha Mohan Datt* v. *Abbas Ali*, AIR 1931 All 294: (1931) 53 All 612: 133 IC 129 (FB).

(*viii*) *Material date*

Material date for deciding "sufficient cause" for non-appearance by the defendant is the date on which *ex parte* decree was passed and not his previous negligence or past defaults. In *G.P. Srivastava* v. *R.K. Raizada*,[47] the Supreme Court stated:

> "The 'sufficient cause' for non-appearance refers to the date on which the absence was made a ground for proceeding *ex parte* and cannot be stretched to rely upon other circumstance anterior in time. *If sufficient cause' is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier.*" (emphasis supplied)

(*ix*) *Government defaulting party*

The words "sufficient cause" cannot be construed differently merely because the defaulting party is a Government or an instrumentality of the State. Such interpretation would violate doctrine of equality enshrined in Article 14 of the Constitution.[48]

But ground realities of life also cannot be ignored. "Whereas a private individual takes a decision one way or the other almost instantaneously, a democratic Government or a bureaucratic department hesitates and halts, discusses and debates, considers and consults, peeps through papers and files, speaks through notes and drafts, moves horizontally and vertically till at last it gravitates towards a conclusion, unmindful and oblivious of urgency and emergency."[49]

(*x*) *Power and duty of court*

When an application for setting aside *ex parte* decree is made by the defendant, the court should consider whether the defendant was prevented by "sufficient cause" from appearing before the court when the suit was called out for hearing. If the court finds that there was sufficient cause for non-appearance, it is bound to be set aside the decree. Conversely, if "sufficient cause" is not shown, *ex parte* decree cannot be set aside. "*This right and this duty is a sine qua non of judicial procedure.*[50] An order setting aside *ex parte* decree is judicial, it must be supported by reasons.[51]

[47] (2000) 3 SCC 54 at p. 57: AIR 2000 SC 1221 at p. 1222.

[48] *Union of India* v. *Ram Charan*, AIR 1964 SC 215 at p. 219; *Municipal Corpn. of Ahmedabad* v. *Manish Enterprises Ltd.*, (1992) 2 Guj LR 1252: (1992) 2 Guj LH 176.

[49] *Municipal Corpn. of Ahmedabad* v. *Manish Enterprises Ltd., supra*, at p. 1257 (GLH): at p. 182 (*per* Thakker, J.).

[50] *Divalibai* v. *Jailkumar*, AIR 1969 Bom 393 at p. 394: (1969) 71 Bom LR 558: 1969 Mah LJ 421; *G.P. Srivastava* v. *R.K. Raizada, supra*.

[51] *Mahesh Yadav* v. *Rajeshwar Singh*, (2009) 2 SCC 205.

*(xi) Test*

The test which should be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. If the reply is in the affirmative, *ex parte* decree should be set aside but if it is in the negative, *ex parte* decree cannot be recalled.[52]

*(xii) Precedents*

"Sufficient cause" is a question of fact. Each case has to be decided on the facts and in the circumstances before the court and not on precedents.[53]

*(xiii) Irregularity in service of summons: Effect*

The second proviso, as added by the Amendment Act of 1976, however, lays down that the court shall not set aside an *ex parte* decree merely on the ground of irregularity in service of summons in a case where the defendant had adequate notice of the date of hearing of the suit, and had sufficient time to appear and answer the plaintiff's claim.[54]

The Code thus makes distinction between illegality and irregularity. The former goes to the root of the matter and renders the action null and void. The latter, however, does not invalidate the action, unless prejudice has been caused to the person making a complaint.[55] The word "and" in the second proviso to Rule 13 must be read as conjunctive and not disjunctive. Hence, unless both the conditions are satisfied, an *ex parte* decree cannot be set aside.[56]

*(xiv) Burden of proof*

The burden of proof that there was "sufficient cause" for non-appearance is on the defendant. But, it is enough if he proves that he attempted to remain present when the suit was called on for hearing. There may be many proceedings in a court wherein his personal presence may not be necessary.[57]

*(xv) Sufficient cause: Illustrative cases*

The following causes have been held to be sufficient for the absence of the defendant;

(1) *bona fide* mistake as to the date of hearing;

[52] *UCO Bank* v. *Iyengar Consultancy Services (P) Ltd.*, 1994 Supp (2) SCC 399; *Payal Ashok Kumar* v. *Capt. Ashok Kumar*, (1992) 3 SCC 116; *M.K. Prasad* v. *P. Arumugam*, (2001) 6 SCC 176; *G.P. Srivastava* v. *P.K. Raizada*, *supra*.

[53] *Ibid*, see also *Salil Dutta* v. *T.M. & M.C. (P) Ltd.*, (1993) 2 SCC 185; *Vijay Kumar* v. *Kamlabai*, (1995) 6 SCC 148.

[54] Notes on Clauses, p. 113.

[55] *Dhirendra Nath* v. *Sudhir Chandra*, AIR 1964 SC 1300: (1964) 6 SCR 1001.

[56] *Khagesh Chandra* v. *Chandra Kanta*, AIR 1954 Ass 183 (FB); *Sunil Poddar* v. *Union Bank of India*, (2008) 2 SCC 326.

[57] *Rampati Devi* v. *Chandrika Devi*, AIR 1979 Pat 314.

(2) late arrival of a train;
(3) sickness of counsel;
(4) fraud of the opposite party;
(5) mistake of pleader in noting wrong date in diary;
(6) negligence of next friend or guardian in case of minor plaintiff or defendant;
(7) death of relative of a party;
(8) imprisonment of party;
(9) strike of advocates;
(10) no instructions *pursis* by a lawyer, etc.

(*xvi*) *No sufficient cause: Illustrative cases*

The following causes, on the other hand, have been held not to be sufficient for absence of the defendant for setting aside an *ex parte* decree;

(1) dilatory tactics;
(2) bald statement of noting wrong date in diary;
(3) negligence of party;
(4) counsel busy in other court;
(5) suit of high valuation;
(6) absence of defendant after prayer for adjournment is refused;
(7) hardship of defendant;
(8) absence to get undue advantage;
(9) mere thinking that the case will not be called out;
(10) not taking part in proceedings, etc.

(*xvii*) *Limitation*

An application for setting aside *ex parte* decree can be made within thirty days from the date of the decree.[58]

(*xviii*) *Notice to opposite party*

An *ex parte* decree cannot be set aside without issuing notice to the opposite party and without giving him an opportunity of hearing.[59] This is in consonance with the principles of natural justice and fair play.[60]

(*xix*) *Procedure*

An application under Rule 13 for setting aside *ex parte* decree may be made by the defendant. In case of death of defendant, his legal representatives can also make such application. It should be signed and verified by the party and not by his advocate.[61]

[58] Art. 123, Limitation Act, 1963; see also *Panna Lal* v. *Murari Lal*, AIR 1967 SC 1384: (1967) 2 SCR 757; *Manick Chandra* v. *Debdas Nandy*, (1986) 1 SCC 512: AIR 1986 SC 446.

[59] R. 14.

[60] For detailed discussion of natural justice, *see*, C.K. Thakker, *Lectures on Administrative Law* (2008) Lecture VI.

[61] S. 146. *See also infra*, "Who may apply".

*(xx) "Upon such terms as the court thinks fit"*

The court has a very wide discretion in imposing such terms on the defendant as it thinks fit before setting aside the *ex parte* decree. It may order the payment of costs, or may order the defendant even to deposit the decretal amount in the court in an appropriate case.[62] The discretion, however, must be exercised reasonably and judicially and not arbitrarily or capriciously.[63] If the terms are onerous, or otherwise unreasonable, a superior court can interfere with them.[64] When an *ex parte* decree is set aside on certain conditions and those conditions are not complied with within the time granted by the court, the application stands dismissed.[65]

*(xxi) Imposition of conditions*

While setting aside *ex parte* decree, court has wide discretion to impose appropriate conditions on the defendant.[66]

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[62] *V.K. Industries* v. *M.P. Electricity Board*, (2002) 3 SCC 159: AIR 2002 SC 1151; *Kumud Lata* v. *Indu Prasad*, (1996) 11 SCC 195: AIR 1997 SC 34; *N. Karuppan* v. *M. Sankaran Nair*, AIR 1973 Ker 28; *B. Padmavathi Rai* v. *Parvathiamma*, AIR 1976 Kant 97.

[63] *Ibid*, see also *Raj Kumar* v. *Mohan Meakin Breweries Ltd.*, AIR 1979 All 370.

[64] *Kumud Lata* v. *Indu Prasad*, (1996) 11 SCC 195: AIR 1997 SC 34; *LIC* v. *Anjan Kumar*, AIR 1987 Cal 197; *Dukhia Ganju* v. *Ramchandra Prasad*, AIR 1968 Pat 271; *Mohan Steels* v. *U.P. Financial Corpn.*, AIR 1986 All 151.

[65] *Dagri* v. *Kera Kachari*, AIR 1976 Gau 16.

[66] For detailed discussion, *see supra*, "Upon such terms as the court thinks fit".

[67] *V.K. Industries* v. *M.P. Electricity Board*, (2002) 3 SCC 159: AIR 2002 SC 1151; *Kumud Lata* v. *Indu Prasad*, (1996) 11 SCC 195: AIR 1997 SC 34; *N. Karuppan* v. *M. Sankaran Nair*, AIR 1973 Ker 28; *B. Padmavathi Rai* v. *Parvathiamma*, AIR 1976 Kant 97.

[68] *Ibid*, see also *Raj Kumar* v. *Mohan Meakin Breweries Ltd.*, AIR 1979 All 370.

[69] *Kumud Lata* v. *Indu Prasad*, (1996) 11 SCC 195: AIR 1997 SC 34; *LIC* v. *Anjan Kumar*, AIR 1987 Cal 197; *Dukhia Ganju* v. *Ramchandra Prasad*, AIR 1968 Pat 271; *Mohan Steels* v. *U.P. Financial Corpn.*, AIR 1986 All 151.

[70] *Dagri* v. *Kera Kachari*, AIR 1976 Gau 16.

*(xxii) Inherent power to set aside decree*

Since the Code makes specific provision for setting aside *ex parte* decree, no inherent power can be exercised to set aside such decree.[71]

As Rankin, L.J.[72] stated, "I entirely dissent from the view that, if no case is made out under that rule (Rule 13), it is open to the learned Judge to enlarge the rule by talking about Section 151."

*(xxiii) Res judicata*

Where an application for setting aside an *ex parte* decree is dismissed, no fresh application would lie if such dismissal is on merits and rule of *res judicata* will apply. But if the dismissal is for default of the appearance or circumstances have been changed, a second application would be maintainable.[73]

*(xxiv) Successive applications*

Successive applications are maintainable only if circumstances have changed, not otherwise.[74]

*(xxv) Execution of decree: Effect*

The fact that an *ex parte* decree has been executed does not disentitle the defendant from applying under Rule 13 to get it set aside. If the decree is set aside restitution can be ordered.[75]

*(xxvi) Decree satisfied: Effect*[76]

*(xxvii) Extent of setting aside ex parte decree*

A peculiar situation, however, arises where an *ex parte* decree is passed against all the defendants but summonses are not served to all of them; or an application to set it aside is made by some of them; or where against some of the defendants a decree is passed on merits after hearing them but against some of the defendants it is passed *ex parte* and an application to set it aside is made by one or more of the defendants against whom a decree is passed *ex parte*. As a general rule, the court will set aside the decree only against such defendant or defendants who had made an application.[77]

[71] *Arjun Singh* v. *Mohindra Kumar, supra; Manohar Lal* v. *Seth Hiralal*, AIR 1962 SC 527: 1962 Supp (1) SCR 450; *Parry Ltd.* v. *Agro Sales & Service*, AIR 1980 Ori 162: (1980) 50 Cut LT 419 (FB).

[72] *K.B. Dutt* v. *Shamsuddin Shah*, AIR 1930 Cal 488 at p. 489: (1930) 34 CWN 419: (1930) 52 Cal LJ 524: 128 IC 94.

[73] *Raj Kumar* v. *Prescribed Authority*, (1983) 2 SCC 254; *Prahlad Singh* v. *Sukhdev Singh*, (1987) 1 SCC 727: AIR 1987 SC 1145. For detailed discussion of "res judicata", *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 113-309.

[74] For detailed discussion, *see supra*, "Res judicata".

[75] *Zendoolal* v. *Kishorilal*, ILR (1899) 23 Bom 716. For detailed discussion, *see* S. 144; C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II at pp. 775-816.

[76] For detailed discussion, *see*, "Execution of decree: Effect".

[77] *Rupchand Gupta* v. *Raghuvanshi (P) Ltd.*, AIR 1964 SC 1889: (1964) 7 SCR 760.

*Illustration*

In a suit by *A* against *B*, *C* and *D*, *ex parte* decree was passed. *C* and *D* were not served with summonses while *B* was served. In an application by *C* and *D*, it was held that the decree against *B* cannot be set aside.[78]

The proviso, however, makes it clear that where the decree is of such a nature that it cannot be set aside as against such defendant only, the court may set it aside against the other defendants also.[79] In the following classes of cases, the decree must be set aside as a whole:

(1) Where the decree is joint and indivisible.

*Illustration*

*A*, *B* and *C* are coparceners of joint Hindu family. They jointly execute a mortgage in favour of *X*. *X* files a suit against all of them. Summons is served to *C* but not to *A* and *B*. None of them appears and an *ex parte* decree is passed against all. *A* and *B* apply to set aside the *ex parte* decree. Here the decree being one and indivisible, it ought to be set aside against *C* also.[80]

(2) Where the suit would result in two inconsistent decrees if the decree were not set aside against the other defendants also.

*Illustration*

*X* sues *A* and *B*, joint executors of a promissory note, for the recovery of amount due thereunder. As a matter of fact, *B* has paid the amount due to *X*. Summons is served to *A* alone. None of them appears and an *ex parte* decree is passed against both. *B* applies to set aside the decree. The decree must be set aside against *A* also. The reason is that if *B* succeeds in proving the payment, there will be two inconsistent decrees.[81]

(3) Where the relief to which the applicant is entitled cannot effectively be given otherwise than by setting aside the decree against the other defendants also.

*Illustration*

*A* files a suit against *B*, *C* and *D* on a mortgage bond and gets an *ex parte* decree against all of them. *B* alone applies to set it aside. Neither in the mortgage bond nor in the plaint nor in the decree there is any specification of shares and liabilities of the respective defendants. The decree must be set aside as a whole.[82]

(4) Where the decree proceeds on a ground common to all the defendants.

*Illustration*

*A* sues *B* and *C* on a promissory note. *B* is the principal debtor and *C* is the surety. An *ex parte* decree is passed against both. *B* alone applies to set aside the decree and shows sufficient cause for his absence. The decree must be set aside against *C* also inasmuch as the liability of both is based on a common ground.[83]

[78] *Keival Ram* v. *Ram Lubhai*, (1987) 2 SCC 344: AIR 1987 SC 1304.
[79] *Mahesh Yadav* v. *Rajeshwar Singh*, (2009) 2 SCC 205.
[80] *Ajodhya Pershad* v. *Sheo Pershad*, (1900) 5 CWN 58.
[81] *Bhura Mal* v. *Har Kishan Das*, ILR (1902) 24 All 383.
[82] *Bala Baksh* v. *Amiruddin*, AIR 1930 Cal 700: 34 CWN 679: 128 IC 182.
[83] *Munshi Ram* v. *Malava Ram*, AIR 1917 Lah 194; *see also infra*, Or. 41 R. 4.

*(xxviii) Effect of setting aside ex parte decree*

The effect of setting aside an *ex parte* decree is that the suit is restored, and the court should proceed to decide the suit as it stood before the decree. The trial should commence *de novo* and the evidence that had been recorded in the *ex parte* proceedings should not be taken into account.[84]

*(xxix) Hearing of application pending appeal*

Mere filing of an appeal in an appellate court against an *ex parte* decree does not take away the jurisdiction of the trial court to entertain and decide an application for setting aside an *ex parte* decree under Order 9 Rule 13. As already stated earlier, two proceedings are different, distinct and independent and there is no possibility of conflict of decision.[85]

*(xxx) Dismissal of appeal against ex parte decree*

Where an appeal against an *ex parte* decree has been decided on any ground other than the withdrawal of such appeal, an application to set aside such *ex parte* decree does not lie.[86]

**(d) Appeal**

An appeal lies against an order rejecting an application to set aside *ex parte* decree.[87] As stated above, an *ex parte* decree is a decree under Section 2(2) of the Code and, therefore, an aggrieved party can also file an appeal under Section 96(2) of the Code.[88] A controversial and somewhat complicated question of law is: Whether in such cases, the appellate court can only consider the decree passed by the lower court on merits as to whether there were sufficient grounds to pass the decree or whether the appellate court can also consider whether there were sufficient reasons for the defendant for non-appearance and the court was not justified in passing an *ex parte* decree against the defendant.

There is a conflict of judicial decisions on this point. One view is that the appellate court can consider only the question whether the decree was wrong in law while the other view is that the appellate court has power to consider whether the lower court was justified in proceeding with the matter *ex parte* and, if the lower court was not right in doing so, to set aside the *ex parte* decree. It is submitted that the latter view

[84] *Aziz Ahmed* v. *I.A. Patel*, AIR 1974 AP 1: ILR 1972 AP 421 (FB); *Ganesh Prasad* v. *Lakshmi Narayan*, (1985) 3 SCC 53: AIR 1985 SC 964.

[85] For detailed discussion, *see supra*, "Remedies".

[86] Explanation to R. 13; see also *Rani Choudhury* v. *Suraj Jit Choudhury*, (1982) 2 SCC 596: AIR 1982 SC 1393; *Bhulan Rout* v. *Lal Bahadur*, (2004) 13 SCC 679.

[87] *Ram Sarup* v. *Gaya Prasad*, AIR 1925 All 610: ILR (1926) 48 All 178 (FB); *Dhoba Naik* v. *Sabi Dei*, AIR 1973 Ori 182.

[88] For detailed discussion, *see infra*, "First Appeals", Pt. III, Chap. 2.

appears to be much more acceptable and preferable, particularly when appeal is continuation of suit and rehearing of the matter..

**(e) Revision**

An order setting aside an *ex parte* decree is a "case decided" within the meaning of Section 115 of the Code and is, therefore, revisable.[89] A High Court may also exercise supervisory jurisdiction under Article 227 of the Constitution in appropriate cases.[90]

**(f) Review**

Since all the remedies against an *ex parte* decree are concurrent, an aggrieved party can also file an application for review if the conditions laid down in Order 47 Rule 1 are satisfied.[91]

**(g) Suit**

A suit to set aside an *ex parte* decree is not maintainable. But if an *ex parte* decree is alleged to have been obtained by the plaintiff by fraud, the defendant can file a regular suit to set aside such decree. It is settled law that fraud vitiates the most solemn transactions.[92] In such suits, the onus is on the party who alleges that the *ex parte* decree passed against him was fraudulent.[93]

[89] *Ram Sarup* v. *Gaya Prasad*, AIR 1925 All 610: ILR (1926) 48 All 178 (FB); *Dhoba Naik* v. *Sabi Dei*, AIR 1973 Ori 182; *Mali Ram* v. *Gayatri Devi*, AIR 1985 Pat 116. For detailed discussion, *see infra*, "Revision", Pt. III, Chap. 9.

[90] *Kamta Prasad* v. *Jaggiya*, AIR 1999 All 184.

[91] For detailed discussion, *see infra*, "Review", Pt. III, Chap. 8.

[92] *Lazarus Estates Ltd.* v. *Beasley*, (1956) 1 All ER 341 at p. 345; *S.P. Chengalvaraya Naidu* v. *Jagannath*, (1994) 1 SCC 1: AIR 1994 SC 853; *Ram Chandra Singh* v. *Savitri Devi*, (2003) 8 SCC 319; *Bhanu Kumar Jain* v. *Archana Kumar*, (2005) 1 SCC 787: AIR 2005 SC 626; *A.V. Papayya Sastry* v. *Govt. of A.P.*, (2007) 4 SCC 221: AIR 2007 SC 1546.

[93] Mulla, *Civil Procedure Code* (2007) Vol. II at pp. 588-89; see also *Rupchand Gupta* v. *Raghuvanshi (P) Ltd.*, AIR 1964 SC 1889: (1964) 7 SCR 760.

PART II

# 9 First Hearing

SYNOPSIS


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## 1. GENERAL

THE PLAINT and written statement constitute "pleadings". The dispute between the parties thus becomes clear. The court thereafter in the light of pleadings of the parties will frame "issues". Order 10 enjoins the court to examine parties with a view to ascertaining matters in controversy in the suit. Order 14 deals with issues. It is the third important stage after presentation of the plaint by the plaintiff and filing of written statement by the defendant. It is known as the "first hearing". Order 15 enables the court to pronounce judgment at the "first hearing" in certain cases.

## 2. FIRST HEARING: MEANING

The expression "first hearing" has not been defined in the Code.

The first hearing of a suit means the day on which the court goes into the pleadings of the parties in order to understand their contentions. As stated above, the machinery of a court is set in motion by the presentation of a plaint, which is the first stage in the suit. The second stage is the filing of the written statement by the defendant. The third important stage in the suit is the framing and settlement of issues and the day on which such issues are framed is the *first hearing* of the suit.[1]

[1] *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425 at p. 431: (1955) 2 SCR 1; *Ved Prakash* v. *Vishwa Mohan*, (1981) 3 SCC 667 at p. 668: AIR 1982 SC 816 at p. 817; *Sham Lal* v. *Atme Nand Jain Sabha*, (1987) 1 SCC 222: AIR 1987 SC 197; *Arjun Khiamal Makhijani* v. *Jamnadas C. Tuliani*, (1989) 4 SCC 612: AIR 1989 SC 1599; *Siraj Ahmad* v. *Prem Nath*, (1993) 4 SCC 406: AIR 1993 SC 2525; *Mangat Singh* v. *Satpal*, (2003) 8 SCC 357: AIR 2003 SC 4300.

In cases in which no issues need be framed, e.g., a small cause suit, the first hearing would be the day on which the trial starts.[2]

Thus, the day on which the court applies its mind to the case either for framing issues or for taking evidence can be said to be "the first day of hearing of the suit".[3] To put it differently, "first hearing" is the date when, for the first time, the case is "called out for hearing and really gone into" and not the date when the case was fixed for hearing but was not gone into.[4]

In *Siraj Ahmad* v. *Prem Nath*[5], the Supreme Court stated, "The date of first hearing of a suit under the Code is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions in the pleadings of the parties to the suit and in the documents filed by them for the purpose of framing the issues to be decided in the suit."[6]

### 3. OBJECT

Order 10 Rule 1 provides that the court shall, at the first hearing of the suit, ascertain from each party or his pleader whether he admits or denies such allegations or facts as are made in the plaint or in the written statement, if any, of the opposite party. After recording admissions and denials, the court shall direct the parties to the suit to settle the matter out of court through conciliation, arbitration, mediation or *Lok Adalat*. If there is no settlement, the case will again be referred to the court.[7]

Rule 2 provides for oral examination of the parties to the suit with a view to elucidating matters in controversy in the suit. The court, thus, ascertains with precision the propositions of law or fact on which the parties are at variance and on such questions issues are required to be framed.[8] In other words, the only point of requiring pleadings and issues is to ascertain the real dispute between the parties, to narrow the

[2] *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425: (1955) 2 SCR 1.

[3] *Sham Lal* v. *Atme Nand Jain Sabha*, (1987) 1 SCC 222 at pp. 225-26: AIR 1987 SC 197 at pp. 200-01; *Arjun Khiamal Makhijani* v. *Jamnadas C. Tuliani*, (1989) 4 SCC 612 at pp. 625-26: AIR 1989 SC 1599 at pp. 1601-02; *Siraj Ahmad* v. *Prem Nath*, *infra*; *Advaita Nand* v. *Judge, Small Cause Court*, (1995) 3 SCC 407; *Mangat Singh* v. *Satpal*, *supra*.

[4] *Taran Mondal* v. *Raj Chandra*, AIR 1919 Cal 70: 50 IC 296; *National Insurance Co. Ltd.* v. *Dhirendra Nath*, AIR 1938 Cal 287.

[5] (1993) 4 SCC 406: AIR 1993 SC 2525.

[6] *Ibid*, at p. 412 (SCC): at p. 2528 (AIR); see also *Advaita Nand* v. *Judge, Small Cause Court*, (1995) 3 SCC 407.

[7] Or. 10 Rr. 1-A to 1-C.

[8] Or. 14 R. 1(5); see also *Manmohan Das* v. *Ramdei*, AIR 1931 PC 175: 134 IC 669 (PC).

area of conflict and to see just where the two sides differ[9], so that no party at the trial is taken by surprise.[10]

### 4. ISSUE: MEANING

According to the dictionary meaning, "issue" means a point in question; an important subject of debate, disagreement, discussion, argument or litigation.[11] In other words, an issue is that which, if decided in favour of the plaintiff, will in itself give a right to relief; and if decided in favour of the defendant, will in itself be a defence.[12] The point or points on which pleadings contests or contradicts averments or assertions of the other party, which needs determination of a question by a court for one side or the other is an "issue".

### 5. FRAMING OF ISSUES: ORDER 14 RULE 1

Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.[13] Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.[14] Each material proposition affirmed by one party and denied by the other shall form the subject-matter of a distinct issue.[15]

### 6. KINDS OF ISSUES: RULES 1-2

Rule 1(4) enacts that issues are of two kinds: (*a*) issues of fact; and (*b*) issues of law.[16] Issues, however, may be mixed issues of fact and law.[17] Rule 2(1) of Order 14 provides that where issues both of law and fact arise in the same suit, notwithstanding that a case may be disposed of on a preliminary issue, the court should pronounce judgment on all issues. But if the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first,

[9] *J.K. Iron and Steel Co. Ltd.* v. *Mazdoor Union*, AIR 1956 SC 231 at p. 235: (1955) 2 SCR 1315.

[10] *Katihar Jute Mills Ltd.* v. *Calcutta Match Works (India) Ltd.*, AIR 1958 Pat 133 at p. 143; *Banke Ram* v. *Sarasti Devi*, AIR 1977 P&H 158 at p. 162-63; *see also*, Or. 10 Rr. 3 & 4.

[11] *Concise Oxford English Dictionary* (2002) at p. 751, *Chamber's 21st Century Dictionary* (1997) at p. 722.

[12] *Howell* v. *Dering*, (1915) 1 KB 54 (62) (*per* Buckley, L.J.).

[13] R. 1(1).

[14] R. 1(2).

[15] R. 1(3).

[16] Usually, however, issues can be said to be of three types:
(*a*) issues of fact;
(*b*) issues of law; and
(*c*) mixed issues of law and fact.
For detailed discussion, *see supra*, Chap. 2. For Model Issues, *see*, Appendix 'C'.

[17] *Sree Meenakshi Mills Ltd.* v. *CIT*, AIR 1957 SC 49: 1956 SCR 691; *Mathura Prasad* v. *Dossibai N.B. Jeejeebhoy*, (1970) 1 SCC 613: AIR 1971 SC 2355.

if that issue relates to (*i*) the jurisdiction of the court; or (*ii*) a bar to the suit created by any law for the time being in force. For that purpose, the court may, if it thinks fit, postpone the settlement of the other issues until the issues of law have been decided.[18]

## 7. IMPORTANCE OF ISSUES

Issues are the backbone of a suit. The framing of issues, therefore, has a very important bearing on the trial and decision of a case. *Firstly,* it is the issues framed and not the pleadings that guide the parties in the matter of leading evidence.[19] *Secondly,* the court cannot refuse to decide the point on which an issue has been framed and evidence led by the parties, even if the point involved is not mentioned in the pleadings.[20] *Thirdly,* the court should not frame an issue which does not arise in the pleadings.[21] *Fourthly,* the issues must be confined to the material questions of fact or law (*facta probanda*) and not on subordinate facts or evidence by which material questions of fact or law are proved or disproved (*facta probantia*).[22] *Fifthly,* one issue should cover only one fact or law in dispute between the parties.[23] *Finally,* if the case goes in appeal, it must be dealt with by the appellate court on the issues settled for trial.[24] After the amendment in the Code in 1976, all issues should normally be tried at the suit and decided at one and the same time.[25] It is, therefore, essential to the right decision of a case that appropriate issues should be framed.[26]

[18] Or. 14 R. 2(2); see also *Major S.S. Khanna* v. *Brig. F.J. Dillon,* AIR 1964 SC 497: (1964) 4 SCR 409; *Cooper Engg. Ltd.* v. *P.P. Mundhe,* (1975) 2 SCC 661; *Lufthansa German Airlines* v. *Vij Sales Corpn.,* (1998) 8 SCC 623; *Arun Agarwal* v. *Nagreeka Exports (P) Ltd.,* (2002) 10 SCC 101; *Abdul Rahman* v. *Prasony Bai,* (2003) 1 SCC 488: AIR 2003 SC 718; *Good Will Girls High School* v. *J. Mary Susheela,* (2003) 9 SCC 106; *Krishna Kumar* v. *Rajendra Singh,* (2008) 4 SCC 300.

[19] *Sita Ram* v. *Radha Bai,* AIR 1968 SC 534 at p. 537: (1968) 1 SCR 805; *J.K. Iron and Steel Co. Ltd.* v. *Mazdoor Union,* AIR 1956 SC 231: (1955) 2 SCR 1315; *Goppulal* v. *Thakurji Shriji Shriji Dwarakadheeshji,* (1969) 1 SCC 792: AIR 1969 SC 1291.

[20] *Victoria Girls' School* v. *Board of Education,* (1969) 74 CWN 328; *State of Mysore* v. *B. Anthony Benedict,* (1968) 2 Lab IC 1384; *Ratneshwari Nandan* v. *Bhagwati Saran,* AIR 1950 FC 142: 1949 FCR 667; *Santosh Hazari* v. *Purushottam Tiwari,* (2001) 3 SCC 179: AIR 2001 SC 965; *Madhukar* v. *Sangram,* (2001) 4 SCC 756.

[21] *Sita Ram, supra; Goppulal* v. *Thakurji Shriji Shriji Dwarakadheeshji,* (1969) 1 SCC 792 at p. 794: AIR 1969 SC 1291 at p. 1293.

[22] *Lekhraj Diddi* v. *Sawan Singh,* AIR 1971 MP 172 at p. 175.

[23] *Snow White Food Product (P) Ltd.* v. *Sohanlal Bagla,* AIR 1964 Cal 209.

[24] *Abdul Sami* v. *Mohd. Noor,* AIR 1966 All 39; *Madhab Sahu* v. *Hatkishore Sahu,* AIR 1975 Ori 48 at p. 54.

[25] *Lufthansa German Airlines* v. *Vij Sales Corpn., supra; D.P. Maheshwari* v. *Delhi Admn.,* (1983) 4 SCC 293: AIR 1984 SC 153; *Kaushiklal Parikh* v. *Mafatlal Industries Ltd.,* (1995) 1 Guj LH 329: (1995) 1 Guj LR 557.

[26] *Pandurang Laxman* v. *Kaluram Bahiru,* AIR 1956 Bom 254 at pp. 255-56.

In *State of Gujarat* v. *Jaipalsingh Jaswantsingh Engineers & Contractors*[27], the High Court of Gujarat stated, "Such framing of issues in the first instance would facilitate the applicant to lead necessary evidence in support of the claim and the reliefs prayed pursuant thereto. In the second instance, it will avail the opponent an opportunity to confront and contradict the particular witness and thereafter to lead the evidence (if he so desires) to bring home the defence pleaded, and in the third instance, enlighten the trial court to test and appreciate the same in proper perspective to enable it to reach a just decision. It is hardly required to be told that *issues are the backbone of a suit. They are also the lamp-post which enlightens the parties to the proceedings, the trial court and even the appellate court—as to what is the controversy, what is evidence and where lies the way to truth and justice.*"[28] (emphasis supplied)

## 8. COURT'S POWER AND DUTY AS TO ISSUES

The duty to frame proper issues rests primarily on the court.[29] The judge must apply his mind and understand the facts of the case before framing issues. But the pleaders appearing for both the parties also should assist the court in framing issues.[30] If proper issues are not framed, the parties may move the court to get the proper issues framed. Issues must be specific and clear and not vague or evasive. The court may examine witnesses or inspect documents before framing issues, to amend the issues, to frame additional issues or to strike out issues that may appear to it to be wrongly framed.[31] Where the parties to a suit agree as to the question of fact or law to be decided between them, they may, by agreement state the same in the form of an issue. If the court is satisfied that the agreement is executed in good faith, it may pronounce the judgment on such issue according to the terms of the agreement.[32]

## 9. MATERIALS FOR FRAMING ISSUES: RULE 3

The court may frame issues from all or any of the following materials:

(*a*) allegations made on oath by the parties, or by any persons present on their behalf, or statements made by the pleaders appearing for the parties;

[27] (1994) 35 (1) Guj LR 258: (1994) 2 Guj LH 403: (1994) 2 Guj CD 474.

[28] *Ibid*, at p. 261 (GLR): 406 (GLH).

[29] R. 1(5). See also *Bhaskar* v. *Narandas*, AIR 1956 Bom 608 at p. 609; *Haridas Mundhra* v. *Indian Cable Co. Ltd.*, AIR 1965 Cal 369 at pp. 370-71.

[30] *Bhaskar* v. *Narandas, supra.*

[31] Rr. 4 and 5. See also *Hiralal* v. *Badkulal*, AIR 1953 SC 225: 1953 SCR 758.

[32] Rr. 6 and 7.

(*b*) allegations made in the pleadings or in answers to interrogatories; and

(*c*) documents produced by the parties.[33]

## 10. OMISSION TO FRAME ISSUES

Even though it is the duty of the court to frame proper issues, mere omission to frame an issue is not *necessarily* fatal to the suit. Omission to frame an issue is an *irregularity* which may or may not be a *material* one. If such omission affects the disposal of the suit on merits, the case must be remanded to the trial court for a fresh trial. On the other hand, where the parties went to trial with full knowledge that a particular point was at issue, they have not been prejudiced and substantial justice has been done, absence of an issue is not fatal to the case so as to vitiate the proceedings.[34]

## 11. DISPOSAL OF SUIT: ORDER 15

The court may at once pronounce a judgment in the following cases:

(1) Where the parties are not at issue on any question of law or fact.[35]

(2) Where there are two or more defendants and any one of them admits the claim of the plaintiff, the court may pronounce judgment against such defendant. (On such pronouncement of judgment, a decree shall follow.) A suit will then proceed against other defendants.[36]

(3) Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies.[37]

(4) Where a party or his pleader makes certain admissions of facts which are sufficient to dispose of the case.[38]

[33] Rr. 3, 1(5).

[34] *Nagubai Ammal* v. *B. Shama Rao*, AIR 1956 SC 593 at p. 598: 1956 SCR 451; *Nedunuri Kameswaramma* v. *Sampati Subba Rao*, AIR 1963 SC 884 at p. 886: (1963) 2 SCR 208; *Supreme Bank Ltd.* v. *P.A. Tendolkar*, (1973) 1 SCC 602 at pp. 628-29: AIR 1973 SC 1104 at p. 1122; *Sk. Mohd. Umar* v. *Kaleskar Hasham*, (1969) 1 SCC 741 at pp. 747-48: AIR 1970 SC 61 at pp. 65-66; *Kunju Kesavan* v. M.M. *Philip*, AIR 1964 SC 164 at p. 169: (1964) 3 SCR 634; *Union of India* v. *Khas Karanpura Colliery Co. Ltd.*, AIR 1969 SC 125 at p. 127: (1968) 3 SCR 784; *Kali Prasad* v. *Bharat Coking Coal Ltd.*, 1989 Supp (1) SCC 628 at p. 634: AIR 1989 SC 1530 at p. 1534; *Kewal Krishan* v. *Dina Nath*, (1992) 2 SCC 51: AIR 1993 SC 881; *Swamy Atmananda* v. *Sri Ramakrishna Tapovanam*, (2005) 10 SCC 51 at p. 64: AIR 2005 SC 2392.

[35] Or. 15 R. 1. See also *Puranmal Bajoria* v. *Nagarmal*, AIR 1980 Pat 143 at pp. 147-48; *Heeralal* v. *Kalyan Mal*, (1988) 1 SCC 278: AIR 1988 SC 618.

[36] R. 2. See also *Sidh Nath* v. *Roop Rani*, AIR 1977 All 286 at pp. 294-95.

[37] R. 4. See also *Sangram Singh* v. *Election Tribunal*, *supra*, at p. 431 (AIR).

[38] *Kundibai* v. *Vishinji Hotchand*, AIR 1947 Sind 105; *Siddik Mahd. Shah* v. *Saran*, AIR 1930 PC 57 at p. 1; *Heeralal* v. *Kalyan Mal*, (1988) 1 SCC 278: AIR 1998 SC 618; *see also infra*, Or. 12, Chap. 10.

(5) Where after the issues have been framed, the court is satisfied that no further argument or evidence is required.[39]

[39] R. 3. See also *Sangram Singh* v. *Election Tribunal, supra,* at p. 431 (AIR); *Bettiah Estate* v. *Bhagwati Saran,* AIR 1993 All 2.

PART II

# 10 Discovery, Inspection and Production of Documents

SYNOPSIS


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## 1. GENERAL

AFTER THE plaint has been presented by the plaintiff and the written statement by the defendant in court, it may appear either to the plaintiff or to the defendant that the nature of his opponent's case is not sufficiently disclosed in his pleadings. He is entitled to know beforehand all *material facts* constituting the case of the opposite party and all *documents* in his possession or power relevant to the issue in the suit with a view to maintain his case or to meet with, impeach or destroy the case of his adversary at the hearing.

This does not, however, mean that a party to a suit has a right to know beforehand the *evidence* of his opponent, for if it were allowed, an unscrupulous litigant may try to destroy it so as to defeat the ends of justice.

As stated above, every suit contemplates two sets of facts, namely, (1) the facts which constitute a party's case (*facta probanda*); and (2) the facts by which the said case is to be proved (*facta probantia*). The first set of facts discloses the *nature* of a party's case and the second set forms the *evidence* of his case. A party is entitled to know beforehand only the first set of facts.

The following provisions have been made in the Code for the said purpose:

(1) Discovery and inspection: Order 11.
(2) Admissions: Order 12.
(3) Production, impounding and return of documents: Order 13; and
(4) Affidavits: Order 19.

## 2. DISCOVERY AND INSPECTION: ORDER 11

### (a) Discovery

*(i) Meaning*

"Discovery" means to compel the opposite party to disclose what he has in his possession or power. It is thus a compulsory disclosure by a party to an action of facts or documents on which the other side wishes to rely.[1]

*(ii) Nature and scope*

After the settlement of issues, a party to a suit may require information from his adversary as to facts or as to documents in possession or power of such party, relevant to the issue in the suit. Where information as to facts is required, the party is allowed to put a series of questions to his adversary. These questions are called *interrogatories*.

[1] *Concise Oxford English Dictionary* (2002) at p. 409.

The judge will go through the proposed questions and, if he considers them proper, he will compel the other side to answer them on oath before trial. This is called *discovery of facts*. On the other hand, if information as to documents is required, the party may apply for an order compelling the other party to submit a list of the relevant documents in his possession or power, and, in certain circumstances, for permission to inspect and take copies of those documents. This is known as *discovery of documents*.

**(b) Interrogatories: Rules 1-11**

(*i*) *Meaning*

"Interrogatory" means to ask questions or to make inquiry closely or thoroughly.[2] Where a party to a suit requires information as to facts from the opposite party, he may administer to his adversary a series of questions. Those questions are called interrogatories. They are delivered in order to ascertain the nature of his opponent's case either for the purpose of proving or supporting his case or for impeaching or destroying the case of the other side.[3]

(*ii*) *Object*

The object of interrogatories is twofold: (*i*) *firstly*, to know the nature of the case of the opponent; and (*ii*) *secondly*, to support his own case, either (*a*) directly, by obtaining admissions; or (*b*) indirectly, by impeaching or destructing the case of his opponent.[4]

In other words, the primary object underlying this procedure is to narrow the points in issue, to save expense by enabling a party to obtain from his opponent information as to material facts and to get his admissions on any matters in question in the suit which otherwise would have to be proved by evidence. The power to allow interrogatories should be exercised liberally without being restricted by technicalities.[5]

(*iii*) *Who may administer interrogatories?*

Interrogatories may be administered by one party to a suit to the other party. Thus, a plaintiff may administer interrogatories to a defendant. Likewise, a defendant may administer interrogatories to a plaintiff.[6] In exceptional cases, a plaintiff may administer interrogatories

[2] *Ibid*, at p. 740.

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

[4] *Bhakta Charan Mallik* v. *Nataorar Mallik*, AIR 1991 Ori 319; *Thakur Prasad* v. *Mohd. Sohayal*, AIR 1977 Pat 233; *Ganga Devi* v. *Krushna Prasad*, AIR 1967 Ori 19.

[5] *Raj Narain* v. *Indira Nehru Gandhi*, (1972) 3 SCC 850 at p. 861: AIR 1972 SC 1302 at p. 1309; *P. Balan* v. *Central Bank of India*, AIR 2000 Ker 24.

[6] *Raj Narain* v. *Indira Gandhi, supra*; *Anila Bala Dasi* v. *Rajendra Nath Dalal*, AIR 1916 Cal 953: (1916) 43 Cal 300: 34 IC 227.

to a co-plaintiff or a defendant may administer interrogatories to a co-defendant.[7]

*(iv) Against whom interrogatories may be allowed*

Generally, interrogatories may be delivered to a party to a suit. Hence, interrogatories may be allowed against plaintiff or defendant.

It may, however, happen that a person may not be arrayed as a party to a suit, but in substance and in reality, he may be a party; e.g. in a suit by an agent, a principal is really the plaintiff. An order of interrogatories, hence, may be obtained against him.[8]

An order of interrogatories may be made against the Government.[9]

Where a party to a suit is a minor, lunatic or of unsound mind, interrogatories may be served on his next friend or guardian *ad litem*.[10]

*(v) Form of interrogatories*

Interrogatories should be in Form Nos. 1 and 2 of Appendix 'C' with necessary variations and modifications as the circumstances may require. An affidavit should be in Form No. 3 of Appendix 'C'.[11]

*(vi) Objections to interrogatories*

A party may object to answer an interrogatory if it is scandalous, irrelevant, *mala fide*, immaterial, privileged, etc.[12]

*(vii) Rules as to interrogatories*

Reading the relevant provisions of law and leading decisions on the point, the following rules as to discovery by interrogatories emerge:

(*i*) Interrogatories may be administered in writing with the leave of the court and subject to such conditions and limitations as may be prescribed by it.[13]

(*ii*) The particulars of interrogatories proposed to be delivered should be submitted to the court, which shall be decided by the court within seven days from filing of the application.[14]

(*iii*) Interrogatories may be administered either by the plaintiff to the defendant or by the defendant to the plaintiff.[15]

[7] *Shaw* v. *Smith*, (1886) 18 QB 193 (CA); *Anandrao* v. *Budra Malla*, ILR (1892) Bom 384; *Krishna Ayyar* v. *Madhava Panikkar*, AIR 1921 Mad 381.

[8] *Attorney General* v. *Gaskill*, (1882) 20 Ch D 519: 51 LJ Ch D 870; *Roop Chand* v. *Church Missionary*, AIR 1923 Lah 282; *Krishna Ayyar* v. *Madhava Panikkar*, AIR 1921 Mad 381.

[9] *Mohd. Mehdi* v. *Governor General in Council*, AIR 1948 Sind 100 (FB).

[10] R. 23.

[11] Rr. 4, 9.

[12] R. 6

[13] S. 30, Or. 11 R. 1.

[14] R. 2; see also *Prem Sukh* v. *Indro Nath*, ILR (1891) 18 Cal 420 (FB); *Sham Kishore* v. *Shoshilbhoosun*, ILR (1880) 5 Cal 707.

[15] R. 1; see also *Shaw* v. *Smith*, (1886) 18 QB 193 (CA); *Molloy* v. *Kilby*, (1880) 15 Ch D 162 (CA).

(*iv*) Interrogatories may also be administered by one plaintiff to another plaintiff or by one defendant to another defendant, provided there is some question or issue between them in the suit, action or proceeding.[16]

(*v*) No party can deliver more than one set of interrogatories to the same party without an order by the court.[17]

(*vi*) In exceptional cases, a court may allow more than one set of interrogatories to one and the same party.[18]

(*vii*) Generally, no leave can be granted to the plaintiff for administering interrogatories until the written statement is filed by the defendant or the time to file the written statement has expired. Similarly, no such leave can be granted to the defendant until he files the written statement.[19]

(*viii*) Where a party to a suit is a corporation or a body of persons empowered to sue or be sued, interrogatories may be administered to an officer or member of such corporation or body.[20]

(*ix*) Where a party to a suit is a minor or a lunatic, interrogatories may be administered to his next friend or *guardian ad litem*.[21]

(*x*) Interrogatories and an affidavit in answer to interrogatories should be delivered in the prescribed form.[22]

(*xi*) Interrogatories shall be answered by affidavit to be filed within ten days after the service of the interrogatories or within such period as the court may allow.[23]

(*xii*) Interrogatories must relate to or have reasonable nexus with any matter in question in the suit.[24]

(*xiii*) Interrogatories must be as to question of fact and not as to conclusions of law, inferences of facts or construction of documents.[25]

(*xiv*) Interrogatories which do not relate to any matter in question in the suit should be deemed to be irrelevant.[26]

(*xv*) Interrogatories cannot be allowed at a premature stage.[27]

[16] *Ibid.*

[17] R. 1.

[18] R. 1.

[19] *Cashin* v. *Craddock*, (1876) 2 Ch D 140; *Union Bank of London* v. *Manby*, (1879) 13 Ch D 239.

[20] R. 5.

[21] R. 23.

[22] Rr. 4, 8, 9 & 10.

[23] R. 8.

[24] Rr. 6, 7.

[25] *Nittomoye Dassée* v. *Soobul Chunder Law*, ILR (1895) 23 Cal 117; *Model Farm Dairies (Bournemouth) Ltd.* v. *Newman*, 1943 KB 5: (1942) 2 All ER 445 (CA).

[26] R. 6, 7.

[27] R. 20.

(*xvi*) Interrogatories may be objected *inter alia* on the ground that they are vexatious, scandalous, irrelevant, unreasonable, not *bona fide* to the questions raised in the suit, injurious to public interest, "fishing" in nature, etc.[28]

(*xvii*) Interrogatories may be set aside on the ground that they have been administered unreasonably or vexatiously, or struck off on the ground that they are prolix, oppressive, unnecessary or scandalous.[29]

(*xviii*) Generally, the costs of the interrogatories shall be borne by the party administering the interrogatories. But the court may direct the party at fault to pay the costs of the interrogatories irrespective of the result of the suit.[30]

(*xix*) Any party may, at the trial of the suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories.[31]

(*xx*) Where any person fails to comply with an order to answer interrogatories, his suit can be dismissed if he is a plaintiff, or his defence can be struck off if he is a defendant.[32]

(*viii*) *Interrogatories which may be allowed*

As a general rule, interrogatories can be allowed whenever the answers to them will serve either to prove the case of the party administering the interrogatories or to destroy the case of his adversary. The right is a valuable one and the party should not lightly be deprived of that right.[33] The power of interrogatories, therefore, should not be confined within narrow technical limits and must be exercised liberally so as to shorten litigation, save expenses and serve the ends of justice.[33] Interrogatories must be directed to facts relevant to "any matters in issue".[34] They need not be directed to the facts directly in issue. It is sufficient if they are relevant to the matters in question in the suit.[35]

Thus, the author of an article published in a newspaper may be asked to answer an interrogatory like, "Was not the article published in the newspaper and set out in the plaint intended to apply to the plaintiff?"

[28] Rr. 6, 7.

[29] Rr. 6, 7.

[30] R. 3.

[31] R. 22.

[32] R. 11.

[33] *Ramlalsao* v. *Tansingh*, AIR 1952 Nag 135 at p. 137: ILR 1952 Nag 650.

[34] *Raj Narain* v. *Indira Nehru Gandhi*, (1972) 3 SCC 850 at p. 861: AIR 1972 SC 1302 at p. 1309; *Delhi Vanaspati Syndicate* v. *K.C. Chawla*, AIR 1983 J&K 65.

[35] *Howel Morgan, In re*, (1888) 39 Ch D 316 (CA); *Jamaitrai Bishansarup* v. *Rai Bahadur Motilal*, AIR 1960 Cal 536; *M.L. Sethi* v. *R.P. Kapur*, (1972) 2 SCC 427: AIR 1972 SC 2379.

Similarly, if a defendant denies that he wrote a material document, he may be asked if other documents produced by him were in his handwriting even though such documents had nothing to do with the question involved in the suit, but will be used for comparison of handwriting of the defendant.

Interrogatories cannot be disallowed on the ground that the party interrogating has other means of proving the facts in question, since one of the purposes of interrogatories is to obtain admissions from the opposite party.[36]

(*ix*) *Interrogatories which may not be allowed*

The procedure for interrogatories, however, in a given case is likely to be abused. Hence, there must be certain limits to the exercise of the said right. As a rule, the power must be exercised with considerable care and caution so that it may not become oppressive and be used for an improper purpose by the other side.

Interrogatories may not be allowed in the following circumstances:

(*i*) Interrogatories for obtaining discovery of facts which constitute exclusively the evidence of the case of his adversary. "The purpose of interrogatories is not to enable a litigant to come into court knowing how his opponent is going to prove his case."[37] Thus, where in a suit for damages, the defendant wanted the plaintiff to state as to how he estimated the damages to the amount of Rs 13,000 mentioned in the plaint, it was held that the plaintiff was not bound to answer it.

(*ii*) Interrogatories as to any confidential and privileged communications between a party and his legal advisers.[38]

(*iii*) Interrogatories which would involve disclosures injurious to public interest.

(*iv*) Interrogatories which are scandalous, irrelevant or not *bona fide* for the purpose of the suit or not sufficiently material at that stage.[39]

(*v*) Interrogatories which are really in the nature of cross-examination.[40]

(*vi*) Interrogatories on questions of law.

(*vii*) Interrogatories which are "fishing" in nature. In other words, the interrogatories must refer to some definite and existing

[36] *Attorney General* v. *Gaskill*, (1882) 20 Ch D 519; *Jamaitrai Bishansarup v. Rai Bahadur Motilal* (*ibid.*) at p. 538; *Nishi Prem* v. *Javed Akhtar*, AIR 1988 Bom 222.

[37] *Knapp* v. *Harvey*, (1911) 2 KB 725 at p. 732 (CA); *M.L. Sethi* v. *R.P. Kapur*, *supra*, at p. 431 (SCC).

[38] Ss. 121 to 129, Evidence Act, 1872.

[39] Rr. 1 and 6.

[40] R. 1; *Raj Narain* v. *Indira Gandhi*, *supra*; *Bhagwandas Parashram* v. *Burjorji Ruttonji Bomonji*, (1913) 37 Bom 347: 17 IC 152.

state of circumstances and should not be put merely in the hope of discovering something which may help the party interrogating to make out some case or with the object of plugging a loophole.[41]

(*viii*) Any interrogatories may be set aside on the ground that they have been administered unreasonably or vexatiously, or struck off on the ground that they are prolix, oppressive, unnecessary or scandalous.[42]

(*x*) *Non-compliance: Effect*

Where any person omits to answer interrogatories, the party administering interrogatory may obtain an order from the court requiring him to answer by affidavit or by oral examination (*viva voce*).[43]

(*xi*) *Appeal*

An order granting or rejecting prayer for interrogatories is neither a "decree" nor an appealable order. No appeal, therefore, lies against such order.

(*xii*) *Revision*

Though an order granting or refusing interrogatories may be said to be a "case decided" under Section 115 of the Code, since it is in the discretion of the court to allow or disallow interrogatories, the High Court normally does not interfere with such order unless it is clearly wrong or illegal.[44]

**(c) Discovery of documents: Rules 12-14**

(*i*) *Nature and scope*

Discovery is of two kinds, namely: (*i*) discovery by interrogatories; and (*ii*) discovery of documents. Generally speaking, a party is entitled to inspection of all documents which do not themselves constitute exclusively the other party's evidence of his case or title. If a party wants inspection of documents in the possession of the opposite party, he cannot inspect them unless the other party produces them. The party wanting inspection must, therefore, call upon the opposite party to produce the document. And how can a party do this unless he knows what documents are in the possession or power of the opposite party? In other words, unless the party seeking discovery knows what are the documents in the possession or custody of the opposite party which

[41] *Ali Kader* v. *Gobind Dass*, (1890) 17 Cal 840; *Hennessy* v. *Wright* (*No. 2*), (1888) 24 QB 445 (CA); *Ganga Devi* v. *Krushna Prasad*, AIR 1967 Ori 19: ILR 1964 Cut 951.

[42] R. 7.

[43] R. 11.

[44] *Kartick Chandra* v. *Amal Kumar*, (1964) 68 CWN 804; *Raj Mohan* v. *Maharaja Srila Srijukha Kirit*, AIR 1961 Trip 23; *Shyamal Kumar* v. *Godavari Devi*, AIR 1977 NOC 120: 1976 BBCJ 344.

would throw light upon the question in controversy, how is it possible for him to ask for discovery of specific documents? Rule 12, therefore, enables a party without filing an affidavit to apply to the court for the purpose of compelling his opponent to disclose the documents in the possession or power, relating to any matter in question in the suit.[45]

If the court makes an order for discovery, the opposite party is bound to make an affidavit of documents and, if he fails to do so, he will be subject to the penalties specified in Rule 21. An affidavit of documents shall set forth all the documents which are, or have been, in his possession or power relating to the matter in question in the proceedings. And as to the documents which are not, but have been in his possession or power, he must state what has become of them and in whose possession they are, in order that the opposite party may be enabled to get production from the persons who have possession of them.[46]

After he has disclosed the documents by affidavit, he may be required to produce for inspection such of the documents as he is in possession of and as are relevant. The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trial of enquiry which may have either of these two consequences. But if the documents are irrelevant or immaterial to the question in controversy or the prayer is made with a view to delay the proceedings, the application will be rejected.[47]

The word "document" in this context includes anything that is written or printed, no matter what the material may be, upon which the writing or printing is inserted or imprinted.[48]

*(ii) Object*

The object of this procedure is twofold: *(i) firstly,* to secure, as far as possible, the disclosure on oath of all material documents in possession or power of the opposite party under the sanction of penalties

[45] *M.L. Sethi* v. *R.P. Kapur, supra.*

[46] *Ibid.*

[47] *Central Bank of India* v. *Shivam Udyog,* (1995) 2 SCC 74: AIR 1995 SC 711.

[48] *M.L. Sethi* v. *R.P. Kapur,* (1972) 2 SCC 427 at pp. 431-32: AIR 1972 SC 2379 at pp. 2382-83.

attached to a false oath; and (*ii*) *secondly*, to put an end to what might otherwise lead to a protracted enquiry as to the material documents actually in possession or power of the opposite party.[49]

Thus, this procedure (*a*) elicits admissions; (*b*) obviates necessity of leading lengthy evidence; and (*c*) expedites trial of suits and thereby assists courts in administration of justice.[50]

(*iii*) *Who may seek discovery?*

A party to a suit may apply to the court for an order of discovery. This can be done either by filing an affidavit or otherwise. If the court makes an order of discovery, the opposite party must in an affidavit set forth all the documents which are or have been in his possession, custody or power.[51]

(*iv*) *Against whom discovery may be ordered*

An order of discovery may be made against a person who is a party to the suit.[52] Where a suit is instituted by a nominal plaintiff, e.g. *benamidar*, the person or persons actually interested may be ordered to give discovery.[53]

(*v*) *Conditions*

Discovery of documents may be ordered by a court if the following conditions are satisfied:

(*i*) It is necessary for fair disposal of suit; or

(*ii*) For saving costs.[54]

(*vi*) *Objection against discovery*

Discovery may be objected on the ground that it is not necessary or not necessary at that stage of the suit.[55] An objection or reason against discovery should be taken clearly and expressly in the affidavit. It is not enough to state that the documents are privileged. It must also be stated how they are privileged so as to enable the court to decide the claim.[56]

[49] *Rameswar Narayan* v. *Rikhanath Koeri*, AIR 1920 Pat 131 at p. 137; *Lajpat Rai* v. *Tej Bhan*, AIR 1957 Punj 14 at p. 15.

[50] *Raj Narain* v. *Indira Gandhi* AIR 1972 All 41; *United Bank of India Ltd.* v. *Nederlandsche Standard Bank*, AIR 1962 Cal 325.

[51] R. 12.

[52] *Ram Sewak* v. *Hussain Kamil Kidwai*, AIR 1964 SC 1249: (1964) 6 SCR 238; *Gopaldas Modi* v. *Hansraj*, AIR 1932 Cal 72: (1932) 58 Cal 1091: 134 IC 935.

[53] *James Nelson & Sons, Ld.* v. *Nelson Line (Liverpool) Ld.*, (1906) 2 KB 217 (CA); *Willis & Co.* v. *Baddeley*, (1892) 2 QB 324.

[54] *Majeti Ramachandrayya* v. *Mamidi Buchayya*, AIR 1935 Mad 288; *Union Bank of India* v. *Hemantlal Ranchhodbhai Vegad*, AIR 1991 Guj 113.

[55] Proviso to R. 12.

[56] *National Assn. of Operative Plasters* v. *Smithies*, 1906 AC 434: (1904-1907) All ER Rep 961 (HL); *Gardner* v. *Irvin*, (1878) 4 Ex D 49 (CA); *Mansell* v. *Frency*, 2 J&H 320.

*(vii) Admissibility of document*

Discovery may be ordered for a document which is relevant and which may have some bearing on the matter in issue. Such document need to be admissible in evidence.[57]

*(viii) Documents disclosing evidence*

Documents constituting evidence of the party cannot be ordered to be produced. The provision relating to discovery cannot be utilized by the party "to come into court knowing how his opponent is going to prove his case".[58]

*(ix) Privileged documents*

English law recognizes "Crown Privilege". It is based on the well-known doctrine *solus populi est suprema lex* (public welfare is the highest law). Public interest, no doubt, requires justice to be done. But it also requires withholding of documents in certain circumstances.[59]

It may, however, be noted that in case of claim of privilege, it is open to the court to inspect the document for deciding the sustainability of the claim. Mere assertion by the State Authority is not final.[60]

*(x) Oppressive discovery*

Discovery may also be resisted on the ground that it is "unduly oppressive" to the party giving discovery. In dealing with the question, the court will bear in mind two conflicting considerations;

(*i*) importance of discovery to the person seeking it; and

(*ii*) burden imposed on the opposite party giving discovery.[61]

Whether the discovery is oppressive or not is a question of fact and depends upon the circumstances of each case.[62]

*(xi) Non-compliance: Effect*

If a party ordered to produce documents fails to comply with the order, a court may draw an adverse inference that had he produced them, they would have gone against him.[63]

[57] *M.L. Sethi* v. *R.P. Kapur, supra; Rajkishore Prasad* v. *State of Orissa*, AIR 1979 Ori 96.

[58] *M.L. Sethi* v. *R.P. Kapur, supra; Central India Spg., Wvg. & Mfg. Co. Ltd.* v. *GIP Rly. Co.*, AIR 1927 Bom 367: (1927) 29 Bom LR 414: 135 IC 625.

[59] For detailed discussion as to "Crown Privilege", *see*, Author's *Lectures on Administrative Law* (2008) Lecture X.

[60] *Ibid., see also*, Arts. 22(6), 74(2), 163(3), Constitution of India; Ss. 124, 162, Evidence Act.

[61] *Halsbury's Laws of England* (4th Edn.) Vol. 13 at p. 77, para 95.

[62] *Ibid*, see also, *Hall* v. *London & North Western Rly. Co.*, (1877) 35 LT 848.

[63] *Moti Lal* v. *Kundan Lal*, AIR 1917 PC 1: 39 IC 964; *Bilas Kunwar* v. *Desraj*, AIR 1915 PC 96: (1914-15) 42 IA 202: 30 IC 299; *Hiralal* v. *Badkulal*, AIR 1953 SC 225: 1953 SCR 758.

*(xii) Rules as to discovery*

The general rules as to discovery of documents may be summarised as under:

(*i*) Any party to a suit may apply to the court for an order directing the other party to make discovery on oath of the documents which are or were in possession, (custody) or power, relating to any matter in question in the suit.[64]

(*ii*) Normally, it is at the discretion of the court to grant or refuse discovery of documents.[65]

(*iii*) The court may exercise this power at any stage, either of its own motion or on an application of any party and subject to such conditions and limitations as may be prescribed by it.[66]

(*iv*) The court may either refuse or adjourn such application if satisfied that such discovery is not necessary or not necessary at that stage of the suit or make such order as it thinks fit.[67]

(*v*) Generally, no order of discovery, inspection or production of documents will be passed by the court on the application of the plaintiff until the written statement is filed by the defendant or the time to file written statement has expired. And no such order will be passed on the application of the defendant until he has filed his written statement.[68]

(*vi*) Discovery cannot be ordered by the court if it is of the opinion that it is not necessary either for the fair disposal of the suit or for saving costs.[69]

(*vii*) A party against whom an order for discovery of documents has been made by the court is, as a general rule, bound to produce all the documents in his possession or power.[70]

(*viii*) A party against whom discovery of documents has been ordered considers that he is entitled to legal protection in respect of a particular document which he has been ordered to produce by the court, he is at liberty to take such objection, or claim privilege.[71]

(ix) When such privilege is claimed for any document, the court will inspect such document for the purpose of deciding the

[64] R. 12.

[65] *M.L. Sethi* v. *R.P. Kapur, supra; Ashreddy* v. *Venkatreddy,* AIR 1958 AP 450: 1958 Andh LT 521.

[66] S. 30, Or. 11 R. 14.

[67] R. 12.

[68] *Union Bank of London* v. *Manby,* (1879) 13 Ch D 239.

[69] R. 12.

[70] R. 13.

[71] R. 13.

validity of the claim of privilege, unless the document relates to matters of State.[72]

(x) Failure to comply with the order of discovery, inspection or production of documents may result in adverse inference against the defaulting party.[73]

**(d) Inspection of documents: Rules 15-19**

Rules 15 to 19 deal with inspection of documents. For the purpose of inspection, documents may be divided into two classes:

(*i*) documents referred to in the pleadings or affidavits of parties; and

(*ii*) other documents in the possession or power of the party but not referred to in the pleadings of the parties.

As regards the first class of documents, a party to a suit is entitled to inspection. And without intervention of the court every party may give notice in the prescribed form to the other party in whose pleadings they are referred to, to produce such documents for his inspection.[74] The party to whom such notice is given should, within ten days from the receipt of such notice, give notice to the party claiming such inspection, stating the time and place at which the documents may be inspected and stating his objections, if any, to the production of any of the documents.[75] If he fails to do so, the court may make an order of inspection.[76]

As regards the second class of documents, the party desiring the inspection can only proceed by way of an application to the court along with an affidavit satisfying the court that the document is relevant to the case.[77]

The primary object of Rules 15 to 19 of Order 11 is to place the opposite party in the same position as if the documents had been fully set out in his pleading or in the affidavit.[78]

**(e) Privileged documents**

The following classes of documents have been recognised as privileged documents and they are, therefore, protected from production:

(*i*) Documents which "of themselves evidence exclusively the party's own case or title".

[72] R. 19.

[73] For detailed discussion, *see supra* "Non-compliance: Effect".

[74] Rr. 15 & 16; *Ram Sewak* v. *Hussain Kamil Kidwai*, AIR 1964 SC 1249 at p. 1251: (1964) 6 SCR 238; *M.L. Sethi* v. *R.P. Kapur*, *supra*.

[75] R. 17.

[76] R. 18(1).

[77] R. 18(2).

[78] *Halsbury's Laws of England* (4th Edn.) Vol. 13 at p. 47, para 57. See also, *Day* v. *William Hill (Park Lane) Ltd.*, (1949) 1 All ER 219.

(*ii*) Confidential communications between a client and his legal adviser.[79]

(*iii*) Public official records relating to affairs of the State and confidential official communications, if their production would be injurious to public interest.[80]

It may, however, be noted that where, in an application for an order for inspection, privilege is claimed for any document, the court may inspect the document for the purpose of deciding the validity of the claim of privilege, unless the document relates to matters of State.[81]

**(f) Premature discovery: Rule 20**

The court is empowered to postpone a premature discovery or inspection.[82] A discovery is premature when the right to discovery depends upon the determination of any issue or question in dispute, or for any other reason it is desirable that any issue or question in dispute in a suit should be determined before deciding upon the right to discovery.[83] In such a case, the court may order that that issue or question be determined first and reserve the question as to discovery thereafter. The object behind this provision is to enable the court to decide an issue in a suit, as distinguished from the suit itself.[84] The rule, however, does not apply where discovery is necessary for the determination of such issue or question.[85]

**(g) Non-compliance with order of discovery or inspection: Rule 21**

Where any party fails to comply with any order to answer interrogatories or for discovery or production of documents, if such party happens to be a plaintiff, his suit may be dismissed for want of prosecution, and if he happens to be a defendant, his defence will be struck off and will be placed in the same position as if he had not defended.[86]

[79] Ss. 126, 129, Evidence Act, 1872.

[80] Ss. 123, 124, Evidence Act, 1872. See also, *State of Punjab* v. *Sodhi Sukhdev Singh*, AIR 1961 SC 493: (1961) 2 SCR 371.

[81] R. 19(2). For detailed discussion *see*, Author's *Lectures on Administrative Law* (2001) Lecture X.

[82] R. 20; *Bhagyalakshmi Ammal* v. *Srinivasa Reddiar*, AIR 1960 Mad 510: (1960) 1 Mad LJ 292; *British India Steam Navigation Co.* v. *Secy. of State for India*, (1910) 38 Cal 230.

[83] *Ibid*, see also *Union of India* v. *Laxminarayan*, AIR 1953 Nag 281: ILR 1953 Nag 88.

[84] *Ibid*, see also *SSC Examination Board* v. *Pratibha Ganpatrao*, AIR 1965 Bom 28: ILR 1965 Bom 113: (1964) 66 Bom LR 569; *Ahmedbhoy Hubibbhoy* v. *Valeebhoy Cassumbhoy*, ILR (1882) 6 Bom 572.

[85] *Majeti Ramachandrayya* v. *Mamidi Buchayya*, AIR 1935 Mad 288; *Ramakrishniah* v. *Satyanandan*, AIR 1932 Mad 284; *SSC Examination Board* v. *Pratibha Ganpatrao*, AIR 1965 Bom 28: ILR 1965 Bom 113: (1964) 66 Bom LR 569; *Nalini Ranjan* v. *Martin & Co.*, AIR 1951 Cal 39.

[86] R. 21(1). See also, *Modula India* v. *Kamakshya Singh*, (1988) 4 SCC 619: AIR 1989 SC 162.

Such order, however, can be passed only after giving notice and a reasonable opportunity of being heard to the plaintiff or the defendant, as the case may be.[86] If the suit of the plaintiff is dismissed on this ground, he cannot file a fresh suit on the same cause of action.[87]

A reference may be made to an important decision of the Supreme Court in *Babbar Sewing Machine Co.* v. *Triloki Nath Mahajan*[88]. In that case, the court ordered the defendant to produce certain documents. The defendant did not comply with that order and his defence was, therefore, struck off. At the trial, he was not allowed to cross-examine the witnesses of the plaintiff. The defendant challenged that action.

Before the Supreme Court, two important questions of law were raised: (*i*) whether the court was justified in striking out the defence of the defendant; and (*ii*) whether the defendant had no right to cross-examine witnesses of the plaintiff.

Setting aside the decision, the court held that the stringent provisions of Order 11 Rule 21 should not be lightly invoked and must be applied only in extreme cases as a last resort.

Referring to a number of English and Indian decisions, A.P. Sen, J. made the following observations, which, it is submitted, lay down correct law on the point:

> "Even assuming that in certain circumstances, the provisions of Order 21 Rule 21 must be strictly enforced, it does not follow that a suit can be lightly thrown out or a defence struck out, without adequate reasons. The test laid down is whether the default is wilful. In the case of a plaintiff, it entails in the dismissal of the suit and, therefore, an order for dismissal ought not be made under Order 21 Rule 21, unless the court is satisfied that the plaintiff was wilfully withholding information by refusing to answer interrogatories or by withholding the documents which he ought to discover. In such an event, the plaintiff must take the consequence of having his claim dismissed due to his default, i.e. by suppression of information which he was bound to give. In the case of the defendant, he is visited with the penalty that his defence is liable to be struck out and to be placed in the same position as if he had not defended the suit. *The power for dismissal of a suit or striking out of the defence under Order 21 Rule 21, should be exercised only where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party.*" (emphasis supplied)[89]

[87] R. 21(2). See also, *Modula India* v. *Kamakshya Singh, supra.*

[88] (1978) 4 SCC 188: AIR 1978 SC 1436.

[89] *Ibid,* at p. 193 (SCC): at p. 1439 (AIR); see also *Modula India* v. *Kamakshya Singh,* (1988) 4 SCC 619: AIR 1989 SC 162.

## 3. ADMISSIONS: ORDER 12

### (a) Nature and scope

Section 58 of the Evidence Act declares that the facts admitted need not be proved. Admissions may be made before the suit or after the filing of the suit. The object of obtaining admissions is to do away with the necessity of proving facts that are admitted; and the judgment and decree may be passed on such admissions.[90] As it has been said, "What a party himself admits to be true may reasonably be presumed to be so."[91]

The adoption of the procedure laid down in Order 12 (Admissions by Notice) results in saving the costs of such proof and in cheapening and shortening litigation.

### (b) Object

As seen above, the primary object of admission is to dispense with proof. The Select Committee stated:

> "The Committee think the practice of admission may with advantage be extended to facts as well as to documents. The procedure is not compulsory but its adoption would result in cheapening and expediting litigation, and it is hoped that its use will be encouraged by the courts."

### (c) Importance

The importance of admission cannot be underestimated. It is the best and the strongest piece of evidence since the facts admitted need not be proved. It saves time, expenses and expedites trial. What a party admits to be true should be presumed to be true. No exception can be taken to this proposition.[92]

### (d) Kinds of admissions

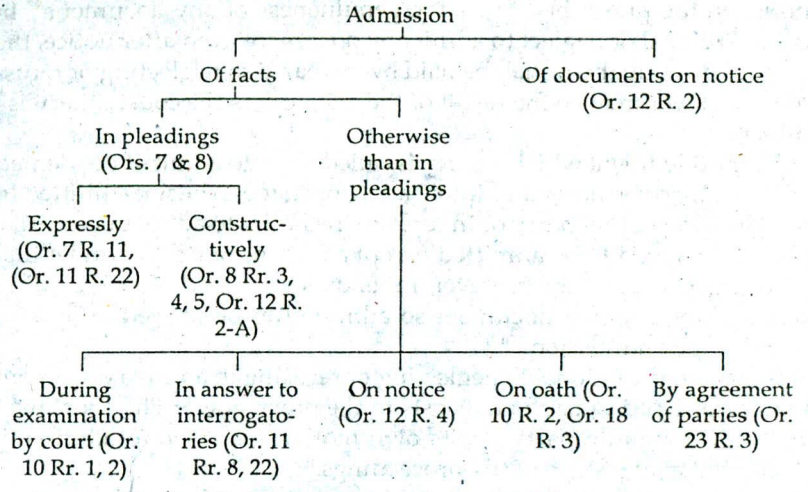
Admissions are of different kinds.[93] The following table shows various kinds of admissions that may be made after the suit is filed:

[90] Or. 12 R. 6; see also *Malwa Strips (P) Ltd.* v. *Jyoti Ltd.*, (2009) 2 SCC 426.

[91] *Slatterie* v. *Pooley*, (1840) 6 M&W 664 at p. 669: 10 LJ Ex 8; see also, *Chandra Kunwar* v. *Narpat Singh*, (1906-07) ILR 34 IA 27: (1907) 29 All 184 (PC).

[92] *Slatterie* v. *Pooley*, (1840) 6 M&W 664: 10 LJ Ex 8: 151 ER 579; *Australian Widows' Fund Life Assurance Society* v. *National Mutual Life Assn. of Australasia Ltd.*, AIR 1914 PC 220; *Siddik Mohd. Shah* v. *Saran*, AIR 1930 PC 57: 121 IC 204; *Uttam Singh Duggal & Co. Ltd.* v. *United Bank of India*, (2000) 7 SCC 120: AIR 2000 SC 2740.

[93] *Uttam Singh Duggal & Co. Ltd.* v. *United Bank of India*, (2000) 7 SCC 120: AIR 2000 SC 2740.




### (e) Conclusiveness of admission

An admission is not conclusive as to the truth of the matter stated therein. It is only a piece of evidence, the weight to be attached to such admission should depend upon circumstances under which it was made. It can be shown to be erroneous or untrue.[94]

### (f) Admission should be taken as a whole

It is well-settled that an admission must be taken as a whole or not at all. It is not open to a court to accept a part of it and reject the rest.[95]

But where one portion of the claim was admitted and the other portion was denied, and both the portions were severable, it was held that the plaintiff could ask for a judgment on the portion admitted by the defendant.[96]

### (g) Notice to admit case: Rule 1

Any party to a suit may give notice in writing that he admits the whole or any part of the case of the other side.[97]

### (h) Notice to admit documents: Rules 2 - 3-A, 8

After discovery and inspection, either party may call upon the other party to admit within seven days from the date of the service of the

[94] *Nagubai Ammal* v. *B. Shama Rao*, AIR 1956 SC 593 at p. 600: 1956 SCR 451.

[95] *Motabhoy Mulla* v. *Mulji Haridas*, AIR 1915 PC 2: (1914-15) 42 IA 103: 29 IC 223; *D.A.V. College* v. *Padmanabha Radhy*, (1988) 1 SCC 653: AIR 1988 SC 612.

[96] *Premsuk Das* v. *Udairam*, AIR 1918 Cal 467: (1918) 45 Cal 138; *Sooltan Ali* v. *Chand Bibee*, (1868) 9 Suth WR 130; *Uttam Singh Duggal & Co. Ltd.* v. *United Bank of India*, (2000) 7 SCC 120: AIR 2000 SC 2740.

[97] R. 1.

notice in the prescribed form, the genuineness of any document.[98] In case of refusal or neglect to admit any document even after notice, the costs of proving them shall be paid by the party so neglecting or refusing, whatever may be the result of the suit, unless the court otherwise directs.[99]

Every document which a party is called upon to admit, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of that party or in reply to the notice to admit documents, shall be deemed to be admitted except as against a person under disability. The court may, however, in its discretion and after recording reasons, require any document so admitted to be proved otherwise than by such admission.[100]

A person unreasonably neglecting or refusing to admit a document may be ordered to pay penal costs to the other side.[101] The court may also call upon any party, on its own motion *suo motu*, to admit any document at any stage of the proceedings.[102]

Admission of documents means admission of facts contained in the documents.[103] But if any document is admitted only for a limited purpose, as, for instance, for dispensing with formal proof of it, it cannot be said that the party thereby accepts the facts stated in the document.[104]

### (i) Notice to admit facts: Rules 4-5

Rules 4 and 5 provide for notice to admit facts. Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call upon any other party to admit, for the purpose of the suit only, any specific fact or facts, mentioned in such notice. The costs of proving such fact or facts shall be paid by the party refusing or neglecting to admit the same within six days after service of such notice, whatever may be the result of the suit, unless the court otherwise directs. Such admission, however, should be accepted or rejected as a whole and it is not permissible to rely on one part, ignoring the other.[105] Likewise, if admission is made subject to a condition, it must be accepted only with that condition.[106]

[98] Rr. 2, 3, 8.

[99] R. 2.

[100] R. 2-A(1).

[101] R. 2-A(2).

[102] R. 3-A.

[103] *Sitaram* v. *Santanuprasad*, AIR 1966 SC 1697 at p. 1703: (1966) 3 SCR 527.

[104] *Lionel Edwards Ltd.* v. *State of W.B.*, AIR 1967 Cal 191 at p. 194; *Videshwar Pathak* v. *Budhiram Barai*, AIR 1964 All 345.

[105] *D.A.V. College* v. *Padmanabha Radhy*, (1988) 1 SCC 653: AIR 1988 SC 612; *Dudh Nath* v. *Suresh Chandra*, (1986) 3 SCC 360: AIR 1976 SC 1509.

[106] *M.M. Essabhoy* v. *Mulji Haridas*, AIR 1915 PC 2.

### (j) Judgment on admissions: Rule 6

Rule 6 empowers the court to pronounce a judgment upon the admissions made by the parties, without waiting for determination of any other question between the parties.

The object of the rule is to enable a party to obtain a speedy judgment, at least to the extent of the relief to which, according to the admission of the opposite party, he is entitled to. A party can, under this rule, move for a judgment upon the admission made by the opposite party and thus get rid of the portion of the action in which there is no dispute.[107]

In the leading case of *Throp* v. *Holdsworth*[108], Jessel, M.R. stated, "This rule enables the plaintiff or the defendant to get rid of so much of the action, as to which there is no controversy."

In *Uttam Singh Duggal & Co. Ltd.* v. *United Bank of India*[109], the Supreme Court held that where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The scope of Rule 6 of Order 12 should not be narrowed down where a party applying for judgment is entitled to succeed on a plain admission of the opposite party.

The power to give judgment under this rule is discretionary and enabling in nature and the party cannot claim it as of right. The court is also not bound to pass a judgment upon admission. If the court is of the opinion that it is not safe to pass a judgment on admissions, or that a case involves questions which cannot be appropriately dealt with and decided on the basis of admission, it may, in the exercise of its discretion, refuse to pass a judgment and may insist upon clear proof of even admitted facts.[110] Moreover, before pronouncing a judgment on admission, the court must be satisfied that the admission is definite and unequivocal.[111]

## 4. PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS: ORDER 13

### (a) Nature and scope

The plaintiff must produce in court with the plaint the documents on which he is suing the defendant. He must deliver a list of documents in support of his claim. A summons to a defendant should contain a

[107] Statement of Objects and Reasons.

[108] (1876) 3 Ch D 637 at p. 640.

[109] (2000) 7 SCC 120 at p. 127: AIR 2000 SC 2740 at p. 2743.

[110] *Razia Begum* v. *Sahebzadi Anwar Begum*, AIR 1958 SC 886 at p. 895: 1959 SCR 1111.

[111] *Gilbert* v. *Smith*, (1876) 2 Ch D 686, *Razia Begum* v. *Sahebzadi Anwar Begum*, AIR 1958 SC 886 at p. 895: 1959 SCR 1111.

direction asking him to produce all the documents in his possession or power upon which he intends to rely in support of his claim.

Order 13 deals with production, admission, impounding, rejection and return of documents.

**(b) Production of documents: Rule 1**

Rule 1 of Order 13 requires the parties or their pleaders to produce the documentary evidence on or before the settlement of issues. The object underlying this provision is to secure a fair trial of cases, obviate the chances for the parties to adduce forged or manufactured evidence and produce their documents before the court at the earliest opportunity.[112] It also seeks to prevent belated production of documents which may cause prejudice to the other side.[113]

As stated above, the plaintiff must produce in court with the plaint the documents on which he sues and upon which he relies in support of his claim.[114] Similarly, the summons should also contain an order to the defendant to produce all the documents upon which he intends to rely in support of his claim.[115]

Rule 1(1) of Order 13 directs the parties or their pleaders to produce all documentary evidence in original, on or before settlement of issues. Rule 1(2) requires the court to receive those documents.

The object of the rule, however, was not to penalise the parties but merely to prevent belated production of documents so that it might not work injustice to the other side. The power, therefore, clearly clothed the court with discretion to allow production of documents if it was satisfied that good cause was shown.[116] The explanation of delay was not as rigorous as one required under Section 5 of the Limitation Act.

Where the documents were not in the possession of the party and they were produced after obtaining certified copies from Revenue Authorities, refusal of production was held to be unjustified.[117] The court has power to receive any document at a later stage if the genuineness of a document is beyond doubt and it is relevant or material to decide the real issue in controversy.[118] No documents whether public

[112] *Parsotiam* v. *Lal Mohar*, AIR 1931 PC 143: (1930-31) 58 IA 254: 132 IC 721 (PC).

[113] *Madan Gopal* v. *Mamraj Maniram*, (1977) 1 SCC 669: AIR 1976 SC 461; *Billa Jagan Mohan* v. *Billa Sanjeeva*, (1994) 4 SCC 659; *Madanlal* v. *Shyamlal*, (2002) 1 SCC 535: AIR 2002 SC 100.

[114] Or. 7 R. 14.

[115] Or. 5 R. 7.

[116] *Madan Gopal* v. *Mamraj Maniram*, (1977) 1 SCC 669 at pp. 674-75: AIR 1976 SC 461 at p. 470; *Billa Jagan Mohan* v. *Billa Sanjeeva*, (1994) 4 SCC 659; *Madanlal* v. *Shyamlal*, (2002) 1 SCC 535: AIR 2002 SC 100.

[117] *Billa Jagan Mohan* v. *Billa Sanjeeva*, (1994) 4 SCC 659 at p. 661; *Lalitha J. Rai* v. *Aithappa Rai*, (1995) 4 SCC 244: AIR 1995 SC 1766.

[118] *Billa Jagan Mohan* v. *Billa Sanjeeva*, (1994) 4 SCC 659.

or private which are above suspicion should be excluded if they are necessary for the just decision of a case.[119] The discretion must be exercised judicially and considering the facts and circumstances of each case. The rule must be liberally construed so as to advance the cause of justice.[120]

In *Babbar Sewing Machine Co.* v. *Triloki Nath Mahajan*[121], the Supreme Court stated, "The power for dismissal of a suit or striking out of the defence under Order 11 Rule 21, should be exercised only where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party."

This provision, however, does not apply to documents (*a*) produced for cross-examination of witnesses of the other side; or (*b*) handed over to a witness merely to refresh his memory.[122]

**(c) Admission of documents: Rules 4-7**

Rule 4 provides that on every document admitted in evidence in the suit, the following particulars shall be endorsed: (*a*) the number and title of the suit; (*b*) the name of the person producing the document; (*c*) the date on which it was produced; and (*d*) a statement of its having been so admitted. The endorsement should be signed by the judge.

The rule as to endorsement must be observed in letter and spirit. In *Sadik Husain* v. *Hashim Ali*[123], the Privy Council said, "Their Lordships, with a view to insisting on the observance of the wholesome provisions of these statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required."

Where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use or an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a third party, a copy of the entry may be furnished.[124] The documents admitted in evidence shall form part of the record of the suit.[125]

[119] *Ibid*, see also, *Gopika Raman Roy* v. *Atal Singh*, AIR 1929 PC 99: (1928-29) 56 IA 119; *Imambandi* v. *Mutsaddi*, AIR 1918 PC 11: (1917-18) 45 IA 73.

[120] *Billa Jagan Mohan* v. *Billa Sanjeeva*, (1994) 4 SCC 659; see also, *Gopika Raman Roy* v. *Atal Singh*, AIR 1929 PC 99: (1928-29) 56 IA 119; *Imambandi* v. *Mutsaddi*, AIR 1918 PC 11: 45 IA 73; *Kanda* v. *Waghu*, AIR 1950 PC 68: (1949-50) 77 IA 15.

[121] (1978) 4 SCC 188 at p. 193: AIR 1978 SC 1436 at p. 1439.

[122] R. 1(3).

[123] AIR 1916 PC 27 at p. 41: (1915-1916) 43 IA 212 at p. 237: 36 IC 104 (PC).

[124] R. 5.

[125] R. 7(1).

**(d) Return of documents: Rules 7, 9**

Documents not admitted in evidence shall be returned to the person producing them.[126]

Rule 9 provides for return of a document to a party producing it after the disposal of the suit or appeal or even during the pendency of the suit provided that the necessary undertaking to produce the original in case it is required is filed, though ordinarily it is not allowed without notice to the other side and without producing certified copy of such document.[127]

**(e) Rejection of documents: Rules 3, 6**

The court may, after recording reasons, reject, at any stage of the suit, any document which it considers irrelevant or inadmissible.[128] The endorsement on the rejected document should show the particulars mentioned in clauses (*a*) to (*c*) of Rule 4(1) above together with the statement of its having been rejected. The said endorsement shall be signed by the judge.[129] The document, thereafter, shall be returned to the person producing it.[130]

**(f) Impounding of documents: Rule 8**

Rule 8 enables a court to impound a document. It states that the court may for sufficient cause direct any document, book or exhibit produced before it in any suit to be impounded and kept in the custody of an officer of the court for such period and subject to such conditions as it thinks fit.[131] Whereas Rule 7 provides for return of documents not admitted in evidence Rule 8 deals with documents admitted in evidence. This power may be exercised by the court in case of forgery or apprehension that the document may be destroyed or altered.

## 5. AFFIDAVITS: ORDER 19

**(a) Meaning**

Though the expression "affidavit" has not been defined in the Code, it has been commonly understood to mean "a sworn statement in writing made especially under oath or on affirmation before an authorised officer or Magistrate".[132]

[126] R. 7.

[127] R. 9; see also *Gitabai* v. *Dayaram Shankar*, AIR 1970 Bom 160.

[128] R. 3.

[129] R. 6.

[130] R. 7(2).

[131] Rr. 8, 11.

[132] *M. Veerabhadra Rao* v. *Tek Chand*, 1984 Supp SCC 571 at pp. 580-81: AIR 1985 SC 28. *See also*, S. 3(3), General Clauses Act, 1897.

Stated simply, an affidavit is a declaration of facts, made in writing and sworn before a person having authority to administer oath. Every affidavit should be drawn up in the first person and should contain only facts and not inferences.[133]

**(b) Essentials**

The essential attributes of an affidavit are:

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

**(c) Contents of affidavit**

An affidavit should be confined to such facts as the deponent is able to prove to his personal knowledge. Rule 3(1) of Order 19, however, allows the deponent to state such facts in interlocutory applications which are based on belief.

**(d) Evidence on affidavit: Rules 1-3**

A court may order that any fact may be proved by affidavit.[134] Ordinarily, a fact has to be proved by oral evidence[135] since affidavits are not included in the definition of "evidence" under Section 3 of the Evidence Act. They can be used as an evidence only if, for sufficient reason, the court invokes the provisions of Order 19 of the Code.[136] Order 19 Rule 1 is a sort of exception to this rule,[137] and empowers the court to make an order that any particular fact may be proved by affidavit, subject, however, to the right of the opposite party to have the deponent produced for cross-examination.[138] If a party desires to controvert the averments contained in the affidavit of the opposite party, he must either file an affidavit-in-reply or cross-examine the

[133] For Model affidavit, *see*, Appendix 'H'.

[134] S. 30(*c*), Or. 19 R. 1; see also, *Savithramma* v. *Cecil Naronha*, 1988 Supp SCC 655: AIR 1988 SC 1987.

[135] Or. 18 R. 4; see also, *Sudha Devi* v. *M.P. Narayanan*, (1988) 3 SCC 366: AIR 1988 SC 1381..

[136] *Sudha Devi* v. *M.P. Narayanan*, (1988) 3 SCC 366 at p. 368: AIR 1988 SC 1381 at p. 1382.

[137] *State of J&K* v. *Bakshi Gulam Mohammad*, AIR 1967 SC 122 at p. 132: 1966 Supp SCR 401; *B.N. Munibasappa* v. *Gurusiddaraja Desikendra*, AIR 1959 Mys 139: ILR 1959 Mys 90.

[138] R. 2; *Khandesh Spg. & Wvg. Mills Co. Ltd.* v. *Rashtriya Girni Kamgar Sangh*, AIR 1960 SC 571 at p. 574: (1960) 2 SCR 841; *Pijush Kanti* v. *Kinnori Mullick*, AIR 1984 Cal 184: (1984) 1 Cal LJ 301: (1984) 88 CWN 615.

deponent. In the absence of this, the court is entitled to come to its own finding.[139]

Affidavits should be confined to such facts as the deponent is able to prove to his personal knowledge, except on interlocutory applications, on which statements of his belief may be admitted.[140] Where an averment is not based on personal knowledge, the source of information should be clearly disclosed.[141]

There is always a duty on the part of the counsel to advise his client as to the verification of the affidavit. The client should be told to swear only to what he knows to be true. What he believes to be true should be mentioned separately.

Unless affidavits are properly verified and are in conformity with the rules, they will be rejected by the court.[142] But, instead of rejecting an affidavit, a court may give an opportunity to a party to file a proper affidavit.

Ordinarily, interlocutory applications, such as an application for attachment before judgment,[143] interim injunction,[144] appointment of receiver,[145] etc. can be decided on affidavits.[146]

### (e) False affidavit

Swearing of false affidavit is an offence of perjury punishable under the Indian Penal Code.[147] It is a grave and serious matter and lenient view is not warranted.[148] Where such affidavit is filed by an officer of the Government very strict action should be taken.[149]

[139] *Gograj* v. *State of U.P.*, (1973) 27 FLR 248 (SC); *State of J&K* v. *Bakshi Gulam Mohammad*, AIR 1967 SC 122: 1966 Supp SCR 401.

[140] R. 3. See also, *State of Bombay* v. *Purushottam Jog*, AIR 1952 SC 317 at p. 319: 1952 SCR 674; *Krishan Chander* v. *Central Tractor Organisation*, AIR 1962 SC 602: (1962) 3 SCR 187; *M. Veerabhadra Rao* v. *Tek Chand*, *supra*.

[141] *Barium Chemicals Ltd.* v. *Company Law Board*, AIR 1967 SC 295 at p. 319: 1966 Supp SCR 311; *Virendra Kumar* v. *Jagjiwan*, (1972) 1 SCC 826 at p. 831: AIR 1974 SC 1957 at p. 1961; *Sukhwinder Pal* v. *State of Punjab*, (1982) 1 SCC 31 at p. 38: AIR 1982 SC 65 at p. 70; *Indian Aluminium Cables Ltd.* v. *Union of India*, (1985) 3 SCC 284 at pp. 290-91: AIR 1985 SC 1201 at pp. 1205-06; *Shivajirao Nilangekar* v. *Dr. Mahesh Madhav*, (1987) 1 SCC 227: AIR 1987 SC 294.

[142] *Ibid*, see also, *A.K.K. Nambiar* v. *Union of India*, (1969) 3 SCC 864 at p. 867: AIR 1970 SC 652 at pp. 653-54; *Savithramma* v. *Cecil Naronha*, 1988 Supp SCC 655: AIR 1988 SC 1987.

[143] *See infra*, Chap. 11.

[144] *Ibid.*

[145] *Ibid.*

[146] *Seeli Tirupati* v. *Bhupathiraju Janikamma*, AIR 1963 AP 445; *Bai Zabukhima* v. *Amardas Balakdas*, AIR 1967 Guj 214; *Mithailal Gupta* v. *Inland Auto Finance*, AIR 1968 MP 33.

[147] S. 191, IPC.

[148] *State* v. *Shingara Singh*, AIR 1963 Punj 185: (1963) 1 Cri LJ 478.

[149] *Nangunieri Sri Vanamomalai Ramanuja* v. *State of T.N.*, 1996 AIHC 204.

PART II

# 11 Interim Orders

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## 1. GENERAL

ACCORDING to the dictionary meaning, "interim" means "for the time being", "in the meantime", "meanwhile", "temporary", "provisional", "not final", "intervening".[1] The word "interim" when used as a noun means "intervening" and when used as an adjective, it means "temporary" or "provisional".[2] Thus, interim or interlocutory orders are those orders passed by a court during the pendency of a suit or proceeding which do not determine finally the substantive rights and liabilities of the parties in respect of the subject-matter of the suit or proceeding.

"Interlocutory" means, not that which decides the cause, but that which only settles some intervening matter relating to the cause; a decree or judgment given provisionally during the course of a legal action.[3]

[1] *Concise Oxford English Dictionary* (2002) at p. 738; *Black's Law Dictionary* (1990) at p. 814; P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. II at p. 2411.

[2] *Bank of Maharashtra* v. *M.V. River Ogbese*, AIR 1990 Bom 107 at p. 110.

[3] P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. II at p. 2143; *Concise Oxford English Dictionary* (2002) at p. 739.

After the suit is instituted by the plaintiff and before it is finally disposed of, the court may make interlocutory orders as may appear to the court to be just and convenient.[4] They are made in order to assist the parties to the suit in the prosecution of their case or for the purpose of protection of the subject-matter of the suit. Courts are constituted for the purpose of doing justice and must be deemed to possess all such powers as may be necessary to do the right and undo the wrong in the course of administration of justice.[5]

Interim orders are necessary to deal with and protect rights of the parties in the interval between the commencement of the proceedings and final adjudication. They enable the court to grant such relief or to pass such order as may be necessary, just or equitable. They also prevent any abuse of process during the pendency of proceedings. Hence, interim or interlocutory proceedings play a crucial role in the conduct of litigation between parties.[6]

Such interim orders may be summarised thus:

(*i*) Payment in Court: Order 24
(*ii*) Security for Costs: Order 25
(*iii*) Commissions: Order 26
(*iv*) Arrest before Judgment: Order 38
(*v*) Attachment before Judgment: Order 38
(*vi*) Temporary Injunctions: Order 39
(*vii*) Interlocutory Orders: Order 39
(*viii*) Receiver: Order 40

Let us discuss these provisions in detail.

## 2. PAYMENT IN COURT: ORDER 24

As it is open to the plaintiff to abandon his suit, so also it is open to the defendant in a suit for debt or damages to deposit in court at any stage of the suit such sum of money as he considers a satisfaction *in full* of the plaintiff's claim.[7] The deposited amount shall be paid to the plaintiff on his application unless the court otherwise directs.[8] Such deposit, however, must be unconditional.[9] No interest shall be allowed to the plaintiff on the sum deposited by the defendant.[10] If such amount

[4] S. 94(*e*).

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

[6] *Halsbury's Laws of England* (4th Edn.) para 326, at p. 243.

[7] Or. 24 Rr. 1 & 2; see also supra, *Banwari Lal* v. *Chando Devi, supra; Ruby Sales & Services (P) Ltd.* v. *State of Maharashtra.*

[8] R. 2.

[9] *Puran Chand* v. *Mangal Nanak*, AIR 1969 P&H 367.

[10] R. 3; see also *State Bank of Bikaner & Jaipur* v. *Abdul Wahid*, AIR 2003 Raj 61.

is deposited at the stage of final arguments only to save payment of interest, the application can be rejected.[11]

If the plaintiff accepts such sum as payment in full satisfaction of his claim, the court shall record his statement to that effect and pronounce the judgment accordingly.[12] On the other hand, if the plaintiff accepts such payment as satisfaction in part of his claim, he is entitled to prosecute the suit for the balance. But, if ultimately it is found that the deposit was in full satisfaction of the plaintiff's claim, the plaintiff shall pay all costs incurred after such deposit.[13]

*Illustration*

*A* sues *B* to recover Rs 15,000. *B* deposits Rs 10,000 *in full* satisfaction of the plaintiff's claim. If *A* accepts the amount as satisfaction *in full* of his claim, the Court shall pronounce the judgment to that effect. If, on the other hand, *A* accepts the amount as satisfaction *in part* only of his claim, he may prosecute his suit for the balance. But if the Court ultimately decides that *A* is entitled only to Rs 10,000, he will have to pay the costs incurred by *B* after depositing Rs 10,000 in the Court.

## 3. SECURITY FOR COSTS: ORDER 25

### (1) Applicability: Rule 1

Rule 1 of Order 25 provides for the taking of security for the costs of the suit. It states that the court may, at any stage of the suit, order the plaintiff to give security for the payment of the costs of the defendant. This is at the discretion of the court.[14]

In the following circumstances, however, the court shall make such order:[15]

(*i*) where the plaintiff resides outside India or where there are two or more plaintiffs and all of them reside outside India; and

(*ii*) where the sole plaintiff or none of the plaintiffs has sufficient immovable property within India other than the suit property.

Rule 10 of Order 41 provides for taking of security for costs of appeal.[16]

[11] *Dinesh Textiles* v. *State Bank of Bikaner & Jaipur*, AIR 1999 Raj 162: (1999) 3 Civ LJ 336.

[12] R. 4(2); see also *Dinesh Textiles* v. *State Bank of Bikaner & Jaipur*, AIR 1999 Raj 162: (1999) 3 Civ LJ 336.

[13] R. 4(1); see also *State Bank of Bikaner & Jaipur* v. *Abdul Wahid*, AIR 2003 Raj 61.

[14] *Premchand Monshee, In the goods of*, (1894) 21 Cal 832; *Arumugam Chettiar* v. *K.R.S. Sevugan Chettiar*, AIR 1950 Mad 779: (1950) 2 Mad LJ 159; *Narasinga Shenoi* v. *Madhava Prabhu*, AIR 1960 Ker 45.

[15] Or. 25 Rule 1.

[16] *See infra*, "First Appeals", Pt. III, Chap. 2.

### (2) Object

The object of the rule is to provide for the protection of the defendants in certain cases where, in the event of success, they may have difficulty in realizing their costs from the plaintiff.[17] It is a discretionary power which can be exercised only in exceptional circumstances, where it is shown that the exercise of power is necessary for the reasonable protection of the interests of the defendant.[18] An order for security of costs may be passed by the court either *suo motu* (of its own motion) or on application of the defendant and must be a reasoned one. The provisions of this order apply even to a minor plaintiff.[19]

### (3) Failure to furnish security: Rule 2

If the security is not furnished within the time fixed or extended, the court shall dismiss the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.[20] Sub-rule (2) of Rule 1 empowers the court to restore the suit dismissed under sub-rule (1). The dismissal shall not, however, be set aside without giving notice to the defendant.[21]

## 4. COMMISSIONS: ORDER 26

### (1) Issue of commissions: Section 75

Sections 75 to 78 deal with the powers of the court to issue commissions and detailed provisions have been made in Order 26 of the Code.[22] The power of the court to issue commission is discretionary and can be exercised by the court for doing full and complete justice between the parties.[23] It can be exercised by the court either on an application by a party to the suit or of its own motion (*suo motu*).[24]

### (2) Purposes: Section 75

Section 75 enacts that a court may issue a commission for any of the following purposes:

(*i*) to examine witnesses;
(*ii*) to make local investigation;
(*iii*) to adjust accounts;
(*iv*) to make partition;

[17] *Premchand Monshee, In the goods of,* (1894) 21 Cal 832 at p. 836.

[18] *Arumugam Chettiar* v. *K.R.S. Sevugan Chettiar,* AIR 1950 Mad 779: (1950) 2 Mad LJ 159.

[19] *Bai Porebai* v. *Devji Meghji,* ILR (1898) 23 Bom 100; *Mohd. Kasim* v. *Haji Rahiman.*

[20] Or. 25 R. 2(1).

[21] R. 2(3).

[22] For detailed discussion, *see,* C.K. Thakker, *Code of Civil Procedure* (Lawyer's Edn.) Vol. I at pp. 1062-73.

[23] *Padam Sen* v. *State of U.P.,* AIR 1961 SC 218: (1961) 1 SCR 884; *Filmistan (P) Ltd.* v. *Bhagwandas Santprakash,* (1970) 3 SCC 258: AIR 1971 SC 61.

[24] *Bandhua Mukti Morcha* v. *Union of India,* (1984) 3 SCC 161: AIR 1984 SC 802.

(*v*) to hold investigation;
(*vi*) to conduct sale; or
(*vii*) to perform ministerial act.

(*a*) *To examine witnesses: Sections 76-78; Order 26 Rules 1-8*

As a general rule, the evidence of a witness in an action, whether he is a party to the suit or not, should be taken in open court and tested by cross-examination. Inability to attend the court on grounds of sickness or infirmity or detriment to the public interest may justify issue of a commission. The court has a discretion to relax the rule of attendance in court where the person sought to be examined as a witness resides beyond the local limits of the jurisdiction of the court[25] or on any other ground which the court thinks sufficient[26], e.g., a witness, who being a *paramhansa*, always remained in naked condition, can be examined on commission.[27] Similarly, if a party or a witness apprehends danger to his life if he appears before the court, he can be examined on commission.[28]

On the other hand, where a party accused of fraud seeks to examine himself on commission, the court may refuse the prayer since the opportunity of noting his demeanour would be lost.[29] The power, however, should not be exercised on the ground that the witness is a man of rank or having social status and it will be derogatory for him to appear in person in court.[30] Sections 75 to 78 deal with the powers of the court to issue commissions and detailed provisions have been made in Order 26 of the Code.

The court may issue a commission for the examination on interrogatories or otherwise of any person in the following circumstances:

(*i*) if the person to be examined as a witness resides within the local limits of the court's jurisdiction, and (*i*) is exempted under the Code from attending court; or (*ii*) is from sickness or infirmity unable to attend court, or (*iii*) in the interest of justice, or for expeditious disposal of the case, or for any other reason, his examination on commission will be proper;[31] or

[25] *Ramakrishna Kulvant Rai* v. *F.E. Hardcastle & Co. (P) Ltd.*, AIR 1963 Mad 103 at p. 104; *Filmistan (P) Ltd.* v. *Bhagwandas Santprakash*, (1970) 3 SCC 258: AIR 1971 SC 61. *See also infra*, Chap. 14.

[26] *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 (paras 14, 69, 80): AIR 1984 SC 802 (paras 14, 70, 81).

[27] *Paramhansa Ramkrishna* v. *Trimbak Rajaram*, AIR 1978 Bom 176.

[28] *Vinayak Trading Co.* v. *Sham Sunder & Co.*, AIR 1987 AP 236.

[29] *Satish Chandra* v. *Kumar Satish Kantha*, AIR 1923 PC 73: 171 IC 391: (1924) 39 Cal LJ 165 (PC)

[30] *A. Marcalline Fernando* v. *St. Francis Xavior Church*, AIR 1961 Mad 31; *Panachand Chhotalal* v. *Manoharlal Nandlal*, AIR 1917 Bom 155.

[31] Or. 26 Rr. 1, 3, 4-A; Ss. 76, 77, 78.

(*ii*) if he resides beyond the local limits of the jurisdiction of the court;[32] or

(*iii*) if he is about to leave the jurisdiction of the court;[32] or

(*iv*) if he is a government servant and cannot, in the opinion of the court, attend without detriment to the public service;[32] or

(*v*) if he is residing out of India and the court is satisfied that his evidence is necessary.[33]

The court may issue such a commission either *suo motu* (of its own motion) or on the application of any party to the suit or of the witness to be examined.[34] The evidence taken on commission shall form part of the record.[35] It shall, however, not be read in evidence in the suit without the consent of the party against whom it is offered, unless (*a*) the person, who gave the evidence, is beyond the jurisdiction of the court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in court, or is a person in the service of the government who cannot, in the opinion of the court, attend without detriment to the public service, or (*b*) the court in its discretion dispenses with the proof of any of such circumstances.[36]

(*b*) *To make local investigation: Rules 9 & 10*

The court may, in any suit, issue a commission to such person as it thinks fit directing him to make local investigation and to report thereon for the purpose of (*a*) elucidating any matter in dispute, or (*b*) ascertaining the market value of any property or the amount of any mesne profits or damages or annual net profits.[37]

The object of local investigation is not to collect evidence which can be taken in court but to obtain evidence which from its very peculiar nature can be had only on the spot.[38] Such evidence enables the court to properly and correctly understand and assess the evidence on record and clarify any point which is left doubtful.[39] It also helps the court in deciding the question in controversy pending before it, e.g., whether the suit premises is really occupied by the tenant or by strangers.[40]

[32] R. 4.

[33] R. 5.

[34] Rr. 2 & 6.

[35] R. 7.

[36] R. 8.

[37] R. 9.

[38] *Padam Sen* v. *State of U.P.*, AIR 1961 SC 218: (1961) 1 SCR 884; *P. Moosa Kutty, In re*, AIR 1953 Mad 717 at p. 718; *Debendranath* v. *Natha Bhuyian*, AIR 1973 Ori 240 at p. 241.

[39] *Ibid.*

[40] *Southern Command Military Engg. Services Employees Coop. Credit Society* v. *V.K.K. Nambiar*, (1988) 2 SCC 292: AIR 1988 SC 2126.

(c) *To adjust accounts: Rules 11 & 12*

In any suit in which an examination or adjustment of accounts is necessary, the court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.[41] The court, for this purpose, shall issue necessary instructions to the Commissioner. The proceedings and the report (if any) of the Commissioner shall be evidence in the suit.[42]

(d) *To make partition: Rules 13 & 14*

Where a preliminary decree for partition of immovable property has been passed, the court may issue a commission to such person as it thinks fit to make a partition or separation according to the rights declared in such decree.[43] The Commissioner shall, after such inquiry as may be necessary, divide the property into the required number of shares and allot them to the parties. He will then prepare a report appointing the share of each party and distinguishing the same by metes and bounds and transmit it to the court. The court shall, after hearing the objections of different parties, make the final allotment.[44]

(e) *To hold investigation: Rule 10-A*

Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the court, be conveniently conducted before the court, the court may, if it thinks it necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the court.[45]

(f) *To sell property: Rule 10-C*

Where, in any suit, it becomes necessary to sell any movable property which is in the custody of the court pending the determination of the suit and which cannot be conveniently preserved, the court may, if, for reasons to be recorded, is of opinion that it is necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit, directing him to conduct such sale and report thereon to the court.[46]

(g) *To perform ministerial act: Rule 10-B*

Where any question arising in a suit involves the performance of any ministerial act which cannot, in the opinion of the court, be conveniently performed before the court, the court may, if, for reasons to be

[41] R. 11.
[42] R. 12.
[43] R. 13.
[44] R. 14; see also *Tushar Kanti* v. *Savitri Devi*, (1996) 10 SCC 96: AIR 1996 SC 2752.
[45] R. 10-A.
[46] R. 10-C.

recorded, is of opinion that it is necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit, directing him to perform that ministerial act and report thereon to the court.[47]

By the Amendment Act of 1976, Rules 10-A to 10-C have been inserted to provide for issue of commissions for scientific investigation, sale of movable property or performance of a ministerial act. Ministerial work means not the office work of the court but work like accounting, calculation and other work of a like nature which courts are not likely to take up without unnecessary waste of time. The Commissioner appointed by the court does not perform any judicial function.[48]

The provisions to issue commissions under the Code of Civil Procedure are exhaustive and, hence, the court cannot exercise inherent powers under Section 151 for the purpose.[49] The Supreme Court or High Courts under the Constitution can exercise plenary powers to issue a commission for any purpose.[50]

**(3) Powers: Rules 16-18**

The Commissioner may (*i*) summon and procure the attendance of parties and their witnesses and examine them;[51] (*ii*) call for and examine documents;[52] (*iii*) enter into any land or building mentioned in the order;[52] (*iv*) proceed *ex parte* if the parties do not appear before him in spite of the order of the court.[53] Rule 18-B empowers the court to fix the date for return of a commission.

**(4) Expenses: Rule 15**

Rule 15 provides that the court may, if it thinks fit, order the party requiring the commission to deposit the necessary expenses within the fixed period.

**(5) Commissions for foreign tribunals: Rules 19-22**

Rules 19 to 22 provide that if a High Court is satisfied that a foreign court wishes to obtain the evidence of a witness residing within its

[47] R. 10-B; *Jagatbhai Punjabhai Palkhiwala* v. *Vikrambhai Punjabhai Palkhiwala*, AIR 1985 Guj 34.

[48] *Jagatbhai* v. *Vikrambhai* (*ibid.*); *Tushar Kanti* v. *Savitri Devi*, (1996) 10 SCC 96: AIR 1996 SC 2752.

[49] *Padam Sen* v. *State of U.P.*, AIR 1961 SC 218: (1961) 1 SCR 884; *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802; *Jaiswal Coal Co.* v. *Fatehganj Coop. Mktg. Society Ltd.*, AIR 1975 Cal 303. For inherent powers of courts *see infra*, Pt. V, Chap. 4.

[50] *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802.

[51] Rr. 16 and 17.

[52] R. 16.

[53] R. 18.

appellate jurisdiction in a proceeding of a civil nature, it may issue a commission for the examination of such witness.

**(6) Limitations**

A judicial function of a court cannot be delegated to a commission. Thus, no commission can be issued to value the property in dispute as it is the function of the court. But commission can be appointed to gather data to help such determination by court.[54] Similarly, commission cannot be appointed to scrutinise votes at the election, but it can be entrusted work of separating undisputed votes from disputed votes or of counting votes as it is merely a ministerial work.[55]

Again, it is not the business of the court to collect evidence for a party nor to protect the rival party from the evil consequences. A civil court, hence, cannot appoint a commission to seize account books in possession of any party on the ground that an opposite party has an apprehension that they would be tempered with.[56]

**(7) Report of Commissioner: Evidentiary value**

The report of the Commissioner would furnish *prima facie* evidence of the facts and data collected by the Commissioner. It will constitute an important piece of evidence and cannot be rejected except on sufficient grounds.[57] It would, however, be open to the court to consider what weight to be attached to the data collected by the Commissioner and reflected in the report and to what extent act upon them.[58]

**(8) Issuance of commission by Supreme Court and High Courts**

The limitations for the issue of commission set out in Section 79 and Order 26 of the Code do not apply to issuance of commission by the Supreme Court or by High Courts in exercise of powers under the Constitution of India.[59]

## 5. ARREST BEFORE JUDGMENT: ORDER 38 RULES 1-4

**(1) Nature and scope**

Generally, a creditor having a claim against his debtor has first to obtain a decree against him and then execute the said decree by having him arrested or his property attached in execution under the

[54] *Narayana Menoki* v. *Raman Nair*, 1967 KLT 200; *V.V. Dravid* v. *State*, AIR 1982 MP 159; *Kershaji Dhanjibhai* v. *Kaikhushru Kolhabhai*, AIR 1929 Bom 478: (1929) 31 Bom LR 1081.

[55] *Ibid*, see also *Habibbhai* v. *Maganbhai*, (1995) 1 Guj LR 871: (1995) 2 Guj CD 16.

[56] *Padam Sen* v. *State of U.P.*, AIR 1961 SC 218: (1961) 1 SCR 884.

[57] *Tushar Kanti* v. *Savitri Devi*, (1996) 10 SCC 96: AIR 1996 SC 2752.

[58] *Ibid; Roy & Co.* v. *Nani Bala*, AIR 1979 Cal 50.

[59] For detailed discussion and case law, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 1068-70.

provisions of Order 21.[60] Under the special circumstances, however, the creditor can move for the arrest of the debtor or for the attachment of his property even before the judgment.

**(2) Object**

The object underlying these provisions is to enable the plaintiff to realise the amount of decree if one is eventually passed in his favour and to prevent any attempt on the part of the defendant to defeat the execution of such decree passed against him.[61]

**(3) Grounds: Rule 1**

Where at any stage of the suit, the court is satisfied, either by affidavit or otherwise, (*a*) that the defendant, with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him, (*i*) has absconded or left the local limits of the jurisdiction of the court, or (*ii*) is about to abscond or leave the local limits of the jurisdiction of the court, or (*iii*) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof, or (*b*) that the defendant is about to leave India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance.[62] The defendant shall not, however, be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim.[63]

**(4) Discretion of court**

The power to arrest the defendant and that too before a decree in favour of the plaintiff is a drastic action and must be taken after due care, caution and circumspection. Before a court acts under this rule, it must have reason to believe on adequate material that unless the power is exercised, there is a real danger that the defendant will remove himself or his property from the jurisdiction of the court.[64]

[60] For detailed discussion, *see infra*, Pt. IV .

[61] *Chandrika Prashad Singh* v. *Hira Lal*, AIR 1924 Pat 312; *V.K. Nataraja Gounder* v. *S.A. Bangaru Reddiar*, AIR 1965 Mad 212.

[62] Or. 38 R. 1.

[63] Proviso to R. 1.

[64] *Vareed Jacob* v. *Sosamma Greevarghese*, (2004) 6 SCC 378; *S. Selvarathinam* v. *Rajasekharam Nair*, AIR 2001 Ker 1: (2000) 1 KLJ 966: (2000) 2 KLT 372; *R.B.M. Patil Joint Venture* v. *Bengal Builders*, AIR 2004 Cal 136: (2004) 2 Mah LJ 696.

Hence, the power of arrest cannot be exercised to secure easy execution of decree.[65]

### (5) Conditions

An application for arrest may be made by the plaintiff at any time after the plaint is presented, even before the service of summons is effected on the defendant. However, before this extraordinary power can be exercised, the court must be satisfied about the following two conditions:[66]

(*a*) The plaintiff's suit must be *bona fide* and his cause of action must be *prima facie* unimpeachable subject to his proving the allegations in the plaint; and

(*b*) the court must have reason to believe on adequate materials that unless this extraordinary power is exercised there is a real danger that the defendant will remove himself or his property from the ambit of the powers of the court.

### (6) Security: Rules 2-4

Where the defendant fails to show cause why he should not furnish security for his appearance, the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon.[67] The court has discretion as to the manner as also the amount of security.[68]

Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.[69]

Where the defendant fails to furnish security or to find fresh security after the original surety has been discharged from his obligation by the court[70], the court may commit him to civil prison until the decision of the suit, or, where a decree is passed against him, until the decree has been executed.[71]

### (7) Where arrest before judgment not allowed?

An order for arrest of a defendant before judgment cannot be obtained in any suit for land or immovable property specified in clauses (*a*) to

[65] (1870) 13 Suth WR 278.

[66] *Seth Chand Mull* v. *Purushottamdoss*, AIR 1926 Mad 584: (1927) 50 Mad 27: 94 IC 512; *Probode Chunder* v. *M. Dowey*, ILR (1887) 14 Cal 695; *Vareed Jacob* v. *Sosamma Greevarghese*, *supra*; *V. Balakrishnan* v. *J.M. Gowrieshan*, AIR 2001 Mad 20.

[67] R. 2(1).

[68] *Stephen Commerce (P) Ltd.* v. *Vessel M.T. Zaima Navard*, AIR 1999 Cal 64.

[69] R. 2(2).

[70] R. 3.

[71] R. 4.

(*d*) of Section 16 of the Code.[72] Thus, no arrest can be effected to ensure execution.[73]

### (8) Appeal

An order passed under Rule 2, 3 or 6 of Order 38 is appealable.[74]

### (9) Revision

An order of arrest made under Rule 1 of Order 38 can be said to be a "case decided" under Section 115 of the Code and is revisable.[75]

### (10) Arrest on insufficient grounds: Section 95

Where in any suit in which an order of arrest of the defendant has been obtained on insufficient grounds by the plaintiff, or where the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting it, on application being made by the defendant, the court may order the plaintiff to pay as compensation such amount, not exceeding fifty thousand rupees, as seems reasonable to the defendant for the expense or injury including injury to reputation caused to him.[76]

## 6. ATTACHMENT BEFORE JUDGMENT: ORDER 38 RULES 5-12

### (1) Nature and scope

Like arrest before judgment, in certain circumstances, an attachment before judgment may be ordered by the court. Rules 5-13 of Order 38 deal with attachment before judgment.

### (2) Object

The primary object of attachment before judgment is to prevent any attempt on the part of the defendant to defeat the realisation of the decree that may be passed against him.[77] It thus prevents any attempt on the part of the defendant to defeat realisation of the decree passed in favour of the plaintiff.[78]

In *Sardar Govindrao* v. *Devi Sahai*[79], the Supreme Court observed:

> "Attachment before judgment is levied where the court on an application of the plaintiff is satisfied that the defendant, with

[72] R. 1.

[73] (1870) 13 Suth WR 298.

[74] Or. 43 R. 1(*q*).

[75] *S. Selvarathinam* v. *Rajasekharam Nair*, AIR 2001 Ker 1: (2000) 1 KLJ 966: (2000) 2 KLT 372.

[76] S. 95.

[77] *Padam Sen* v. *State of U.P.*, AIR 1961 SC 218 at p. 220: (1961) 1 SCR 884. *See also*, S. 94(*b*).

[78] *Ibid.*, see also *Sardar Govindrao* v. *Devi Sahai*, *infra*.

[79] *Sardar Govindrao* v. *Devi Sahai*, (1982) 1 SCC 237: AIR 1982 SC 989.

intent to obstruct or delay the execution of any decree that may be passed against him, (*a*) is about to dispose of the whole or any part of his property, or (*b*) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. *The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of a guarantee against the decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree.*"[80] (emphasis supplied)

**(3) Grounds: Rule 5**

Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, (*a*) is about to dispose of the whole or any part of his property, or (*b*) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court; the court may direct the defendant, within a time to be fixed by it, either to furnish security, of such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.[81]

Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.[82]

The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.[83] The court may also in the order direct conditional attachment and the estimated value thereof.[84] If an order of attachment is made without complying with the provisions of Rule 5(1), such attachment shall be void.[85] The provisions of Order 21 (execution proceedings) will also apply to attachment before judgment.[86]

[80] *Ibid*, at p. 268 (SCC): at p. 1006 (AIR).

[81] R. 5(1). See also *N. Pappammal* v. *L. Chidambaram*, AIR 1984 Mad 70.

[82] R. 6(1).

[83] R. 5(2).

[84] R. 5(3).

[85] R. 5(4). See also *N. Pappammal* v. *L. Chidambaram, supra*; *Y. Vijayalakshmamma* v. *Sakinala Lakshmaiah and Sons*, AIR 1980 AP 176 at p. 179; *G. Subramania Mudaliar* v. *Murugesan*, AIR 1982 Mad 49 at pp. 50-51; *T. Srinivasan* v. *V. Srinivasan*, AIR 1985 Mad 269.

[86] R. 11-A.

**(X) Principles**

The remedy of attachment before judgment is an extraordinary remedy and must be exercised sparingly and strictly in accordance with law and with utmost care and caution so that it may not become an engine of oppression.[87] Before an order of attachment can be made, the court must be satisfied about the following two conditions:

(*i*) that the defendant is about to dispose of the whole or any part of his property; and

(*ii*) that the disposal is with the intention of obstructing or delaying the execution of any decree that may be passed against him.[88]

An attachment practically takes away the power of alienation and such a restriction on the exercise of the undoubted rights of ownership ought not to be imposed upon an individual except upon clear and convincing proof that the order is needed for the protection of the plaintiff.[89] A man is not debarred from dealing with his property just because a suit has been filed against him. Otherwise in every case in which a suit is brought against a man if during the pendency of the proceedings he sells some of his properties that would be at once a sufficient ground to satisfy the court that he is disposing his property with intent to defraud the plaintiff. Clearly, there must be additional circumstances before the court can be satisfied that such an intention exists.[90] This process is never meant as a weapon for the plaintiff to coerce the defendant to come to terms. Hence, utmost caution and circumspection should guide the court. The court must advert to the provisions of the Code in this regard, advert to and investigate the allegations thrown against the defendant, satisfy itself that a case for attachment before judgment has been made out and then pass the requisite order. These principles have come to be recognised as mandates to the court and if the court acts in breach thereof, such an order of the court will have to be ignored as the result of dereliction of duty.[91]

In *Bharat Tobacco Co.* v. *Maula Saheb*[92], the High Court of Gujarat has rightly observed, "In order to invoke the jurisdiction of the court under Order 38 Rule 5 of the Code, it is not sufficient to reproduce the language of that rule but the party seeking the order must establish by affidavit or otherwise facts which would satisfy the court that

[87] *Ratan Kumar* v. *Howrah Motor Co. (P) Ltd.*, AIR 1975 Cal 180 at p. 181; *Premraj Mundra* v. *Mohd. Maneck Gazi, infra.*

[88] *Ibid*, see also *Hari Sankar* v. *Bhoori Devi*, (1975) 77 PLR 133; *Bharat Tobacco Co.* v. *Maula Saheb*, AIR 1980 Guj 202 at pp. 203-04.

[89] *Jai Prakash* v. *Basanta Kumari*, (1911) 15 IC 604 (Cal).

[90] *Nowroji Pudumjee* v. *Deccan Bank Ltd.*, AIR 1921 Bom 69.

[91] *T. Srinivasan* v. *V. Srinivasan*, AIR 1985 Mad 269.

[92] AIR 1980 Guj 202: (1981) 22 Guj LR 343.

the opposite party is about to dispose of the whole or any part of his property with a view to obstructing or delaying the execution of the decree that may be passed in the suit. An order of attachment before judgment is a drastic order and ordinarily the court would be slow in exercising the power conferred upon it under Order 38 Rule 5 of the Code for the simple reason that, if the power is not exercised with utmost care and caution, it may ruin the reputation and business of the party against whom the power is exercised. The court must act with utmost circumspection before issuing an order of attachment so that the power vested in the court is not abused by an unscrupulous litigant as a weapon of oppression against the opposite party. *It is the duty of the court to take care to see that it is not used as an instrument to coerce the opposite party to settle the matter with the party armed with an order of attachment before judgment on the latter's terms.*"[93] (emphasis supplied)

The following powerful observations of Dawson Miller, C.J.[94] are worth quoting:

> "The power given to the court to attach a defendant's property before judgment is never meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before a defendant's liability is established by a decree, may have the effect of seriously embarrassing him in the conduct of the defence, as the properties could not be alienated even for the purpose of putting him in funds for defending the suit, which may eventually prove to have been entirely devoid of merit. *Such a power is only given when the court is satisfied not only that the defendant is about to dispose of his properties or to remove it from the jurisdiction of the court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him, and so deprive the plaintiff, successful, of the fruits of victory.*"[95] (emphasis supplied)

Suffice to say that in the leading case of *Premraj Mundra* v. *Mohd. Maneck Gazi*[96], after referring to several authorities, Justice Sinha had deduced the following principles relating to passing of an order of attachment before judgment:

(1) That an order under Order 38, Rules 5 and 6 can only be issued if circumstances exist as are stated therein.

(2) Whether such circumstances exist is a question of fact which must be proved to the satisfaction of the court.

[93] *Bharat Tobacco Co.* v. *Maula Saheb*, AIR 1980 Guj 202 at p. 204: (1981) 22 Guj LR 343 at p. 345.

[94] *Chandrika Prashad Singh* v. *Hira Lal*, AIR 1924 Pat 312: 73 IC 721.

[95] *Ibid*, at p. 314 (AIR).

[96] AIR 1951 Cal 156: 87 Cal LJ 41.

(3) That the court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the defendants would not be prejudiced.

(4) That the affidavits in support of the contentions of the applicant must not be vague, and must be properly verified. Where it is affirmed as true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the source of information should be disclosed, and the grounds for belief should be stated.

(5) That a mere allegation that the defendant was selling off his properties is not sufficient. Particulars must be stated.

(6) There is no rule that transactions before a suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation.

(7) Where only a small portion of the property belonging to the defendant is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the plaintiff's claim.

(8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit has been filed. There must be additional circumstances to show that the transfer is with an intention to delay or defeat the plaintiff's claim. It is open to the court to look to the conduct of the parties immediately before the suit and to examine the surrounding circumstances and to draw an inference as to whether the defendant is about to dispose of the property, and if so, with what intention. The court is entitled to consider the nature of the claim and the defence put forward.

(9) The fact that the defendant is in insolvent circumstances or in acute financial embarrassment is a relevant circumstance, but not by itself sufficient.

(10) That in the case of running businesses, the strictest caution is necessary and the mere fact that a business has been closed, or that its turnover has diminished, is not enough.

(11) Where, however, the defendant starts disposing of his properties one by one, immediately upon getting notice of the plaintiff's claim, and/or where he had transferred the major portion of his properties shortly prior to the institution of the suit, and was in an embarrassed financial condition, these were grounds from which an inference could legitimately be drawn that the object of the defendant was to delay and defeat the plaintiff's claim.

(12) Mere removal of properties outside the jurisdiction of the court concerned is not enough, but where the defendant, with notice of the plaintiff's claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate court, and without any satisfactory reason, an adverse inference may be drawn against the defendant. Where the removal is to a foreign country, the inference is greatly strengthened.

(13) The defendant in a suit is under no liability to take any special care in administering his affairs, simply because there is a claim pending against him. Mere neglect or suffering execution by other creditors is not a sufficient reason for an order under Order 38 of the Code.

(14) The sale of properties at a gross undervalue, or *benami* transfers, are always good indications of an intention to defeat the plaintiff's claim. The court must, however, be very cautious about the evidence on these points and not rely on vague allegations.[97]

**(5) Conditional attachment**

The court has ample power to direct conditional attachment.[98] No prior notice is necessary in such cases. It is, however, open to the defendant and his right to show cause against attachment has not been affected.[99]

Conditional order of attachment, however is not by itself attachment. Unless the property is actually attached in accordance with the procedure prescribed by the Code, the order is ineffective and no attachment can be made of property.[100]

**(6) Mode of attachment: Rule 7**

Rule 7 enacts that attachment shall be made in the manner provided for attachment of property in execution of a decree.

**(7) Exemption from attachment: Rule 12**

The court cannot order attachment or production of any agricultural produce in possession of an agriculturist.[101]

[97] *Premraj Mundra* v. *Mohd. Maneck Gazi*, AIR 1951 Cal 156 at p. 160-61: 87 Cal LJ 41.

[98] R. 5(3).

[99] *Sardar Govindrao* v. *Devi Sahai, supra; see also* (1969) 19 Raj 701; *Shalimar Rope Works Ltd.* v. *N.C. John and Sons Ltd.*, (1986) Ker LT 1366; *Sohanraj Ganeshmal Shah* v. *Gulabrao B. Kate*, AIR 1972 Bom 377: (1972) 74 Bom LR 107.

[100] *Mahadev Vasudev* v. *Janaksingh*, AIR 1954 Bom 251; *Vasavamba (Smt.)* v. *Parasuram Sait and Sons*, AIR 1973 Mys 291; *Sri Krishna Gupta* v. *Shri Ram Babu*, AIR 1967 All 136.

[101] R. 12.

**(8) Rights of third party: Rule 10**

An attachment before judgment does not affect the rights of persons, existing prior to the attachment, if they are not parties to the suit.[102]

**(9) Adjudication of claims: Rule 8**

Rule 8 provides that any claim preferred to the property, attached before judgment, shall be adjudicated upon in the manner provided for adjudication of claims to property attached in execution of a decree for the payment of money.

**(10) Reattachment in execution: Rule 11**

Where the property is under attachment, and a decree is subsequently passed in favour of the plaintiff, it is not necessary to apply for fresh attachment of the property in execution.[103] The provisions of Order 21 applicable to an attachment made in execution of a decree will also apply to an attachment before judgment continuing after judgment.[104]

**(11) Effect of attachment**

An order of attachment before judgment is a sort of guarantee against decree becoming infructuous for want of property available for satisfaction of such decree. The plaintiff, however, does not get title by effecting attachment before judgment.[105]

**(12) Removal of attachment: Rule 9**

An order of attachment will be withdrawn if the defendant furnishes security or the suit is dismissed.[106]

**(13) Appeal**

An order passed under Order 38 Rule 5 is appealable.[107]

**(14) Revision**

An order granting or refusing attachment before judgment is a case decided within the meaning of Section 115 of the Code and is revisable by the High Court.[108]

[102] R. 10.
[103] R. 11.
[104] R. 11-A.
[105] *Sardar Govindrao* v. *Devi Sahai, supra; Firm Amin Chand Hakam Chand* v. *Noshah Begum*, AIR 1954 Punj 235.
[106] R. 9.
[107] Or. 43 R. 1(q).
[108] *International Air Transport Assn.* v. *Hansa Travels (P) Ltd.*, AIR 1998 Ker 80.

**(15) Wrongful attachment**

A suit for damages is maintainable for wrongful attachment of property.[109]

**(16) Attachment on insufficient grounds: Section 95**

Where in any suit in which an order of attachment of the property of a defendant has been obtained on insufficient grounds by the plaintiff, or where the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting it, on application being made by the defendant, the court may order the plaintiff to pay as compensation such amount, not exceeding fifty thousand rupees, as it deems reasonable to the defendant for the expense or injury including injury to reputation caused to him.[110]

## 7. TEMPORARY INJUNCTIONS: ORDER 39 RULES 1-5

**(1) General**

Every court is constituted for the purpose of administering justice among parties and, therefore, must be deemed to possess all such powers as may be necessary to do full and complete justice to the parties before it.

**(2) Meaning**

An injunction is a judicial process whereby a party is required to do, or to refrain from doing, any particular act. It is a remedy in the form of an order of the court addressed to a particular person that either prohibits him from doing or continuing to do a particular act (prohibitory injunction); or orders him to carry out a certain act (mandatory injunction).[111]

**(3) Doctrine explained**

It is well-settled principle of law that interim order can always be granted in the aid of and as ancillary to the main relief available to the party on final determination of his rights in a suit or any other proceeding. Therefore, a court undoubtedly possesses the power to grant interim

[109] For detailed discussion, *see infra*, "Attachment on insufficient grounds: Section 95".

[110] S. 95; See also *Ananda* v. *Shariatullah*, AIR 1932 Cal 92: 35 CWN 546; *Gyan Prakash* v. *Kishori Lal*, AIR 1942 All 261: ILR 1942 All 360; *Mudhun Mohun* v. *Gokul Dass*, (1866) 10 MIA 563; *Brahmasuriah* v. *Amba Bai*, AIR 1964 Mys 41; *Bank of India* v. *Shital Chandra*, AIR 1986 Cal 313.

[111] *Halsbury's Laws of England* (4th Edn.) Vol. 24, para 901. *See also*, Author's *Lectures on Administrative Law* (2008) Lecture X.

relief during the pendency of the suit.[112] Temporary injunctions are thus injunctions issued during the pendency of proceedings.

### (4) Object

The primary purpose of granting interim relief is the preservation of property in dispute till legal rights and conflicting claims of the parties before the court are adjudicated. In other words, the object of making an order regarding interim relief is to evolve a workable formula to the extent called for by the demands of the situation, keeping in mind the pros and cons of the matter and striking a delicate balance between two conflicting interests, i.e., injury and prejudice, likely to be caused to the plaintiff if the relief is refused; and injury and prejudice likely to be caused to the defendant if the relief is granted. The court in the exercise of sound judicial discretion can grant or refuse to grant interim relief.[113]

The underlying object of granting temporary injunction is to maintain and preserve *status quo* at the time of institution of the proceedings and to prevent any change in it until the final determination of the suit. It is in the nature of protective relief granted in favour of a party to prevent future possible injury.[114]

The need for such protection, however, has to be judged against the corresponding need of the defendant to be protected against injury resulting from exercising his own legal rights. The court must weigh one need against another and determine where the balance of convenience lies and may pass an appropriate order in exercise of its discretionary power.[115]

### (5) Types

Injunctions are of two kinds: (*i*) temporary; and (*ii*) permanent. A permanent injunction restrains a party *forever* from doing the specified act and can be granted only on merits at the conclusion of the trial after hearing both the parties to the suit.[116] It is governed by Sections 38 to

[112] *State of Orissa* v. *Madan Gopal*, AIR 1952 SC 12 at p. 14: 1952 SCR 28; *Premier Automobiles* v. *Kamlekar Shantaram*, (1976) 1 SCC 496: AIR 1975 SC 2238; *Dorab Cowasji Warden* v. *Coomi Sorab Warden*, (1990) 2 SCC 117: AIR 1990 SC 867; *Shiv Kumar* v. *MCD*, (1993) 3 SCC 161.

[113] *Dorab Cowasji Warden* v. *Coomi Sorab Warden*, *supra*; *CCE* v. *Dunlop India Ltd.*, (1985) 1 SCC 260 at pp. 266-67: AIR 1985 SC 330; *Shiv Kumar* v. *MCD*, *supra*; *Hindustan Petroleum Corpn. Ltd.* v. *Sriman Narayan*, (2002) 5 SCC 760; *Transmission Corpn. of A.P. Ltd.* v. *Lanco Kondapalli Power (P) Ltd.*, (2006) 1 SCC 540.

[114] *Ibid*, see also *Polins* v. *Gray*, (1879) 12 Ch D 438; *ITO* v. *M.K. Mohd. Kunhi*, AIR 1969 SC 430: (1969) 2 SCR 65; *Manohar Lal* v. *Seth Hiralal*, AIR 1962 SC 527: 1962 Supp (1) SCR 450.

[115] *Gujarat Bottling Co. Ltd.* v. *Coca Cola Co.*, (1995) 5 SCC 545: AIR 1995 SC 2372 at p. 2389.

[116] S. 37(2), Specific Relief Act, 1963.

42 of the Specific Relief Act, 1963. A temporary or interim injunction, on the other hand, restrains a party *temporarily* from doing the specified act and can be granted only until the disposal of the suit or until the further orders of the court. It is regulated by the provisions of Order 39 of the Code of Civil Procedure, 1908 and may be granted at any stage of the suit.[117]

Injunctions are also (*i*) preventive, prohibitive or restrictive, i.e. when they prevent, prohibit or restrain someone from doing something; or (*ii*) mandatory, i.e. when they compel, command or order some person to do something.

**(6) Who may apply?**

It is not the plaintiff alone who can apply for an interim injunction. A defendant may also make an application for grant of an injunction against the plaintiff.[118]

**(7) Against whom injunction may be issued**

An injunction may be issued only against a party and not against a stranger or a third party.[119] It also cannot be issued against a court or judicial officer.[120] Normally, injunction can be granted against persons within the jurisdiction of the court concerned.[121]

**(8) Grounds: Rule 1**

Temporary injunction may be granted by a court in the following cases:

(*a*) where any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree;[122] or

(*b*) where a defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors;[123] or

[117] S. 37(1), Specific Relief Act, 1963.

[118] *Rattu* v. *Mala*, AIR 1968 Raj 212; *B.F. Varghese* v. *Joseph Thomas*, AIR 1957 TC 286; *Municipal Corpn. of Greater Bombay* v. *Bhagwan Sakharam Salaskar*, AIR 1974 Bom 272; *Ganga Bricks Udhyog* v. *Jai Bhagwan Swarup*, AIR 1982 All 333; *Gujarat Bottling Co. Ltd.* v. *Coca Cola Co.*, (1995) 5 SCC 545: AIR 1995 SC 2372.

[119] *L.D. Meston School Society* v. *Kashi Nath*, AIR 1951 All 558; *Fakira* v. *Rumsukhibai*, AIR 1946 Nag 428: ILR 1946 Nag 908; *Marwari Sabha* v. *Kanhaya Lal*, AIR 1973 All 298.

[120] *Ibid*, see also *Kalia* v. *Gram Sabha Manas*, AIR 1973 P&H 479; *Mahanth Ramkeshwar* v. *Baldeo Singh*, AIR 1938 Pat 606; *Varanasaya Sanskrit Vishwavidyalaya* v. *Rajkishore*, (1977) 1 SCC 279: AIR 1977 SC 615.

[121] *P. Venkatachalam* v. *Rajagopala Naidu*, AIR 1932 Mad 705; *T.A. Menon* v. *K.P. Parvathi Ammal*, AIR 1950 Mad 373.

[122] Or. 39 R. 1(*a*).

[123] R. 1(*b*).

(*c*) where a defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit;[124] or

(*d*) where a defendant is about to commit a breach of contract, or other injury of any kind;[125] or

(*e*) where a court is of the opinion that the interest of justice so requires.[126]

**(9) Principles**

The power to grant a temporary injunction is at the discretion of the court. This discretion, however, should be exercised reasonably, judiciously and on sound legal principles. Injunction should not be lightly granted as it adversely affects the other side. The grant of injunction is in the nature of equitable relief, and the court has undoubtedly power to impose such terms and conditions as it thinks fit.[127] Such conditions, however, must be reasonable so as not to make it impossible for the party to comply with the same and thereby virtually denying the relief which he would otherwise be ordinarily entitled to. Generally, before granting the injunction, the court must be satisfied about the following aspects:[128]

*(a) Prima facie case*

The first rule is that the applicant must make out a *prima facie* case in support of the right claimed by him. The court must be satisfied that there is a *bona fide* dispute raised by the applicant, that there is a strong case for trial which needs investigation and a decision on merits and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him. The existence of a *prima facie* right and infraction of such right is a condition precedent for grant of temporary injunction. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a *prima facie* case in his favour.[129]

[124] 1 (*c*).

[125] R. 2(1).

[126] Ss. 94(*c*), 151. See also *Manohar Lal* v. *Seth Hiralal*, AIR 1962 SC 527: 1962 Supp (1) SCR 450; *Cotton Corpn. of India Ltd.* v. *United Industrial Bank Ltd.*, (1983) 4 SCC 625: AIR 1983 SC 1272.

[127] R. 2(2).

[128] *Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719 at p. 721: AIR 1993 SC 276; *Dorab Cowasji Warden* v. *Coomi Sorab Warden*, (1990) 2 SCC 117: AIR 1990 SC 867; *Wander Ltd.* v. *Antox India (P) Ltd.*, 1990 Supp SCC 727 at pp. 731-32: AIR 1990 SC 867 at pp. 876-77; *United Commercial Bank* v. *Bank of India*, (1981) 2 SCC 766 at pp. 787-88: AIR 1981 SC 1426 at p. 1440; *Gangubai* v. *Sitaram*, (1983) 4 SCC 31 at p. 33: AIR 1983 SC 742 at p. 743; *Shiv Kumar* v. *MCD, supra; Hindustan Petroleum Corpn. Ltd.* v. *Sriman Narayan*, (2002) 5 SCC 760; *Transmission Corpn. of A.P. Ltd.* v. *Lanco Kondapalli Power (P) Ltd.*, (2006) 1 SCC 540.

[129] *Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719 at p. 721: AIR 1993 SC 276.

*Prima facie* case, however, should not be confused with a case proved to the hilt. It is no part of the court's function at that stage to try to resolve a conflict of evidence nor to decide complicated questions of fact and of law which call for detailed arguments and mature considerations. *These are matters to be dealt with at the trial.*[130] (emphasis supplied) In other words, the court should not examine the merits of the case *closely* at that stage because it is not expected to decide the suit finally. In deciding a *prima facie* case, the court is to be guided by the plaintiff's case as revealed in the plaint, affidavits or other materials produced by him.

Explaining the ambit and scope of the connotation "*prima facie*" case, in *Martin Burn Ltd.* v. *R.N. Banerjee*[131], the Supreme Court observed:

> "A *prima facie* case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. *While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.* It may be that the tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record."[132]
>
> (emphasis supplied)

*(b) Irreparable injury*

The existence of the *prima facie* case alone does not entitle the applicant for a temporary injunction.[133] The applicant must further satisfy the court about the second condition by showing that he will suffer irreparable injury if the injunction as prayed is not granted, and that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury. In other words, the court must be satisfied that refusal to grant injunction would result in

[130] *American Cyanamid Co.* v. *Ethicon Ltd.*, (1975) 1 All ER 504 at p. 510: 1975 AC 396 at p. 407: (1975) 2 WLR 316 at p. 323 (*per* Lord Diplock).

[131] AIR 1958 SC 79: 1958 SCR 514.

[132] *Ibid*, at p. 85 (AIR). See also *Buckingham & Carnatic Co. Ltd.* v. *Workers*, AIR 1953 SC 47 at p. 49: 1953 SCR 219: 1952 Lab AC 490; *American Cyanamid Co.* v. *Ethicon Ltd., infra*; *Hindustan Petroleum Corpn. Ltd.* v. *Sriman Narayan*, (2002) 5 SCC 760; *Transmission Corpn. of A.P. Ltd.* v. *Lanco Kondapalli Power (P) Ltd.*, (2006) 1 SCC 540.

[133] *CCE* v. *Dunlop India Ltd.*, (1985) 1 SCC 260 at pp. 266-67: AIR 1985 SC 330; *Transmission Corpn. of A.P. Ltd.* v. *Lanco Kondapalli Power (P) Ltd.*, (2006) 1 SCC 540; *Barkat Ali* v. *Zulfiquar*, AIR 1975 AP 187 at p. 190; *Shayak Mohammad.* v. *Iqbal Ahmed*, AIR 1973 Raj 115; *S. Radhakrishna Murthy* v. *K. Narayanadas*, AIR 1982 AP 384 at p. 388; *U.P. Avas Evam Vikas Parishad* v. *N.V. Rajgopalan*, AIR 1989 All 125.

"irreparable injury" to the party seeking relief and he needs to be protected from the consequences of apprehended injury. Granting of injunction is an equitable relief and such a power can be exercised when judicial intervention is absolutely necessary to protect rights and interests of the applicant. The expression *irreparable injury* however does not mean that there should be no possibility of repairing the injury. It only means that the injury must be a material one, i.e., which cannot be adequately compensated by damages.[134] An injury will be regarded as irreparable where there exists no certain pecuniary standard for measuring damages.

In the leading case of *American Cyanamid Co.* v. *Ethicon Ltd.*[135], the House of Lords has rightly pronounced the principle thus:

> "[T]he governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction."[136]

*(c) Balance of (in) convenience*

The third condition for granting interim injunction is that the balance of convenience must be in favour of the applicant. In other words, the

[134] *Manohar Lal* v. *Seth Hiralal*, AIR 1962 SC 527: 1962 Supp (1) SCR 450; *Cotton Corpn. of India Ltd.* v. *United Industrial Bank Ltd.*, (1983) 4 SCC 625: AIR 1983 SC 1272.

[135] (1975) 1 All ER 504: 1975 AC 396: (1975) 2 WLR 316.

[136] *American Cyanamid Co.* v. *Ethicon Ltd.*, (1975) 1 All ER 504 at p. 510: 1975 AC 396 at p. 407: (1975) 2 WLR 316.

court must be satisfied that the comparative mischief, hardship or inconvenience which is likely to be caused to the applicant by refusing the injunction will be greater than that which is likely to be caused to the opposite party by granting it.

The court while exercising discretion in granting or refusing injunction should exercise sound judicial discretion and should attempt to weigh substantial mischief or injury likely to be caused to the parties, if the injunction is refused, and compare it with that which is likely to be caused to the opposite party if the injunction is granted. If on weighing conflicting probabilities, the court is of the opinion that the balance of convenience is in favour of the applicant, it would grant injunction, otherwise refuse to grant it.[137]

Again, to quote the remarkable observations of Lord Diplock in *American Cyanamid Co.* v. *Ethicon Ltd.*[138]:

> "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. *The court must weigh one need against another and determine where 'the balance of convenience' lies.*"[139] (emphasis supplied)

Though English and Indian Courts have used the phrase "balance of convenience", it is submitted that proper expression should be "balance of inconvenience". It is further submitted that once the plaintiff establishes *prima facie* case, the court will consider the question of granting or refusing interim injunction. If the court thinks that by refusing interim injunction, more or greater inconvenience will be caused to the plaintiff, it will grant injunction. If, on the other hand, it finds that by granting interim injunction, greater inconvenience will be caused to the defendant, it will refuse the relief. It is by considering *comparative inconvenience* that the court will exercise the discretion.

In the opinion of the authors, the concept is similar to "greater hardship" under Rent Laws. Several Rent Acts allow eviction decree against a tenant if the tenanted property is required by the landlord for *bona fide* use and occupation. Those Acts, however, require Rent

[137] *Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719 at p. 721: AIR 1993 SC 276.
[138] (1975) 1 All ER 504: 1975 AC 396: (1975) 2 WLR 316.
[139] *Ibid*, at p. 509 (AER): at p. 406 (AC): at pp. 321-22 (WLR).

Court to consider the question of "greater hardship". Once the landlord proves his *bona fide* requirement, the court will consider whether greater hardship will be caused to the landlord by refusing to pass decree or to the tenant by passing such decree. And on the basis of such consideration and finding thereon, the court will make an appropriate order evicting or refusing to evict tenant. The same principle applies in granting or refusing to grant temporary or interim injunction.

*(d) Other factors*

The above principles and guidelines are merely illustrative and neither exhaustive nor absolute rules. It should not be forgotten that grant of injunction is a discretionary power and such a power must be exercised in accordance with sound judicial principles. It is an equitable relief and even if all the above conditions are satisfied there may be other circumstances leading to a refusal to grant such a relief.[140]

As Lord Diplock stated, "I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in particular circumstances of individual cases."[141]

Thus a relief of injunction may be refused on the ground of delay, laches or acquiescence,[142] or where the applicant has not come with clean hands,[143] or has suppressed material facts,[144] or where monetary compensation is adequate relief.[145]

**(10) Discretion of court**

Power to grant injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as a matter of right or course. Grant of injunction is at the discretion of the court and such discretion must be exercised in favour of the plaintiff only if the court is satisfied that, unless the defendant is restrained by an order of injunction, irreparable loss or damage will be caused to the plaintiff. The Court grants such relief *ex debito justitiae*, i.e., to meet the ends of justice.[146]

It is a matter of common knowledge that on many occasions even public interest suffers in view of such interim orders of injunction,

[140] *Gujarat Bottling Co. Ltd.* v. *Coca Cola Co.*, (1995) 5 SCC 545: AIR 1995 SC 2372.

[141] *American Cyanamid Co.* v. *Ethicon Ltd.*, (1975) 1 All ER 504 at p. 511 (AER).

[142] *Bharat Starch & Chemicals Ltd.* v. *(Ahmedabad) Ltd. Mill Stores*, AIR 1949 Cal 357.

[143] First Proviso to R. 4, see also *Malua* v. *Union of India*, AIR 1971 Cal 507; *Transmission Corpn. of A.P. Ltd.* v. *Lanco Kondapalli Power (P) Ltd.*, (2006) 1 SCC 540.

[144] *Ibid*, see also *Vellakutty* v. *Karthyayani*, AIR 1968 Ker 179.

[145] *V.D. Tripathy* v. *V.S. Dwivedi*, AIR 1976 All 97.

[146] *Shiv Kumar* v. *MCD*, (1993) 3 SCC 161; *Dalpat Kumar* v. *Prahlad Singh*, (1992) 1 SCC 719; *Mahadeo Savlaram* v. *Pune Municipal Corpn.*, (1995) 3 SCC 33; *Hindustan Petroleum Corpn. Ltd.* v. *Sriman Narayan*, (2002) 5 SCC 760.

because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of property without any authority of law or without following procedures which are fundamental and vital in nature. But at the same time, judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court.[147]

In *Dalpat Kumar* v. *Prahlad Singh*[148], the Supreme Court stated, "The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused, and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that, pending the suit, the subject-matter should be maintained in *status quo*, an injunction would be issued. Thus *the court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.*"[149] (emphasis supplied)

The same considerations apply to the defendant seeking vacation of interim relief. In *Gujarat Bottling Co. Ltd.* v. *Coca Cola Co.*[150] the defendant committed a breach of agreement by transferring shares of the plaintiff to a third party without obtaining consent or even without informing the plaintiff. The plaintiff, therefore, terminated the agreement and obtained interim injunction against the defendant restraining him from entering into an agreement with the third party. The defendant applied for vacating the interim injunction.

Rejecting the prayer, the Supreme Court observed:

> "Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was

[147] *Shiv Kumar* v. *MCD*, (1993) 3 SCC 161 at p. 175.
[148] (1992) 1 SCC 719: AIR 1993 SC 276.
[149] *Ibid*, at p. 721 (SCC): at p. 277 (AIR).
[150] (1995) 5 SCC 545: AIR 1995 SC 2372.

seeking relief. His conduct should be fair and honest. *These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings.*"[151] (emphasis supplied)

**(11) Injunction which may be granted**

In accordance with the above principles, interim injunction of maintaining *status quo*, against transfer of property, disposal of goods, making construction, effecting recovery of dues, attachment of property, appointment of receiver or commission, against prosecution, etc., can be granted by a court.

**(12) Injunction which may not be granted**

Since the power can be exercised judicially and in the public interest, no interim injunction causing administrative inconvenience or resulting in public mischief should be granted. Thus, *ordinarily* no injunction should be granted against recovery of tax or octroi, enforcement of contractual rights and liabilities, transfer or suspension of employees, delaying election process, interfering with inquiry or investigation, etc.

**(13) Inherent power to grant injunction**

Rule 1 of Order 39, no doubt, enumerates circumstances in which a court may grant interim injunction. It, however, nowhere provides that no temporary injunction can be granted by the court unless the case falls within the said provision. Hence, where the case is not covered by Order 39, interim injunction can be granted by the court in exercise of inherent powers under Section 151 of the Code.[152]

**(14) Notice: Rule 3**

The court shall, before granting an injunction, give notice to the opposite party, except where it appears that the object of granting the injunction would be defeated by delay.[153] But the proviso added by the Amendment Act of 1976 lays down that when an *ex parte* injunction is proposed to be given, the court has to record reasons for coming to the conclusion that the object of granting injunction would be defeated by delay. In such a situation, the court shall order the applicant to send a copy of the application and other documents immediately to the

[151] *Ibid*, at p. 576 (SCC): at p. 2389 (AIR).

[152] *Manohar Lal* v. *Seth Hiralal*, AIR 1962 SC 527 at p. 532: 1962 Supp (1) SCR 450; *ITO* v. *M.K. Mohd. Kunhi*, AIR 1969 SC 430: (1969) 2 SCR 65; *Tanusree* v. *Ishani Prasad*, (2008) 4 SCC 791: AIR 2008 SC 1909.

[153] R. 3; see also supra, *Shiv Kumar* v. *MCD*.

opposite party. In such a case, the court shall make an endeavour to finally dispose of the application within 30 days from the date on which the *ex parte* injunction was granted. Where the court finds it difficult to dispose of the application within the period of 30 days, reasons are required to be recorded.[154]

An order of injunction may be discharged, varied or set aside by the court on an application being made by any party dissatisfied with such order, or where such discharge, variation or setting aside has been necessitated by a change in circumstances, or where the court is satisfied that such order has caused undue hardship to the other side.[155]

**(15) Ex parte injunction**

Rule 3 of Order 39 requires the applicant to issue a notice to the opposite party before an injunction is granted. Though the Court has the power to grant an *ex parte* injunction without issuing a notice or granting a hearing to the party, who will be affected by such order, the said power is to be exercised sparingly and under exceptional circumstances.

In *Morgan Stanley Mutual Fund* v. *Kartick Das*[156], the Supreme Court indicated the factors which should weigh with a court in the grant of an *ex parte* injunction:

(*i*) whether irreparable or serious mischief will ensue to the plaintiff;

(*ii*) whether the refusal of *ex parte* injunction would involve greater injustice than grant of it would involve;

(*iii*) the court will also consider the time at which the plaintiff first had notice of the act complained of so that the making of an improper order against a party in his absence is prevented;

(*iv*) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant *ex parte* injunction;

(*v*) the court would expect a party applying for *ex parte* injunction to show utmost good faith in making the application;

(*vi*) even if granted, the *ex parte* injunction would be for a limited period of time;

(*vii*) general principles like *prima facie* case, balance of convenience and irreparable loss would also be considered by the court.[157]

[154] R. 3-A.
[155] R. 4.
[156] (1994) 4 SCC 225 at p. 241-42.
[157] *Ibid*, at pp. 241-42.

**(16) Recording of reasons**

When the court purposes to grant *ex parte* injunction without issuing notice to the opposite party, proviso to Rule 3 enjoins the court to record reasons. The requirement of recording reasons is not a mere formality but a mandatory requirement.

Dealing with this aspect, in *Shiv Kumar* v. *MCD*[158], the Supreme Court stated, "[T]he requirement for recording the reasons for grant of *ex parte* injunction cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why, instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and the court has to consider briefly these factors in the *ex parte* order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such *ex parte* orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order. *If it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code attracts the principle that, if a statute requires a thing to be done in a particular manner, it should be done in that manner or not all.*"[159] (emphasis supplied)

**(17) Imposition of conditions**

Even when the court is satisfied with the case of the applicant, and is inclined to grant interim relief, it must consider the interest of the other side. The party at whose instance interim order is passed, should be made accountable for the consequences of such order. In appropriate cases, the applicant may be asked to furnish security for any increase in cost as a result of delay or damage suffered due to such interim

[158] (1993) 3 SCC 161.

[159] *Ibid*, at pp. 176-77 (SCC).

relief. "Stay order or injunction order, if issued, must be moulded to provide for restitution."[160]

**(18) Doctrine of precedent**

Interim orders have no precedential value and an applicant cannot claim grant of interim relief on the ground that in similar matters interim relief has been granted by the court.[161] Judicial comity, however, requires that in similar matters, similar interim orders should *normally* be made.[162]

**(19) Public projects**

In many cases, injunction is sought to prevent public authorities from implementing public projects. In such cases, public interest is one of the material and relevant considerations in granting or refusing the prayer for injunction. The court must consider this aspect, and even if a case is made out to grant equitable relief of granting injunction, it must adequately protect the public authority by imposing appropriate conditions on the plaintiff, including payment of compensation by him in the event of his failure in the suit.[163]

The need of such protection has, however, to be weighed against the corresponding need of the defendant to be protected against an injunction resulting from the exercise of his own legal rights. The court must weigh one need against another and determine where the balance of convenience lies and may pass an appropriate order in exercise of its discretionary power. Public detriment should not outweigh public interest and public benefit in granting interim orders.[164]

**(20) Res judicata**

The doctrine of *res judicata* applies to different stages of the same suit or proceeding.[165] Hence, if interim injunction is once granted or refused by the court, the said order will operate till the disposal of the suit or

[160] *Raunaq International Ltd.* v. *I.V.R. Construction Ltd.*, (1999) 1 SCC 492 at p. 503: AIR 1999 SC 393 at p. 398.

[161] *Empire Industries Ltd.* v. *Union of India*, (1985) 3 SCC 314: AIR 1986 SC 662.

[162] *Ibid*, at p. 344 (SCC): at p. 679 (AIR) (*per* Mukherji, J. for himself and Fazl Ali, J.; Varadrajan, J. *contra*); see also *Siliguri Municipality* v. *Amalendu Dass*, (1984) 2 SCC 436: AIR 1984 SC 653: *Bir Bajrang Kumar* v. *State of Bihar*, AIR 1987 SC 1345; *State of Gujarat* v. *Prabhat Solvent Extraction Industries (P) Ltd.*, (1982) 1 SCC 624.

[163] *Winki Dilawari* v. *Amritsar Improvement Trust*, (1996) 11 SCC 644; *Gujarat Bottling Co. Ltd.* v. *Coca Cola Co.*, (1995) 5 SCC 545: AIR 1995 SC 2372; *Ramniklal N. Bhutta* v. *State of Maharashtra*, (1997) 1 SCC 134 at p. 140: AIR 1997 SC 1236 at pp. 1239-40.

[164] *Raunaq International Ltd.* v. *I.V.R. Construction Ltd.*, (1999) 1 SCC 492 at p. 503: AIR 1999 SC 393 at p. 398.

[165] For detailed discussion, *see supra*, Chap. V.

throughout the proceeding. An application for granting or vacating injunction will lie if there are changed circumstances.[166]

**(21) Interim relief for limited period: Effect**

Where a court grants interim injunction or relief for a limited period, it comes to an end on the expiry of that period. *Normally*, in such cases, the plaintiff or his advocate requests the court for extension or continuation of such relief. But in absence of specific order, it expires.[167]

**(22) Continuation of interim relief to approach higher court**

If the object of granting interim injunction or relief is to maintain and preserve *status quo* of the position which was there at the time of institution of suit, there is no reason why such position should not be allowed to be continued if the aggrieved party wants to approach higher or superior court after the matter is decided by the lower court. The court at the time of deciding the matter has power to continue interim relief till the party aggrieved gets an opportunity to approach higher forum.[168]

**(23) Restoration of benefits**

Where a court grants interim injunction which results in injustice to the opposite party, it is not only the right but the *duty* of the court at the time of passing a final order to undo injustice and to restore the *status quo ante*.[169]

In *Director of Inspection (Intelligence)* v. *Vinod Kumar*[170], against the prohibitory orders, issued by the Income Tax Authorities, the petitioner filed a writ petition and obtained an *ex parte* interim order prohibiting the authorities from enforcing the orders. The petitioner then removed his goods under the *ex parte* order and withdrew the petition.

Holding that the process of law was completely abused for the purpose of gaining an undeserved benefit, the Supreme Court held that the petitioner could not be allowed to derive an undue advantage from the situation.

[166] *Ibid*, see also *Arjun Singh* v. *Mohindra Kumar*, AIR 1964 SC 993: (1964) 5 SCR 946; *Satyadhyan Ghosal* v. *Deorjin Debi*, AIR 1960 SC 941: (1960) 3 SCR 590.

[167] *Luis Proto (Dr.)* v. *Union of India*, 1992 Supp (2) SCC 644: AIR 1992 SC 1812.

[168] *Defence Research & Development Laboratories* v. *C. Pandu*, AIR 1977 AP 7; *Chandigarh Admn.* v. *Manpreet Singh*, (1992) 1 SCC 380: AIR 1992 SC 435; *Polini* v. *Gray*, (1879) 12 Ch D 438: 41 LT 173 (CA).

[169] *Prabodh Verma* v. *State of U.P.*, (1984) 4 SCC 251: AIR 1985 SC 167; *Jethabhai Khatau & Co.* v. *Luxmi Narayan Cotton Mills Ltd.*, (1981) 3 SCC 61: AIR 1981 SC 1201; *Dorab Cowasji Warden* v. *Coomi Sorab Warden*, (1990) 2 SCC 117: AIR 1990 SC 867; *Delhi Development Authority* v. *Skipper Construction Co. (P) Ltd.*, (1996) 4 SCC 622: AIR 1996 SC 2005.

[170] AIR 1987 SC 1260.

Restoration of benefits, in appropriate cases, may include payment of costs, difference of price, damages, etc.[171]

**(24) Appeal**

An order granting or refusing to grant injunction is subject to appeal.[172] Where *ex parte* relief is granted by the court and the application is not decided within thirty days, the aggrieved party may prefer an appeal against such an order.[173]

**(25) Revision**

An order granting or refusing an injunction is a "case decided" within the meaning of Section 115 of the Code and, hence, a revision lies against such an order.[174]

**(26) Breach of injunction: Rule 2-A**

Section 94(*c*) and Rule 2-A of Order 39 provide for the consequences resulting from a disobedience or breach of an order of injunction issued by the court. The penalty may be either arrest of the opponent or attachment of his property or both. However, the detention in civil prison shall not exceed three months and the attachment of property shall not remain in force for more than one year.[175] If the disobedience or breach continues, the property attached may be sold and, out of the proceeds, the court may award such compensation as it thinks fit to the injured party.[176] The transferee court can also exercise this power and can punish for breach of injunction granted by the transferor court.[177]

**(27) Injunction on insufficient grounds: Section 95**

Where in any suit in which an order of temporary injunction has been obtained by the plaintiff on insufficient grounds, or where the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting it, on application being made by the defendant, the court may order the plaintiff to pay such amount,

[171] *Raunaq International Ltd.* v. *I.V.R. Construction Ltd.*, (1999) 1 SCC 492 at p. 503: AIR 1999 SC 393 at p. 398.

[172] Or. 43 R. 1(*r*).

[173] *A. Venkatasubbiah Naidu* v. *S. Chellappan*, (2000) 7 SCC 695: AIR 2000 SC 3032.

[174] *Firm Ishardass Devi Chand* v. *R.B. Parkash Chand*, AIR 1969 SC 938; *Saharanpur Coop. Cane Development Union Ltd.* v. *Lord Krishna Sugar Mills Ltd.*, (1973) 3 SCC 719: AIR 1973 SC 1451; *Hindustan Lever Ltd.* v. *Colgate Palmolive (I) Ltd.*, (1998) 1 SCC 720; *Bina Murlidhar* v. *Kanhaiyalal Lokram*, (1999) 5 SCC 222: AIR 1999 SC 2171. For detailed discussion, *see infra*, "Revision".

[175] R. 2-A(1); see also *Tayabbhai M. Bagasarwalla* v. *Hind Rubber Industries (P) Ltd.*, (1997) 3 SCC 443: AIR 1997 SC 1240; *Patel Rajnikant* v. *Patel Chandrakant.*

[176] R. 2-A(2).

[177] R. 2-A(1).

not exceeding fifty thousand rupees, as it deems to be a reasonable compensation to the defendant for the expense or injury including injury to reputation caused to him.[178]

### 8. INTERLOCUTORY ORDERS: ORDER 39 RULES 6-10

Rules 6 to 10 of Order 39 provide for making certain interlocutory orders. The court has power to order sale of any movable property, which is the subject-matter of the suit or attached before judgment in such suit, which is perishable, or for any just and sufficient cause desirable to be sold at once.[179]

It can also order for detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein.

For that purpose it can authorise any person to enter upon or into any land or building in the possession of any other party to such suit or authorise any samples to be taken or observation to be made or experiment to be tried for the purpose of obtaining full information.[180] However, before making such orders the court shall give notice to the opposite party except where it appears that the object of making such orders would be defeated by the delay.[181]

Where the suit land is liable to payment of revenue to government or a tenure liable to sale and the party in possession of such land or tenure neglects to pay revenue or rent, any other party to the suit claiming an interest in such land or tenure may, on payment of the revenue or rent due, be put in immediate possession of the property. The court may award in the decree the amount so paid with interest thereon against the defaulter.[182]

Where the subject-matter of a suit is money or some other thing capable of delivery and a party to a suit admits that he holds such money or thing as a trustee for another party or that it belongs or is due to that party, the court may order it to be deposited in court or delivered to that party with or without security.[183]

### 9. RECEIVER: ORDER 40

#### (1) Meaning

The term "receiver" is not defined in the Code of Civil Procedure. Stated simply, a receiver is one who receives money of another and

[178] S. 95.
[179] R. 6.
[180] R. 7.
[181] R. 8.
[182] R. 9.
[183] R. 10.

renders account.[184] According to Kerr[185], he is "an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues and profits of land, or personal estate, which it does not seem reasonable to the court that either party should collect or receive, or for enabling the same to be distributed among the persons entitled". In other words, he is an independent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation *pendente lite*, when it does not seem reasonable to the court that either party should hold it.[186]

**(2) Object**

The primary object of appointment of receiver is to protect, preserve and manage the property during the pendency of the litigation. A receiver is an officer and is an extended arm and hand of the court, a part of court machinery by which the rights of the parties are protected. The purpose of appointment of receiver is to preserve the suit property and safeguard interests of both the parties to the suit.[187]

**(3) Discretion of court**

Appointment of receiver is in the discretion of the court. But the mode of appointment of receiver is recognised as one of the harshest remedies for the protection and enforcement of rights of the parties and it should be allowed in extreme cases and in the circumstances where the interests of justice require such power to be exercised.[188]

**(4) Appointment: Rule 1(*a*)**

Where it appears to the court to be just and convenient, it may appoint a receiver.[189] The principles followed by the Chancery Courts in England for the appointment of receivers are adopted by Indian courts also. Courts in India have very wide jurisdiction to appoint as well as to remove a receiver in the exercise of their discretion. The discretion, however, is not absolute, arbitrary and unregulated. It is a sound and judicial discretion and must be exercised cautiously, judicially and after taking into account all the circumstances of the case for the pur-

[184] *Concise Oxford English Dictionary* (2002) at p. 1195; P. R. Aiyar, *Advanced Law Lexicon* (2005) Vol. IV at p. 3980.

[185] *Kerr on Receivers* (2001) at p. 3.

[186] *T. Krishnaswamy Chetty* v. *C. Thangavelu Chetty*, AIR 1955 Mad 430 at p. 432; *K.T. Thomas* v. *Indian Bank*, 1984 Supp SCC 703; *Maharaj Jagat Singh* v. *Lt. Col. Sawai Bhawani Singh*, 1993 Supp (2) SCC 313: AIR 1993 SC 1721.

[187] *P. Lakshmi Reddy* v. *L. Lakshmi Reddy*, AIR 1957 SC 314: 1957 SCR 195; *Ma Hnin Yeik* v. *K.A.R.K. Chettyar Firm*, AIR 1939 Rang 321 (FB); *Narayandas* v. *Taraben Kalimuddin Mulla Fakhri Society*, AIR 1998 Guj 12.

[188] *Benoy Krishna* v. *Satish Chandra*, AIR 1928 PC 49; ILR 1951 Mys 55 (FB).

[189] Or. 40 R. 1(1)(*a*); *see also*, S. 94(*d*).

pose of serving the ends of justice and protecting the rights of all the parties interested in the controversy.[190]

**(5) Principles**

The following principles must be borne in mind before a receiver is appointed by a court:[191]

(*i*) The appointment of a receiver is a discretionary power of the court.

(*ii*) It is a protective relief. The object is preservation of the property in dispute pending a judicial determination of the rights of the parties to it.

(*iii*) A receiver should not be appointed unless the plaintiff *prima facie* proves that he has very excellent chance of succeeding in the suit.

(*iv*) It is one of the harshest remedies which the law provides for the enforcement of rights, and therefore, should not be lightly resorted to. Since it deprives the opposite party possession of property before a final judgment is pronounced, it should only be granted for the prevention of a manifest wrong or injury. A court will never appoint a receiver merely on the ground that it will do no harm.

(*v*) Generally, an order appointing a receiver will not be made where it has the effect of depriving the defendant of a *de facto* possession, since that might cause irreparable loss to him. But if the property is shown to be *in medio*, that is to say, in enjoyment of no one, it will be in the common interest of all the parties to appoint a receiver.

(*vi*) The court should look at the conduct of the party who makes an application for appointment of a receiver. He must come with clean hands and should not have disentitled himself to this equitable relief by laches, delay or acquiescence.

**(6) Who may appoint receiver?**

A receiver may be appointed by the court before which the proceedings are pending. Thus, in case of a suit, receiver can be appointed by the trial court. Where an appeal is preferred against the decree passed by the trial court, it is the appellate court which has power to appoint receiver.

[190] *T. Krishnaswamy Chetty* v. *C. Thangavelu Chetty, supra,* at p. 434; *Hiralal Patini* v. *Loonkaran Sethiya,* AIR 1962 SC 21: (1962) 1 SCR 868.

[191] *T. Krishnaswamy Chetty* v. *C. Thangavelu Chetty, supra,* at pp. 434-35; *Srinivasa Rao* v. *Baburao,* AIR 1970 Mys 141; *Bokaro & Ramgur Ltd.* v. *State of Bihar,* AIR 1966 Pat 154; *S.B. Industries* v. *United Bank of India,* AIR 1978 All 189 at p. 190-91; *Krishna Kumar* v. *Grindlays Bank P.L.C.,* (1990) 3 SCC 669: AIR 1991 SC 899.

A court, however, cannot appoint a receiver *suo motu*.[192]

**(7) Who may be appointed as receiver?**

A person who is independent, impartial and totally disinterested should normally be appointed as receiver. *Generally*, a party to the suit (plaintiff or defendant) should not be appointed as receiver by the court. But the rule is not rigid or inflexible. In exceptional circumstances or for special reasons, a party to a suit or proceeding can also be appointed as receiver.[193]

**(8) Powers: Rule 1(d)**

A receiver is an officer or representative of the court and he functions under its directions.[194] The court may confer upon the receiver any of the following powers:

(*i*) to institute and defend suits;
(*ii*) to realize, manage, protect, preserve and improve the property;
(*iii*) to collect, apply and dispose of the rents and profits;
(*iv*) to execute documents; and
(*v*) such other powers as it thinks fit.[195]

But he has no power except such as are conferred upon him by the order by which he was appointed. It is open to a court not to confer all of the above powers. They are conditioned by the terms of his appointment.[196] But even when full powers are conferred on him, he should take the advice of the court in all important matters if he wants to protect himself.[197]

A receiver cannot sue or be sued without the leave of the court.[198] However, grant of leave is the rule and refusal an exception.[196] But if the suit is filed without such leave, it is liable to be dismissed. If the

[192] *Mahendra H. Patel* v. *Ram Narayan*, (2000) 9 SCC 190: AIR 2000 SC 3569 (1): 2000 AIR SCW 3688; *Ramchandra Jeetmal* v. *Jeetmal Ganpat Porwal*, AIR 1962 MP 380; *Parshotam Das* v. *Prem Narain*, AIR 1956 All 665.

[193] *Kasturi Bai* v. *Anguri Chaudhary*, (2001) 3 SCC 176: AIR 2001 SC 1361; *Indira Transport* v. *Rattan Lal*, AIR 1998 Del 2; *Ganpat* v. *Prahlad*, AIR 1952 Nag 253; *Jasoda* v. *Satyabhama*, AIR 1965 Ori 28.

[194] *Hiralal Patni* v. *Loonkaran Sethiya*, AIR 1962 SC 21: (1962) 1 SCR 868; *P. Lakshmi Reddy* v. *L. Lakshmi Reddy*, AIR 1957 SC 314: 1957 SCR 195; *Sadhuram Bansal* v. *Pulin Behari*, (1984) 3 SCC 410: AIR 1984 SC 1471; *Balkrishan Gupta* v. *Swadeshi Polytex Ltd.*, (1985) 2 SCC 167 at pp. 192-93: AIR 1985 SC 520 at p. 534.

[195] R. 1(1)(*d*). *Harinagar Sugar Mills Co. Ltd.* v. *High Court of Bombay*, AIR 1966 SC 1707: (1966) 3 SCR 948.

[196] *S.B. Industries* v. *United Bank of India*, *supra*; *Krishna Kumar* v. *Grindlays Bank P.L.C.*, (1990) 3 SCC 669: AIR 1991 SC 899.

[197] *Balbir Anand* v. *Ram Jawaya*, AIR 1960 Raj 192 at p. 195.

[198] *Kanhaiyalal* v. *Dr. D.R. Banaji*, AIR 1958 SC 725: 1959 SCR 333; *Everest Coal Co. (P) Ltd.* v. *State of Bihar*, (1978) 1 SCC 12: AIR 1977 SC 2304.

decree is passed in such suit, it can be set aside.[196] No such sanction is, however, necessary to prosecute the receiver for a criminal offence alleged to have been committed by him by abusing his authority as receiver.[199]

Since he is *custodia legis*, any obstruction or interference by anyone with his possession without the leave of the court is interference with the court's proceedings and is liable for contempt of court.[200] Property in the hands of a receiver cannot be attached without the leave of the court.[201]

A receiver is entitled to the remuneration fixed by the court for the services rendered by him.[202] A receiver is entitled to be indemnified for the debts incurred or contracts entered into by him in the course of management of the estate.

The status of a receiver has been appropriately explained in the leading case of *Jagat Tarini Dasi* v. *Naba Gopal Chaki*[203] in the following words:

> "The receiver is appointed for the benefit of all concerned; he is the representative of the court, and of all parties interested in the litigation, wherein he is appointed. He is the right arm of the court in exercising the jurisdiction invoked in such cases for administering the property; the court can only administer through a receiver. For this reason, all suits to collect or obtain possession of the property must be prosecuted by the receiver, and the proceeds received and controlled by him alone."[204]

### (9) Duties: Rule 3

A receiver has to furnish such security, as the court thinks fit, duly to account for what he shall receive in respect of the property. He has to submit accounts for such period and in such forms as the court directs. He has to pay the amount due from him as per the direction of the court.[205] Being a representative of the court, he is bound to discharge his duties personally and cannot delegate or assign any of his rights or duties entrusted to him by the court.[206]

[199] *Khimchand Narottam Bhavsar, In re*, AIR 1928 Bom 493; *K. Shyamalambal* v. *M.S. Ramamurthi*, AIR 1948 Mad 318.

[200] *S.B. Industries* v. *United Bank of India, supra*; *Krishna Kumar* v. *Grindlays Bank P.L.C.*, (1990) 3 SCC 669: AIR 1991 SC 899.

[201] *Kanhaiyalal* v. *Dr. D.R. Banaji, supra.*

[202] R. 2.

[203] ILR (1907) 34 Cal 305.

[204] See also *Kurapati Venkata* v. *Thondepu Ramaswami & Co.*, AIR 1964 SC 818: 1963 Supp (2) SCR 995; *Balkrishan* v. *Swadeshi Polytex Ltd., supra.*

[205] R. 3.

[206] *Balaji* v. *Ramchandra*, ILR (1895) 19 Bom 660.

**(10) Liabilities: Rule 4**

If the receiver fails to submit accounts, or fails to pay the amount due, or occasions loss to the property by his wilful default or negligence, the court may direct his property to be attached and sold and make good any amount found to be due from him.[207] A receiver is bound to exercise the same diligence in keeping down expenses and in caring for the estate in his possession as a prudent man would observe in connection with his own property under similar circumstances.[208]

Thus, he is not responsible for sums actually received by him but also for all sums which he might have received but for his default or negligence. Where he fails to pay the amount ordered by the court, the court would be justified in directing the attachment and sale of his property. The court has also an inherent power to remove the receiver appointed by it, when he does not comply with the orders of the court or abuses his powers or authority.[209]

**(11) Appeal**

An order appointing or refusing to appoint a receiver is appealable.[210]

**(12) Revision**

An order passed on an application for appointment of receiver by allowing the application or rejecting such application is a "case decided" within the meaning of Section 115 of the Code. Hence, where no appeal lies, a revision is competent and maintainable.[211]

[207] R. 4.

[208] *Mohini* v. *Sarkar*, AIR 1941 Cal 144.

[209] *Rani Mathusri Jijai Amba*, Ex p., (1890) 13 Mad 390 (PC); *K.T. Thomas* v. *Indian Bank*, *supra*; see also supra, *Krishna Kumar* v. *Grindlays Bank P.L.C.*

[210] Or. 43 R. 1(*s*).

[211] *Kanhaiya* v. *Kanhaiya Lal*, AIR 1924 All 376: ILR (1924) 46 All 372: 79 IC 363; *Global Plastics and Chemicals India (P) Ltd.* v. *Gian Kaur*, (1993) 2 Punj LR 477.

PART II

# 12 Withdrawal and Compromise of Suits

SYNOPSIS


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## 1. GENERAL

ORDER 23 deals with withdrawal and compromise of suits. It provides for two types of withdrawals:

(*i*) Absolute withdrawal, i.e. withdrawal without the leave of the court; and

(*ii*) Qualified withdrawal, i.e. withdrawal with the leave of the court.

It declares the effect of withdrawals. The Order also provides for compromise of suits and effect thereof.

## 2. WITHDRAWAL OF SUIT: ORDER 23 RULES 1 & 2

### Withdrawal without leave of court: Rule 1(1), (4)

ıny time after the institution of a suit, the plaintiff may abandon his or abandon a part of his claim against all or any of the defendants

without the leave of the court.[1] This right is absolute and unqualified and the court cannot refuse permission to withdraw a suit and compel the plaintiff to proceed with it[2], unless any vested right comes into existence before such prayer is made.[3] However, in case of such abandonment or withdrawal of a suit or part of a claim without the leave of the court, the plaintiff will be precluded from instituting a fresh suit in respect of the same cause of action.[4]

The principle underlying Order 23 Rule 1 is that once a plaintiff invokes the jurisdiction of the court and institutes a suit, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again if he abandons such suit without the permission of the court to file fresh suit. "The law confers, upon a man no rights or benefits which he does not desire" (*Invito beneficium non datur*)[5]. The plaintiff also becomes liable for such costs as the court may award to the defendant.[6]

Rule 1-A of Order 23 as added by the Amendment Act of 1976 provides for the circumstances under which the defendant may be allowed to be transposed as a plaintiff where the suit is withdrawn by the plaintiff.[7]

**(b) Withdrawal with leave of court: Rule 1(3)**

(*i*) *Grounds*

Where the court is satisfied that a suit must fail by reason of some formal defect, or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may grant permission to withdraw such suit or such part of the claim with liberty to file a fresh suit in respect of the subject-matter of such suit or such part of the claim on such terms as it thinks fit.[8]

Such permission may be granted by the court on the following grounds:

(1) *Formal defect.*—Though the expression "formal defect" has not been defined in the Code, it connotes some defect of form or procedure not affecting the merits of the case[9]; such as want of statutory

[1] Or. 23 R. 1(1).

[2] *Bijayananda Patnaik* v. *Satrughna Sahu*, AIR 1963 SC 1566 at p. 1571: (1964) 2 SCR 538; *Hulas Rai* v. *Firm K.B. Bass & Co.*, AIR 1968 SC 111 at p. 113: (1967) 3 SCR 886.

[3] *R. Ramamurthi* v. *V. Rajeswara*, (1972) 2 SCC 721: AIR 1973 SC 643.

[4] R. 1(4); see also *Sarguja Transport Service* v. *STAT*, (1987) 1 SCC 5: AIR 1987 SC 88; *Upadhyay & Co.* v. *State of U.P.*, (1999) 1 SCC 81: AIR 1999 SC 509.

[5] *Sarguja Transport Service* v. *STAT*, *supra*, at pp. 10-11 (SCC).

[6] R. 1(4); see also *Konkan Trading Co.* v. *Suresh Govind*, (1986) 2 SCC 424: AIR 1986 SC 1009.

[7] R. 1-A; see also *R. Rathinavel Chettiar* v. *Sivaraman*, (1999) 4 SCC 89.

[8] R. 1(3).

[9] *Ramrao Bhagwantrao* v. *Babu Appanna*, AIR 1940 Bom 121 (FB); *Khatuna* v. *Ramsewak Kashinath*, AIR 1986 Ori 1.

notice under Section 80 of the Code, misjoinder of parties or of causes of action, non-payment of proper court fee or stamp fee, failure to disclose cause of action, mistake in not seeking proper relief, improper or erroneous valuation of the subject-matter of the suit, absence of territorial jurisdiction of the court, defect in prayer clause, etc.[10]

But a defect affecting the merits of the case, or a defect which goes to the root of the plaintiff's case cannot be said to be a formal defect;[11] e.g. non-joinder of a necessary party, omission to substitute heirs, omission to include all the causes of action in the plaint, non-registration of a partnership firm, bar of limitation, deliberate undervaluation of the subject-matter of the suit, addition of a new factual plea, failure to bring legal representatives on record, non-examination of material witnesses, insufficiency of evidence, filing of representative suit without following procedure prescribed by Order 1 Rule 8 etc.[12]

(2) *Sufficient grounds.*—The expression "sufficient grounds" need not *generally* be construed *ejusdem generis* (of the same kind or nature) with formal defect.[13] For instance, where the suit was premature, or it had become infructuous, or where the plaintiff felt that the defendant was absent and even if the decree was passed, it could not be executed, or where two suits were filed and due to mistake both were withdrawn, or there was omission to file Power of Attorney, it was held to be a sufficient ground. Wide and liberal meaning should be given to the expression "sufficient grounds" by exercising power in the interest of justice (*ex debito justitiae*).[14]

[10] *Certificate Officer* v. *Kasturi Chand,* AIR 1970 Ori 239; *Brajamohan Sabato* v. *Sarojini Panigeahi,* AIR 1975 Ori 39; *Atul Krushna* v. *Rajukishore,* AIR 1956 Ori 77; *Tata Iron & Steel Co.* v. *Arun Chandra,* AIR 1967 AP 246; *S.H. Kelkar* v. *Mandakini Bai,* AIR 1970 Mys 163; *Beniram* v. *Gaind,* (1981) 4 SCC 209: AIR 1982 SC 789.

[11] *Robert Watson & Co.* v. *Collector of Zillah Rajashahye,* 13 MIA 160 (PC); *Dwarka Agarwalla* v. *Sashi Babha,* (1966) 32 Cut LT 864; *Harikrishna* v. *State of Orissa,* (1976) 42 Cut LT 339; *Raja Srinath Roy* v. *Dinabandhu Sen,* AIR 1914 PC 48.

[12] *Ramrao Bhagwantrao* v. *Babu Appanna, supra; Khatuna* v. *Ramsewak Kashinath, supra; Haridas* v. *Giridhari,* AIR 1934 Cal 59; *Muktanath Tewari* v. *Vidyashanker Dube,* AIR 1943 All 67; *Asian Assurance Co. Ltd.* v. *Madholal Sindhu,* AIR 1950 Bom 378; *Tarachand* v. *Gaibihaji Ahmed,* AIR 1956 Bom 632; *Trinath Parida* v. *Sobha Bholaini,* AIR 1973 Ori 37; *Savitri Devi* v. *Hira Lal,* AIR 1977 HP 91; *T.K. Prabhawati (Dr.)* v. *C.P. Umma Kunhathabi,* AIR 1981 Ker 170; *Khatuna* v. *Ramsewak,* AIR 1986 Ori 1; *Kannuswami Pillai* v. *Jagathambal,* ILR (1918) 41 Mad 701; *Prabhat Chandra Saikia* v. *Rajani Bala,* AIR 1972 Gau 85: (1997) 99 Bom LR 450; *Santosh Kumar* v. *Khedkar Mota and Co.,* 2001 AIHC 2840.

[13] *Tarachand case, supra; Sukhain* v. *Liquidator, Coop. Society,* AIR 1944 Nag 183; *Eleavarthi Nadipatha* v. *Eleavarthi Pedda Venkataraju,* AIR 1966 Mad 346; *Radha Krishna* v. *State of Rajasthan,* AIR 1977 Raj 131; *Atul* v. *Raj Kishore, supra; Brij Mohan* v. *Sarojini, supra.*

[14] *Beniram* v. *Gaind,* (1981) 4 SCC 209: AIR 1982 SC 789; *Konkan Trading Co.* v. *Suresh Govind,* (1986) 2 SCC 424: AIR 1986 SC 1009; *K.S. Bhoopathy* v. *Kokila,* (2000) 5 SCC 458: AIR 2000 SC 2132.

But, the power cannot be exercised where the plaintiff was not ready to conduct the suit; or where no notice was served to the defendant due to death, etc.

*(ii) Effect of leave*

It is in the discretion of the court to grant such permission and it can be granted by the court either on an application of the plaintiff or even *suo motu*. Such permission may be granted on such terms as to costs, etc. as the court thinks fit. The granting of permission to withdraw a suit with liberty to file a fresh suit removes the bar of *res judicata*. It restores the plaintiff to the position which he would have occupied had he brought no suit at all.

**(c) Suit by minor: Rule 1(2)**

By the Amendment Act of 1976, a specific provision has been made that where the plaintiff is a minor, neither the suit nor any part of the claim can be abandoned without the leave of the court.[15] Sub-rule (2) of Rule 1 enacts that an application for leave under the proviso to sub-rule (1) of Rule 1 must be accompanied by an affidavit of the next friend and also, if the minor of such person is represented by a pleader, by a certificate of the pleader to the effect that the proposed abandonment is, in his opinion, for the minor's benefit.

**(d) Withdrawal by one of the plaintiffs: Rule 1(5)**

Where there are two or more plaintiffs in a suit, the suit or part of the claim cannot be abandoned or withdrawn without the consent of all the plaintiffs.[16] One of such plaintiffs, however, may abandon or withdraw from the suit to the extent of his own interest in it.

**(e) Limitation: Rule 2**

A plaintiff withdrawing a suit with liberty to file a fresh suit is bound by the law of limitation in the same manner as if the first suit has not been filed at all.[17]

**(f) Applicability to other proceedings**

*(i) Appeals*

Appeal is a continuation of suit.[18] The provisions of this Order therefore, apply to withdrawal of appeals.[19] The appellant has a right to withdraw his appeal unconditionally and if he makes such an applica-

[15] Proviso to R. 1(1). *See also infra*, Chap. 16.

[16] R. 1(5).

[17] R. 2. *See also*, S. 14(3), Limitation Act, 1963.

[18] For detailed discussion, *see infra*, Pt. III, Chap. 2.

[19] *Bijayananda Patnaik* v. *Satrughna Sabu*, AIR 1963 SC 1566 at p. 1964: (1964) 2 SCR 538; *Ammini Kutty* v. *George Abraham*, AIR 1987 Ker 246.

tion, the court must grant it, subject to costs, and has no power to say that it will not permit the withdrawal and will go on with the hearing of the appeal.[20] Similarly, in appropriate cases, an appellate court can grant permission to withdraw a suit with liberty to file a fresh suit.[21] Such power, however, has to be exercised sparingly and cautiously.[22]

*(ii) Revisions*

The revisional jurisdiction of a High Court is a part of appellate jurisdiction of the High Court. Basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense.[23]

So far as the provisions of Order 23 of the Code are concerned, it has been held in some cases that they apply to withdrawal proceedings[24] but a contrary view has also been taken.[25]

*(iii) Representative suits*

Where the plaintiff sues in a representative character, he cannot abandon or withdraw the suit or a part of the claim. He may, however, get out of the suit, but that does not put an end to the litigation where other persons are interested in it and have a right to come in and continue the litigation.[26]

*(iv) Writ petitions*

The general principles for withdrawal of suits also apply to petitions under Article 226 or Article 32 of the Constitution. Ordinarily, therefore, a High Court or the Supreme Court would not refuse the prayer of the petitioner or his advocate to allow him to withdraw the petition, if such withdrawal is unconditional.[27] But he cannot thereafter institute a fresh petition on the same cause of action.[28]

[20] *Bijayananda Patnaik* v. *Satrughna Sabu*, AIR 1963 SC 1566 at p. 1571: (1964) 2 SCR 538.

[21] *Suraj Pal Singh* v. *Gharam Singh*, AIR 1973 All 466. *See also infra*, S. 107(2), Pt. III, Chaps. 2, 3.

[22] *Eleavarthi Nadipatha* v. *Eleavarthi Pedda Venkataraju*, AIR 1966 Mad 346.

[23] *Shankar Ramchandra Abhyankar* v. *Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74: AIR 1970 SC 1. For detailed discussion, *see infra*, Pt. III, Chaps. 2, 9.

[24] *Moosa Suleman* v. *Hanuman Idol.*, 1979 Bom CR 214.

[25] *Manhar Lal* v. *Meena Agencies*, (1986) 2 Guj LR 1079: 1986 Bom Rent Cas 106; *Mahabir Prasad* v. *Ramchandra Prasad*, AIR 1979 NOC 57 (Pat): 1978 BLJ 390.

[26] *Asian Assurance Co. Ltd.* v. *Madholal Sindhu*, AIR 1950 Bom 378; *Sheela Barse* v. *Union of India*, (1988) 4 SCC 226: AIR 1988 SC 2211. For detailed discussion of "Representative suit", *see supra*, Chap. 5.

[27] *Daryao* v. *State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574; *Gulabchand Chhotalal Parikh* v. *State of Gujarat*, AIR 1965 SC 1153: (1965) 1 SCR 547. For detailed discussion, *see supra*, "Withdrawal of petitions".

[28] *Sarguja Transport Service* v. *STAT*, (1987) 1 SCC 5: AIR 1987 SC 88; *Sahdeo Jha* v. *Union of India*, (1992) 2 SCC 190: (1992) 20 ATC 207; *Upadhyay & Co.* v. *State of U.P.*, (1999) 1 SCC 81: AIR 1999 SC 509.

But if such writ petition is withdrawn on some technical defect or logistic problem or availability of alternative remedy or such formal objection, fresh petition will not be barred.[29]

(*v*) *Execution proceedings*

The provisions of Order 23 do not apply to execution proceedings.[30] The court has no power to allow an application for execution to be withdrawn with liberty to file a fresh application. Withdrawal of an application without the permission of the court to bring a fresh application, hence is no bar to a fresh application for execution within the period of limitation.[31]

### (g) Appeal

An order granting or refusing permission to withdraw the suit with permission to file fresh suit on the same cause of action is neither a "decree" nor an appealable order. Hence, no appeal lies against such order.

### (h) Revision

An order granting or refusing permission to withdraw the suit with permission to file fresh suit on the same cause of action can be said to be a "case decided" under Section 115 of the Code. Such order is, therefore, revisable.

## 3. COMPROMISE OF SUIT: RULES 3 - 3-B

### (a) General

After the institution of the suit, it is open to the parties to compromise, adjust or settle it by an agreement or compromise.[32] The general principle is that all matters which can be decided in a suit can also be settled by means of a compromise.[33]

Rule 3 of Order 23 lays down that (*i*) where the court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement in writing and signed by the parties; or (*ii*) where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of

[29] *Haryana State Coop. Land Development Bank* v. *Neelam*, (2005) 5 SCC 91: AIR 2005 SC 1843. For detailed discussion and case law, *see*, V.G. Ramachandran, *Law of Writs* (2006) Vol. I, Pt. II, Chap. 6.

[30] R. 4.

[31] *Palaniandi Pillai* v. *Papathi Ammal*, AIR 1914 Mad 1: 15 Mad LT 100; *Hardit Singh* v. *Surinder Nath*, AIR 1982 Del 588; *Jai Prakash* v. *Khimraj*, AIR 1991 Raj 136; (1999) 2 Mad LJ 781.

[32] *Moti Lal Banker* v. *Maharaj Kumar Mahmood Hasan Khan*, AIR 1968 SC 1087: (1968) 3 SCR 158.

[33] *K.K. Chari* v. *R.M. Seshadri*, (1973) 1 SCC 761 at p. 777: AIR 1973 SC 1311 at p. 1323; *Hiralal Moolchand* v. *Barot Raman Lal*, (1993) 2 SCC 458: AIR 1993 SC 1449; *Prithvichand* v. *S.Y. Shinde*, (1993) 3 SCC 271: AIR 1993 SC 1929.

the suit, the court shall record such agreement, compromise or satisfaction and pass a compromise decree accordingly.[34]

**(b) Satisfaction of court**

It is the duty of the court to satisfy itself with regard to the terms of agreement. The court must be satisfied that the agreement is lawful and it can pass a decree in accordance with it. The court should also consider whether such a decree can be enforced against all the parties to the compromise.

A court passing a compromise decree performs a judicial act and not a ministerial act. Therefore, the court must satisfy itself by taking evidence or on affidavits or otherwise that the agreement is lawful. If the compromise is not lawful, an order recording compromise can be recalled by the court.[35] In case of any dispute between the parties to the compromise, it is the duty of the court to inquire into and decide whether there has been a lawful compromise in terms of which the decree should be passed. An agreement or compromise which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of Rule 3.[36]

The court in recording compromise should not act in a casual manner. Where it is alleged by one party that a compromise has not been entered into or is not lawful, it is the duty of the court to decide that question.[37]

**(c) Compromise on behalf of minor**

No next friend or guardian of a minor shall, without the leave of the court, enter into any agreement or compromise on behalf of the minor with reference to the suit, unless such leave is expressly recorded in the proceedings.[38]

**(d) Compromise by pleader**

A pleader stands in the same position as his client with regard to his authority to compromise the suit. An advocate appearing for a party, therefore, has always an implied authority to enter into a compromise on behalf of his client.[39]

[34] *Gurpreet Singh* v. *Chatur Bhuj*, (1988) 1 SCC 270: AIR 1998 SC 400; *Byram Pestonji* v. *Union Bank of India*, (1992) 1 SCC 31: AIR 1991 SC 2234; *Rachakonda Venkat* v. *R. Satya Bai*, (1996) 1 SCC 671.

[35] *Banwari Lal* v. *Chando Devi*, (1993) 1 SCC 581: AIR 1993 SC 1139.

[36] Explanation to R. 3; *Banwari Lal* v. *Chando Devi, supra*; *Ruby Sales & Services (P) Ltd.* v. *State of Maharashtra*, (1994) 1 SCC 531.

[37] *Banwari Lal* v. *Chando Devi, supra*.

[38] Or. 32 Rr. 6 and 7. *See also infra*, Chap. 16.

[39] For detailed discussion, *see supra*, Chap. 7.

**(e) Representative suit: Rule 3-B**

No agreement or compromise in a representative suit can be entered into without the leave of the court. Before granting such leave, notice to the persons interested should be given by the court.[40]

**(f) Compromise decree and res judicata**

A compromise decree is not a decision of the court. It is acceptance by the court of something to which the parties had agreed. A compromise decree merely sets the seal of the court on the agreement of the parties. The court does not decide anything. Nor can it be said that a decision of the court is implicit in it. Hence, a compromise decree cannot operate as *res judicata*.[41] In some cases, however, it is held that a consent decree would also operate as *res judicata*.[42]

It is submitted that the former view is correct since, in a consent decree, it cannot be said that a suit is heard and finally decided by the court on merits. Such a decree, however, may create an estoppel between the parties.[43]

**(g) Compromise decree and estoppel**

A compromise decree is not a decision on merits as it cannot be said that the case was "heard and finally decided". Nevertheless, it is based on consent or compromise of parties and, therefore, will operate as an estoppel.[44]

**(h) Execution of compromise decree**

A consent decree is executable in the same manner as an ordinary decree.[45] But if the decree gives effect to an unlawful compromise or is passed by the court having no jurisdiction to pass it, it is a *nullity* and its validity can be set up even in the execution.[46] The underlying

[40] R. 3-B; see also *Atma Ram* v. *Beni Prasad*, AIR 1935 PC 185.

[41] *Pulavarthi Venkata* v. *Valluri Jagannadha*, AIR 1967 SC 591 at pp. 594-95: (1964) 2 SCR 310.

[42] *Shankar* v. *Balkrishna*, AIR 1954 SC 352: (1955) 1 SCR 99; *Kumar Sudhendu Narain* v. *Renuka Biswas*, (1992) 1 SCC 206 at pp. 214-15: AIR 1992 SC 385 at p. 391; *Byram Pestonji* v. *Union Bank of India*, (1992) 1 SCC 31 at p. 48.

[43] *Pulavarthi Venkata* v. *Valluri Jagannadha*, AIR 1967 SC 591 at pp. 594-95: (1964) 2 SCR 310; *Sailendra Narayan Bhanja Deo* v. *State of Orissa*, AIR 1956 SC 346: 1956 SCR 72; *Mohanlal Goenka* v. *Benoy Krishna*, AIR 1953 SC 65: 1953 SCR 377; *Byram Pestonji* v. *Union Bank of India* (*ibid.*).

[44] *Shankar* v. *Balkrishna*, AIR 1954 SC 352: (1955) 1 SCR 99; *Sunderabai* v. *Devaji Shankar Deshpande*, AIR 1954 SC 82; *Sailendra Narayan Bhanja Deo* v. *State of Orissa*, AIR 1956 SC 346: 1956 SCR 72; *Prithvichand* v. *S.Y. Shinde*, (1993) 3 SCC 271: AIR 1993 SC 1929.

[45] *Moti Lal Banker* v. *Maharaj Kumar Mahmood Hasan Khan*, AIR 1968 SC 1087: (1968) 3 SCR 158; *Byram Pestonji* v. *Union Bank of India*, (1992) 1 SCC 31: AIR 1991 SC 2234.

[46] *Ferozi Lal Jain* v. *Man Mal*, (1970) 3 SCC 181: AIR 1970 SC 794; *Roshan Lal* v. *Madan Lal*, (1975) 2 SCC 785: AIR 1975 SC 2130; *Nai Bahu* v. *Lala Ramnarayan*, (1978) 1 SCC 58 at pp. 61-62: AIR 1978 SC 22 at p. 25.

principle is that a defect of jurisdiction strikes at the very authority of the court to pass a decree and such a defect cannot be cured even by the consent of parties.[47]

Prior to the Amendment Act of 1976, a compromise decree could be passed only so far as it related to the suit. The Amendment Act, 1976 now specifically provided that whether or not the subject-matter of the agreement, compromise or satisfaction is identical with the subject-matter of the suit, if it is between the parties and the compromise is a lawful one, the court can pass such a decree.[48]

### (i) Bar to suit: Rule 3-A

No suit can be filed to set aside a compromise decree on the ground that it is not lawful.[49]

### (j) Appeal

No appeal lies against a decree passed by the court with consent of parties,[50] nor a suit can be instituted to set aside a compromise decree on the ground that such compromise is not lawful,[51] though such order was appealable before the Amendment Act, 1976.[52]

Rule 1-A(2) of Order 43, however, lays down that in an appeal against a decree passed after recording or refusing to record a compromise, the order recording or refusing to record a compromise can also be questioned. A party challenging the compromise can file an appeal under Section 96(1) of the Code and Section 96(3) shall not bar such an appeal.[53] Likewise, such a decree can be challenged by filing a suit on the ground of fraud, undue influence or coercion.[54]

A compromise decree is a creature of an agreement and does not stand on a higher footing than the agreement which preceded it. It is, therefore, liable to be set aside on any of the grounds which may invalidate an agreement.[55]

[47] For detailed discussion, *see supra*, Chap. 1.

[48] R. 3. See also *S.G. Thimmappa* v. *T. Anantha*, AIR 1986 Kant 1; *Union Carbide Corpn.* v. *Union of India*, (1991) 4 SCC 584: AIR 1992 SC 248.

[49] R. 3-A. See also *S.G. Thimmappa* v. *T. Anantha*, *supra*; *Banwari Lal* v. *Chando Devi*, *supra*; *Ruby Sales & Services (P) Ltd.* v. *State of Maharashtra*, *supra*.

[50] S. 96(3). *See also infra*, Pt. III, Chap. 2.

[51] R. 3-A.

[52] Or. 43 R. 1 (*m*) (since *deleted*).

[53] *Banwari Lal* v. *Chando Devi*, (1993) 1 SCC 581: AIR 1993 SC 1139.

[54] *Thimmappa* v. *Anantha*, AIR 1986 Kant 1; *Gosto Behari Pramanik* v. *Malati Sen*, AIR 1985 Cal 379; *Banwari Lal* v. *Chando Devi*, *supra*; *Ruby Sales & Services (P) Ltd.* v. *State of Maharashtra*, *supra*; *see also infra*, Pt. III, Chap. 2.

[55] *Ruby Sales & Services (P) Ltd.* v. *State of Maharashtra*, (1994) 1 SCC 531 at p. 535.

**(k) Revision**

An order recording or refusing to record compromise is a "case decided" within the meaning of Section 115 of the Code. A High Court can revise such order provided the conditions laid down in the said section are satisfied.[56]

[56] For detailed discussion of "revisional jurisdiction of High Courts", *see infra*, Pt. III, Chap. 9.

PART II

# 13 Death, Marriage and Insolvency of Parties

SYNOPSIS


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## 1. GENERAL

ORDER 22 deals with the creation, assignment or devolution of interest during the pendency of suits. It also applies to appeals[1], but not to execution proceedings.[2] The provisions of Order 22 are exhaustive.[3] They should, however, be liberally construed to serve the ends of justice.[4]

Such creation, assignment or devolution may arise in the following circumstances:

(*i*) Death of a party (Rules 1 to 6);
(*ii*) Marriage of a party (Rule 7);
(*iii*) Insolvency of a party (Rule 8); or
(*iv*) Assignment of interest (Rule 10).

[1] Or. 22 R. 11.

[2] R. 12.

[3] *Bhagwan Swaroop* v. *Mool Chand*, (1983) 2 SCC 132: AIR 1983 SC 355; *Padmaram* v. *Surja*, AIR 1961 Raj 72; *Grindlays Bank Ltd.* v. *C.R.E., Wood & Co. (P) Ltd.*, AIR 1984 Del 138; *P. Preetha* v. *Panyam Cements & Mineral Industries Ltd.*, (2001) 6 Andh LT 779.

[4] *Sardar Amarjit Singh* v. *Pramod Gupta*, (2003) 3 SCC 272: AIR 2003 SC 2588.

## 2. DEATH OF PARTY: RULES 1-6

### (a) Death of plaintiff

Where the sole plaintiff dies, the suit will not abate, if the right to sue survives. It can be continued by the heirs and legal representatives of the deceased plaintiff. If the right to sue does not survive, the suit will come to an end.[5]

Where one of the several plaintiffs dies and the right to sue survives to the surviving plaintiff or plaintiffs, the court will make an entry to that effect and proceed with the suit by the surviving plaintiff or plaintiffs.[6]

Where one of the several plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs or where the sole plaintiff dies and the right to sue survives, the court on an application by the legal representative of the deceased plaintiff will make him a party and proceed with the suit.[7]

Where no such application is made within the period of limitation (ninety days), the suit shall abate so far as the deceased plaintiff is concerned. On an application by the defendant, the court may award costs, which might have been incurred by him in defending the suit, from the estate of the deceased plaintiff.[8]

Where the plaintiff dies after hearing and before pronouncement of judgment, the suit shall not abate.[9]

The same principle will apply in case of death of the plaintiff after passing of preliminary decree and before final decree.[10]

### (b) Death of defendant

Where the sole defendant dies, the suit shall not abate if the right to sue survives. It can be continued against the heirs and legal representatives of the deceased defendant.[11]

Where one of the several defendants dies and the right to sue survives against the surviving defendant or defendants, or where the sole surviving defendant dies and the right to sue survives, the court, on an application by the legal representatives of the deceased defendant, will make him a party and proceed with the suit.[12]

[5] R. 1. For detailed discussion, *see infra*, "Right to sue".

[6] R. 2.

[7] R. 3(1).

[8] R. 3(2).

[9] R. 6. See also *N.P. Thirugnanam* v. *Dr. R. Jagan Mohan*, (1995) 5 SCC 115: AIR 1996 SC 116.

[10] *Jitendra Ballav* v. *Dhirendranath*, AIR 2004 Ori 148.

[11] R. 1. For detailed discussion, *see infra*, "Right to sue".

[12] R. 2.

Where no such application is made within the period of limitation (ninety days), the suit shall abate as against the deceased defendant.[13]

The court may, if it thinks fit, exempt the plaintiff from substituting the legal representative of a non-contesting or *pro forma* defendant and pronounce judgment notwithstanding the death of such defendant.[14]

Where the plaintiff is ignorant of the death of the defendant and for that reason is unable to make an application for substitution of the legal representative of the deceased defendant within the period of limitation, and the suit stands abated, he may make an application for setting aside such abatement within the period of limitation (ninety days), stating that due to ignorance of the death of the defendant he could not make an application within time. The court shall consider the application, having due regard to the fact of such circumstance.[15]

Where the defendant dies after hearing and before the pronouncement of judgment, the suit shall not abate.[16] The suit also does not abate on account of the death of an unnecessary party.[17]

### (c) Right to sue

When a party to a suit dies, the first question to be decided is whether the right to *sue* survives or not. If it does not, there is an end to the suit. If it does, the suit will not abate. It can be continued by or against the heirs and legal representatives of the deceased party.[18]

The expression "right to sue" has not been defined in the Code, but it may be interpreted to mean "right to seek relief".[19] In other words, "right to sue" survives if the cause of action survives or continues.

The general rule is that all rights of action and all demands whatsoever, existing in favour of or against a person at the time of his death, survive to or against his representatives.[20] But in cases of personal actions, i.e. actions where the relief sought is personal to the deceased or the rights intimately connected with the individuality of the deceased,

[13] R. 4(1).

[14] R. 4(4).

[15] R. 4(5).

[16] R. 6.

[17] *Radha Rani* v. *Hanuman Prasad*, AIR 1966 SC 216: (1966) 1 SCR 1; *Sri Chand* v. *Jagdish Pershad*, AIR 1966 SC 1427: (1966) 3 SCR 451; *Mangal Singh* v. *Rattno*, AIR 1967 SC 1786: (1967) 3 SCR 454; *Kanhaiyalal* v. *Rameshwar*, (1983) 2 SCC 260: AIR 1983 SC 503; *Union of India* v. *Avtar Singh*, (1984) 3 SCC 589: AIR 1984 SC 1048.

[18] R. 1. See also *Jayaram Reddy* v. *Revenue Divisional Officer*, (1979) 3 SCC 578 at p. 583: AIR 1979 SC 1393 at p. 1396; *Shri Krishna Singh* v. *Mathura Ahir*, (1981) 3 SCC 689 at p. 720: AIR 1980 SC 707.

[19] *Ibrahimbhai* v. *State of Gujarat*, AIR 1968 Guj 202 at p. 207: (1967) 8 Guj LR 793 at p. 801; *Phool Rani* v. *Naubat Rai*, (1973) 1 SCC 688 at p. 692: AIR 1973 SC 2110 at p. 2111.

[20] *Shri Krishna Singh* v. *Mathura Ahir*, (1981) 3 SCC 689 at p. 720: AIR 1980 SC 707, at p. 726; *Ambalika Padhi* v. *Radhakrishna Padhi*, (1992) 1 SCC 667: AIR 1992 SC 431; *M. Veerappa* v. *Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506.

the right to sue will not survive to or against his representatives. In these cases, the maxim *actio personalis moritur cum persona* (a personal action dies with the person) applies.[21]

This principle is found in Section 37 of the Indian Contract Act, 1872[22] and Section 306 of the Indian Succession Act, 1925.[23]

Thus, it has been held that the right to sue survives in a suit by a landlord against his tenant for the possession of the rented house after the death of the landlord; or in a suit for rendition of accounts against a trustee where the trustee died; or in a suit for specific performance of the contract after the death of the plaintiff; or in a suit for partition of ancestral property by a coparcener after his death; or in a suit for pre-emption. On the other hand, it has been held that the right to sue does not survive in the following cases: in a suit for damages for assault, personal injuries or for malicious prosecution; or for defamation; or for breach of contract of betrothal; or for dissolution of marriage; or

[21] *Girijanandini Devi* v. *Bijendra Narain*, AIR 1967 SC 1124: (1967) 1 SCR 93; *Hazari* v. *Neki*, AIR 1968 SC 1205: (1968) 2 SCR 833; *Phool Rani case, supra; Melepurath Sankunni* v. *Thekittil Geopalankutty*, (1986) 1 SCC 118: AIR 1986 SC 411; *M. Veerappa* v. *Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506; *Puran Singh* v. *State of Punjab*, (1996) 2 SCC 205: AIR 1996 SC 1092; *Koodalmanickam* v. *Thachudaya Kaimal*, (1996) 2 SCC 680.

[22] S. 37, Contract Act, 1872 reads as under:

"*Obligation of parties to contracts.*–The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of death of such promisors before performance, unless a contrary intention appears from the contract.

*Illustrations*

(*a*) *A* promises to deliver goods to *B* on certain day on payment of Rs 1000. *A* dies before that day. *A*'s representatives are bound to deliver the goods to *B*, and *B* is bound to pay Rs 1000 to A's representatives.

(*b*) *A* promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before that day. The contract cannot be enforced either by *A*'s representatives or by *B*."

[23] S. 306, the Succession Act, 1925 reads:

"*Demands and rights of action of or against deceased survive to and against executor or administrator.* All demands whatsoever and all rights to prosecute or defend any action or special proceedings existing in favour of or against a person at the time of his decease, survive to and against his executors and administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

*Illustrations*

(*a*) *A* collision takes place on a railway station in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

(*b*) *A* sues *B* for divorce. *A* dies. The cause of action does not survive to his representative." See also *Melepurath* v. *Thekittil*, (1986) 1 SCC 118: AIR 1986 SC 411.

in a suit for specific performance of a contract involving exercise of special skill like a promise to paint a picture, or to sing a song.

**(d) Nature of inquiry**

A personal action dies with the death of the person (*actio personalis moritur cum persona*). This doctrine, however, operates in a limited class of actions *ex delicto*, discussed above. In other actions, where the right to sue survives in spite of the death of the person, the suit does not abate. Hence, whenever a party to a suit dies, the first question to be decided is as to whether the right to sue survives or not. If the right is held to be a personal right which extinguishes with the death of the person concerned and does not devolve on the legal representatives, there is an end to the suit. But if the right to sue survives against the legal representatives of the plaintiff, the suit can continue.[24]

In *M. Veerappa* v. *Evelyn Sequeira*[25], the Supreme Court rightly stated:

> "If the entire suit claim is founded on torts the suit would undoubtedly abate. If the action is founded partly on torts and partly on contract then such part of the claim as relates to torts would stand abated and the other part would survive. If the suit claim is founded entirely on contract then the suit has to proceed to trial in its entirety and be adjudicated upon."[26]

In *Melepurath Sankunni* v. *Thekittil Geopalankutty*[27], the Supreme Court held that where a suit for defamation is dismissed and the plaintiff files an appeal, the plaintiff-appellant seeks to enforce his right to sue for damages against the defendant. The right to sue, therefore, does not survive on the death of the plaintiff. But where such suit is decreed, even on the death of the plaintiff, the legal representatives are entitled to continue the appeal since the question relates to benefit or detriment to the estate of the deceased. In such case, the cause of action merges with the decree.

**(e) Applicability to other proceedings: Rules 11-12**

The maxim *actio personalis moritur cum persona* (a personal action dies with the person) does not apply only to suits in those cases where the plaintiff dies during the pendency of a suit but also to cases where the plaintiff dies during the pendency of appeal or appeals. *This is on the footing that by reason of the dismissal of the suit by the trial court or the first*

[24] *Puran Singh* v. *State of Punjab*, (1996) 2 SCC 205 at p. 210: AIR 1996 SC 1092.

[25] (1988) 1 SCC 556: AIR 1988 SC 506.

[26] *Ibid*, at p. 568 (SCC): at p. 512 (AIR).

[27] (1986) 1 SCC 118: AIR 1986 SC 411; see also *Yallawwa* v. *Shantavva*, (1997) 11 SCC 159: AIR 1997 SC 35.

*appellate court, as the case may be, the plaintiff stands relegated to his original position before the trial court.*[28] (emphasis supplied)

This principle is, however, subject to the rule laid down in *Melepurath Sankunni* v. *Thekittil Geopalankutty*[29].

The provisions of Order 22 of the Code in terms do not apply to execution proceedings,[30] to writ petitions under Article 226 or 32 of the Constitution,[31] or to revisions.[32]

A representative suit or appeal does not abate on the death of one of the plaintiffs or appellants. The remaining plaintiff/plaintiffs or appellant/appellants may continue the proceedings.[33]

**(f) Partial abatement**

An abatement of suit may be total or partial. If the entire suit is founded on tort or on personal action, the suit would debate as a whole on the death of the plaintiff or the defendant, as the case may be. But if the action is founded partly on tort and partly on contract, the claim relating to tort will abate whereas the claim relating to contract will survive.[34]

Thus, if *A* files a suit against *B*, a trustee under Section 92 of the Code for his removal as also for settlement of scheme and *B* dies during the pendency of suit; the suit will abate as regards his removal, but it can be continued as regards settlement of scheme.[35]

**(g) Determination of question as to legal representative**

Rule 5 deals with the determination of the question as to legal representatives. It provides that where the question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, it is the duty of the court to decide such question. Wherever there is a dispute as to who is the legal representative of the deceased plaintiff or the deceased defendant, the court may hold an inquiry and determine the question. A lengthy or elaborate inquiry is, however, not necessary. Where such question arises before the appellate court, that court may direct the subordinate court to inquire into

[28] *M. Veerappa* v. *Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506.

[29] (1986) 1 SCC 118: AIR 1986 SC 411.

[30] Or. 22 R. 12; see also *Ghantesher* v. *Madan Mohan*, (1996) 11 SCC 446: AIR 1997 SC 471.

[31] *Puran Singh* v. *State of Punjab*, (1996) 2 SCC 205: AIR 1996 SC 1092.

[32] *Swastik Oil Mills Ltd.* v. *CST*, AIR 1968 SC 843: (1968) 2 SCR 492; *Mohd. Sadaat Ali* v. *Corpn. of City of Lahore*, AIR 1949 Lah 186 (FB); *Narpatsingh* v. *Gokuldas*, AIR 1966 AP 384.

[33] *Charan Singh* v. *Darshan Singh*, (1975) 1 SCC 298: AIR 1975 SC 371; *Gujarat SRTC* v. *Valji Mulji Soneji*, (1979) 3 SCC 202: AIR 1980 SC 64.

[34] *M. Veerappa* v. *Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506.

[35] *Anand Rao* v. *Ramdas*, (1920-21) 48 IA 12: AIR 1921 PC 123.

and give its findings on the dispute as to who is the legal representative of a deceased party.[36]

**(h) Duty of pleader to communicate death of party: Rule 10-A**

Rule 10-A as inserted by the Amendment Act of 1976 imposes an obligation on the pleader of the parties to communicate to the court the fact of the death of the party represented by him.[37]

As a general rule, on the death of the client, his contract with the pleader comes to an end and so the authority of the pleader to act on behalf of his client expires. Such a situation, however, creates many complications. A provision is, therefore, made which imposes a duty on the part of the pleader to inform the court of the death of his client. It also enacts that for the said purpose the contract between the pleader and the party shall be deemed to subsist.[38]

The legislative intention of casting burden on the advocate of a party to give intimation of death of the party represented by him and for this limited purpose to introduce a deeming fiction of the contract being kept subsisting between the advocate and the deceased party through his legal representative/representatives was that the other party may not be taken unaware at the time of hearing of appeal.[39] As observed in *Gangadhar* v. *Raj Kumar*[40], this rule has been introduced "in order to avoid procedural justice scoring a march over substantial justice".

**(i) Procedure where there is no legal representative**

Rule 4-A has been added by the Amendment Act of 1976. It lays down the procedure where there is no legal representative of a party who has died during the pendency of the suit or a legal representative is not found. The underlying object of this provision is that the other side should not suffer because of the absence of the legal representative of the deceased party.

**(j) Effect of abatement: Rule 9**

Where the suit abates or is dismissed due to failure of the plaintiff to bring the legal representative or representatives of the deceased party, no fresh suit will lie on the same cause of action. The only remedy available to the plaintiff or the person claiming to be the legal representative is to get the abatement set aside.[41]

[36] Proviso to R. 5.

[37] *O.P. Kathpalia* v. *Lakhmir Singh*, (1984) 4 SCC 66 at p. 82: AIR 1984 SC 1744 at p. 1755; *Gangadhar* v. *Raj Kumar*, (1984) 1 SCC 121 at p. 125: AIR 1983 SC 1202 at p. 1205.

[38] Statement of Objects and Reasons.

[39] *Gangadhar* v. *Raj Kumar*, *infra*. See also *Bhagwan Swaroop* v. *Mool Chand*, (1983) 2 SCC 132: AIR 1983 SC 355.

[40] (1984) 1 SCC 121 at p. 125: AIR 1983 SC 1202 at p. 1205.

[41] R. 9.

Such abatement or dismissal of the suit, however, does not operate as *res judicata*.[42]

**(k) Suit against dead person**

No suit can be filed against a dead person. Such a suit is *non est* and has no legal effect. Likewise, a decree passed against a dead man is a nullity.[43]

But where a suit is filed against a dead person by the plaintiff without knowledge of such death, on the application by the plaintiff, the court may permit the legal representatives of the defendant to be brought on record. On such impleadment, the suit shall be deemed to have been instituted on the day the plaint was presented. *The court's satisfaction breathes life into the suit.*[44] (emphasis supplied)

**(l) Consequences**

On the death of a party to the suit, the following consequences ensue;

| | | |
|---|---|---|
| 1. (*a*) | Where one of the several plaintiffs dies and the right to sue survives in favour of the surviving plaintiff or plaintiffs alone; or | — the Court shall record such fact and proceed with the suit.[45] |
| (*b*) | where one of the several defendants dies and the right to sue survives against the surviving defendant or defendants alone, | |
| 2. (*a*) | Where one of the several plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone; or | — on an application being made, the court shall make the legal representatives of the deceased plaintiff a party and proceed with the suit.[46] |
| (*b*) | where a sole surviving plaintiff dies and the right to sue survives, | If no such application is made within the prescribed period, the suit shall abate so far as the deceased plaintiff is concerned.[47] |

[42] *Ibid, see also supra*, "Res judicata", Chap. 2.

[43] *Hira Lal* v. *Kali Nath*, AIR 1962 SC 199 at p. 201: (1961) 2 SCR 747; see also *Amba Bai* v. *Gopal*, (2001) 5 SCC 570: AIR 2001 SC 2003.

[44] *Karuppaswamy* v. *C. Ramamurthy*, (1993) 4 SCC 41 at p. 45: AIR 1993 SC 2324 at p. 2326.

[45] R. 2.

[46] R. 3(1).

[47] R. 3(2).

In such case, on an application by the defendant, the court may award to him the costs which he may have incurred in defending the suit from the estate of the deceased plaintiff.[48]

3. (*a*) Where one of the several defendants dies and the right to sue does not survive against surviving defendant or defendants alone; or

— on an application being made, the court shall make the legal representatives of the deceased defendant a party and proceed with the suit.[49]

(*b*) where a sole surviving defendant dies and the right to sue survives,

If no such application is made within the prescribed period, the suit shall abate against the deceased defendant.[50]

The court may, however, at its discretion exempt a plaintiff from substituting the legal representatives of a non-contesting or *pro forma* defendant and pronounce the judgment notwithstanding the death of such defendant.[51]

Where the plaintiff was ignorant of the death of a defendant and could not, for that reason, make an application for the substitution of legal representative of such defendant within the prescribed period, and the suit is abated, he (plaintiff) may make an application for such abatement within the prescribed period, and in considering the said application, the court shall have due regard to the fact of such ignorance of the plaintiff.[52]

4. Where either party dies between the conclusion of the hearing and the pronouncement of the judgment,

— suit shall not abate whether the cause of action survives or not.[53]

[48] R. 3(2).
[49] R. 4(1).
[50] R. 4(3).
[51] R. 4(4).
[52] R. 4(5).
[53] R. 6

**(m) General principles**

With regard to the death of a party to a proceeding, from the various judgments of the Supreme Court, the following general principles emerge:

(1) If an application is not made within the time allowed by law to bring the legal representatives of the deceased on record, the suit will abate so far as the deceased plaintiff or the deceased defendant is concerned.[54] Such abatement is automatic and no specific order is envisaged by the Code.[55]

(2) When once a suit or appeal is abated, a specific order setting aside such abatement is necessary.[56]

(3) Where in a proceeding, a party dies and one of the legal representatives is already on record in another capacity, what is necessary is that he should be described also as an heir and legal representative of the deceased party. Failure to describe him as such would not, however, abate the proceeding.[57]

(4) If there are two or more heirs and legal representatives of the deceased party and one or more have been brought on record within time, a suit or an appeal will not abate on the ground that all the legal representatives have not been brought on record in time.[58]

(5) If the legal representatives of the deceased plaintiff or the deceased defendant are brought on record within the prescribed period at one stage of the suit, it will enure for the benefit of the subsequent stages of the suit.[59]

(6) Where a plaintiff or an appellant after diligent and *bona fide* inquiry ascertains who the legal representatives of a deceased defendant or respondent are, and brings them on record within the prescribed period, there is no abatement of the suit or appeal if the impleaded legal representatives sufficiently

[54] *Union of India* v. *Ram Charan*, AIR 1964 SC 215: (1964) 3 SCR 467; *Jayaram Reddy* v. *Revenue Divisional Officer*, (1979) 3 SCC 578: AIR 1979 SC 1393; *Zilla Singh* v. *Chandgi*, 1991 Supp (2) SCC 430: AIR 1991 SC 263; *Chaudhry Ram* v. *State of Haryana*, 1994 Supp (3) SCC 675.

[55] *Madan Naik* v. *Hansubala Devi*, (1983) 3 SCC 15 at pp. 18-19: AIR 1983 SC 676 at p. 679; *Jayaram Reddy* v. *Revenue Divisional Officer* (*ibid.*).

[56] *Ibid*, see also, R. 9.

[57] *Mahabir Prasad* v. *Jage Ram*, (1971) 1 SCC 265: AIR 1971 SC 742; *Jayaram Reddy* v. *Revenue Divisional Officer*, (1979) 3 SCC 578: AIR 1979 SC 1393; *Mohd. Arif* v. *Allah Rabbul*, (1982) 2 SCC 455: AIR 1982 SC 948.

[58] *Mahabir Prasad* v. *Jage Ram*, *supra*; *Ramdass* v. *Director of Consolidation*, (1971) 1 SCC 460: AIR 1971 SC 673; *Jayaram Reddy* v. *Revenue Divisional Officer*, *supra*; *BANCO National Ultramarino* v. *Nalini Bai Naique*, 1989 Supp (2) SCC 275: AIR 1989 SC 1589.

[59] *Rangubai Kom Sankar* v. *Sunderabai Bhratar*, AIR 1965 SC 1794: (1965) 3 SCR 211; *Jayaram Reddy* v. *Revenue Divisional Officer*, *supra*.

represent the estate of the deceased. The decree passed by the court in such a case will bind not only those impleaded but the entire estate too.[60]

(7) The above rule, however, does not apply where the impleading of a person as a legal representative is not found to be *bona fide* or where there has been fraud or collusion between the creditor and the heir impleaded or there are other circumstances which indicate that there has not been a fair or real trial.[60]

(8) The doctrine of abatement applies to an appeal also.[61]

(9) No suit can be filed against a dead person. But if a suit is filed against a dead man without the knowledge that he is dead, it is not *non est*. On an application by the plaintiff, the court may permit to implead the right defendant in the place of the deceased defendant.[62] *The court's satisfaction breathes life into the suit.*[63] (emphasis supplied)

(10) Legal representatives of the deceased are entitled to take all the contentions available to the deceased. But if they intend to take personal or individual defences, they must get themselves impleaded in their personal capacity.[64]

(11) On the death of the plaintiff/appellant, whether or not the suit/appeal abates depends upon whether the suit/appeal is founded entirely on torts or on contract, or partly on torts and partly on contract.[65]

[60] *Harihar Prasad* v. *Balmiki Prasad*, (1975) 1 SCC 212: AIR 1975 SC 733; *Jayaram Reddy* v. *Revenue Divisional Officer, supra*; *Daya Ram* v. *Shyam Sundari*, AIR 1965 SC 1049: (1965) 1 SCR 231; *N.K. Mohd. Sulaiman* v. *N.C. Mohd. Ismail*, AIR 1966 SC 792: (1966) 1 SCR 937; *Dolai Maliko* v. *Krushna Chandra*, AIR 1967 SC 49: 1966 Supp SCR 22; *Collector of 24 Parganas* v. *Lalith Mohan*, 1988 Supp SCC 578: AIR 1988 SC 2121; *BANCO National Ultramarino* v. *Nalini Bai Naique, supra*; *Raj Rajeshwari Prasad* v. *Shashi Bhushan*, (1995) 5 SCC 579.

[61] R. 11. See also *Ramagya Prasad* v. *Murli Prasad*, (1973) 2 SCC 9: AIR 1972 SC 1181; *Jayaram Reddy* v. *Revenue Divisional Officer, supra*, at p. 589 (SCC): at p. 1401 (AIR); *Madan Naik* v. *Hansubala Devi*, (1983) 3 SCC 15: AIR 1983 SC 676; *Bhagwan Sawaroop* v. *Mool Chand*, (1983) 2 SCC 132: AIR 1983 SC 355; *M. Veerappa* v. *Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506.

[62] *Ramprasad* v. *Vijaykumar*, AIR 1967 SC 278: 1966 Supp SCR 188; *Cuttack Municipality* v. *Shyamsundar Behera*, AIR 1977 Ori 137; *Sisir Kumar* v. *Manindra Kumar*, AIR 1958 Cal 681; *C. Mutu* v. *Bharath Match Works*, AIR 1964 Mys 293.

[63] *Karuppaswamy* v. *C. Ramamurthy*, (1993) 4 SCC 41 at p. 45: AIR 1993 SC 2324 at p. 2326.

[64] *Bal Kishan* v. *Om Parkash*, (1986) 4 SCC 155: AIR 1986 SC 1952; *Vidyawati* v. *Man Mohan*, (1995) 5 SCC 431: AIR 1995 SC 1653.

[65] *M. Veerappa* v. *Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506; *Kanta Rani* v. *Rama Rani*, (1988) 2 SCC 109: AIR 1988 SC 726; *Collector of 24 Parganas* v. *Lalith Mohan*, 1988 Supp SCC 578: AIR 1988 SC 2121.

(12) No decree can be passed in favour of or against a dead person. But such a decree is not *necessarily* a nullity. In certain circumstances, it is permissible for the court to reopen the proceedings or to remand the case and to decide the case after hearing the parties likely to be affected thereby.[66]

(13) Where a joint and indivisible decree is passed by the court below in favour of two or more plaintiffs and one of them dies and the defendant fails to bring the heirs and legal representatives of the deceased plaintiff on record in time, the appeal against the other respondents also abates.[67]

(14) In cross-appeals arising from the same decree where parties to a suit adopt rival positions, on the death of a party if his legal representatives are impleaded in one appeal it will not enure for the benefit of cross-appeal and the same would abate.[68]

(15) If an appeal as well as cross-objections in the appeal are before the court and the respondent dies, substitution of his legal representatives in the cross-objections, being part of the same record, would enure for the benefit of the appeal and the failure of the appellant to implead the legal representatives of the deceased respondent would not have the effect of abating the appeal but not *vice versa*.

(16) A suit filed in a representative capacity does not abate on the death of one of the plaintiffs[69] nor a suit filed by a *karta* of a Hindu undivided family abates on his death and the succeeding *karta* can continue the proceedings.[70]

(17) A suit or appeal does not abate on account of the death of an unnecessary, non-material or *pro forma* defendant or respondent.[71]

[66] *Melepurath Sankunni* v. *Thekittil Geopalankutty*, (1986) 1 SCC 118: AIR 1986 SC 411; *M. Veerappa* v. *Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506; *Hira Lal* v. *Kali Nath*, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747; *Jayaram Reddy* v. *Revenue Divisional Officer*, *supra*, at p. 583 (SCC): at p. 1396 (AIR); *Jiviben Lavji Raganath* v. *Jadavji Devshanker*, AIR 1978 Guj 32: (1977) 18 Guj LR 883; *Prempiari* v. *Dukhi*, AIR 1976 All 444; *Radhakrishna, Chatursingh*, AIR 1987 Guj 220; *Himangshu Bhusan* v. *Manindra Mohan*, AIR 1954 Cal 205; *Raddulal* v. *Mahabirprasad*, AIR 1959 Bom 384; *Abdul Azeez* v. *Dhanabagiammal*, AIR 1983 Mad 5; *Karuppaswamy* v. *C. Ramamurthy*, (1993) 4 SCC 41: AIR 1993 SC 2324.

[67] *State of Punjab* v. *Nathu Ram*, AIR 1962 SC 89: (1962) 2 SCR 636; *Harihar Prasad* v. *Balmiki Prasad*, *supra*; *Bibijan* v. *Murlidhar*, (1995) 1 SCC 187; *Papanna* v. *State of Karnataka*, (1996) 1 SCC 291.

[68] *Jayaram Reddy case*, *supra*, at p. 595 (SCC): at p. 1406 (AIR); *Chaudhry Ram* v. *State of Haryana*, 1994 Supp (3) SCC 675.

[69] *Charan Singh* v. *Darshan Singh*, (1975) 1 SCC 298: AIR 1975 SC 371.

[70] *Gujarat SRTC* v. *Valji Mulji*, (1979) 3 SCC 202: AIR 1980 SC 64.

[71] *Mangal Singh* v. *Rattno*, AIR 1967 SC 1786: (1967) 3 SCR 454; *Kanhaiyalal* v. *Rameshwar*, (1983) 2 SCC 260: AIR 1983 SC 503; *Union of India* v. *Avtar Singh*, (1984) 3

(18) Neither a suit nor an appeal abates where any party to a suit or an appeal dies between the conclusion of hearing and the pronouncement of the judgment.[72]

(19) The court has no inherent power under Section 151 of the Code to implead legal representatives of a deceased respondent if the suit had abated on account of the appellant not taking appropriate steps within time to bring the legal representatives of the deceased party on record.[73]

(20) When a suit or appeal abates, a very valuable right accrues to the other party and such a right cannot be ignored or interfered with lightly. In the name of doing substantial justice to one party, no injustice should be done to the other party.[74]

(21) Laches or negligence furnish no good grounds for setting aside abatement. A party guilty of negligence must bear the consequences and must suffer.[75] However, if there is a slight negligence or minor laches which is not intentional in not making an application within time, an application for setting aside abatement can be granted for doing substantial justice.[76] The rural background of the parties can also be taken into account for this purpose.[77]

(22) If the parties proceed with the matter without raising any objection regarding abatement of suit or appeal, no objection can be allowed at a later stage.[78]

(23) A mere excuse about the plaintiff not knowing of the death of the opposite party is not sufficient. He has to state reasons, which, according to him, led to his not knowing of the death

SCC 589: AIR 1984 SC 1048; *Upper India Cable Co.* v. *Bal Kishan*, (1984) 3 SCC 462: AIR 1984 SC 1381.

[72] R. 6. See also *N.P. Thirugnanam* v. *Dr. R. Jagan Mohan*, (1995) 5 SCC 115; *Shri Krishna Singh* v. *Mathura Ahir*, (1981) 3 SCC 689 at p. 720: AIR 1980 SC 707 at pp. 726-27; *Shiv Dass* v. *Devki*, 1995 Supp (2) SCC 658; *Union of India* v. *Avtar Singh*, (1984) 3 SCC 589: AIR 1984 SC 1048.

[73] *Union of India* v. *Ram Charan*, AIR 1964 SC 215: (1964) 3 SCR 467.

[74] *Bhagwan Swaroop* v. *Mool Chand*, (1983) 2 SCC 132 at p. 139: AIR 1983 SC 355 at p. 358; *State of Gujarat* v. *Sayed Mohd. Baquir*, (1981) 4 SCC 1: AIR 1981 SC 1921; *Newanness* v. *Sk. Mohamad.*, 1995 Supp (2) SCC 529.

[75] *Bhagwan Swaroop* v. *Mool Chand* (*ibid.*) at p. 140 (SCC): at p. 359 (AIR).

[76] Ibid, *Shadi* v. *Ram Pal*, (1983) 2 SCC 255; *Bapurao* v. *Jamunabai*, (1983) 2 SCC 253: AIR 1983 SC 186; *Harjeet Singh* v. *Raj Kishore*, (1984) 3 SCC 573: AIR 1984 SC 1238; *Gangadhar* v. *Raj Kumar*, (1984) 1 SCC 121 at pp. 124-25: AIR 1983 SC 1202 at pp. 1204-05; *O.P. Kathpalia* v. *Lakhmir Singh*, (1984) 4 SCC 66 at p. 62: AIR 1984 SC 1744 at p. 1755.

[77] *Sital Prasad* v. *Union of India*, (1985) 1 SCC 163: AIR 1985 SC 1; *Ram Sumiran* v. *DDC*, (1985) 1 SCC 431: AIR 1985 SC 606; *Bhag Singh* v. *Daljit Singh*, 1987 Supp SCC 685.

[78] *Chaya* v. *Bapusaheb*, (1994) 2 SCC 41; *Dondapani Sahu* v. *Arjuna Panda*, (1969) 3 SCC 397; *Shiv Dass* v. *Devki*, 1995 Supp (2) SCC 658.

of the defendant within a reasonable time and satisfy the court about it.[79]

(24) Where a suit abates or is dismissed for the non-substitution of the legal representative or representatives of the deceased party, no fresh suit can be filed on the same cause of action.[80] However, the cause of action of the abated suit may be invoked as a defence in a subsequent suit.[81]

(25) Where a suit abates or is dismissed under Order 22, the plaintiff or his legal representative/representatives may apply for an order to set aside the abatement or dismissal, and if it is proved that the applicant was prevented by any sufficient cause from continuing the suit, the court will set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.[82]

(26) The expression "sufficient cause" should be construed liberally to advance substantial justice.[83] A strict and pedantic approach should not be taken by the Court.[84]

(27) Though "sufficient cause" cannot be construed liberally merely because the defaulting party is the Government,[85] yet delay in official business requires a public justice approach.[86] Certain amount of latitude within reasonable limits is permissible having regard to impersonal bureaucratic set-up involving red-tapism.[87]

(28) Considerations for condonation of delay under Section 5 of the Limitation Act and for bringing heirs on record or for setting aside abatement under Order 22 are distinct and different.[88]

(29) Where no sufficient cause for condonation of delay for setting aside an abatement is made out by the applicant, the suit or

[79] *Union of India* v. *Ram Charan*, AIR 1964 SC 215: (1964) 3 SCR 467.

[80] R. 9(1).

[81] Explanation to R. 9.

[82] R. 9(2). See also *Bhagwan Swaroop* v. *Mool Chand*, *supra*.

[83] *Union of India* v. *Ram Charan*, *supra*; *Bhagwan Swaroop* v. *Mool Chand*, *supra*.

[84] *Ibid*, see also *Bhag Singh* v. *Daljit Singh*, 1987 Supp SCC 685; *Sital Prasad* v. *Union of India*, (1985) 1 SCC 163: AIR 1985 SC 1.

[85] *State of Gujarat* v. *Sayed Mohd. Baquir*, (1981) 4 SCC 1: AIR 1981 SC 1921; *Bhagwan Swaroop* v. *Mool Chand*, (1983) 2 SCC 132: AIR 1983 SC 355.

[86] *State of M.P.* v. *S.S. Akolkar*, (1996) 2 SCC 568: AIR 1996 SC 1984.

[87] *State of Haryana* v. *Chandra Mani*, (1996) 3 SCC 132: AIR 1996 SC 1623; *Municipal Corpn. of Ahmedabad* v. *Manish Enterprises Ltd.*, (1992) 2 Guj LR 1252: (1992) 2 Guj LH '76.

[88] *Ram Bhajan Singh* v. *Madheshwar Singh*, 1995 Supp (2) SCC 757: AIR 1995 SC 1685.

appeal requires to be dismissed. A strong case on merits is not a ground for condonation of delay.[89]

(30) An order refusing to set aside an abatement is not a "decree" within the meaning of Section 2(2). The order, however, has been made appealable.[90] But neither Second Appeal nor Letters Patent Appeal is maintainable against such an order.[91]

### 3. MARRIAGE OF PARTY: RULE 7

The marriage of a female plaintiff or defendant shall not cause the suit to abate. Where the decree is passed against a female defendant, it may be executed against her alone.[92] A decree in favour of or against a wife, where the husband is legally entitled to the subject-matter of the decree or is liable for the debt of his wife may, with the permission of the court, be executed by or against him.[93]

### 4. INSOLVENCY OF PARTY: RULE 8

#### (a) Insolvency of plaintiff

The insolvency of a plaintiff shall not cause the suit to abate and can be continued by his Assignee or Receiver for the benefit of his creditors. But if the Assignee or Receiver declines to continue the suit, or to give security for costs, as ordered by the court, the court may, on the application of the defendant, dismiss the suit on the ground of the plaintiff's insolvency. The court may also award the defendant costs for defending the suit, to be paid as a debt against the plaintiff's estate.[94]

#### (b) Insolvency of defendant

Rule 8 does not apply where the defendant becomes an insolvent. In such cases, the court may stay the suit or proceeding pending against the defendant who has been adjudged an insolvent.[95] Rule 10 will also apply in those cases and a receiver will become a representative of the defendant-debtor.

### 5. DEVOLUTION OF INTEREST: RULE 10

Rule 10 enacts that if, during the pending of the suit, any interest in the suit has passed from the plaintiff or defendant to any other person, the suit may with the leave of the court be continued by or against the

[89] *State of Gujarat* v. *Sayed Mohd. Baquir*, (1981) 4 SCC 1: AIR 1981 SC 1921; *Bhagwan Sivaroop* v. *Mool Chand*, (1983) 2 SCC 132: AIR 1983 SC 355.

[90] Or. 43 R. 1(*k*).

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

[92] R. 7(1).

[93] R. 7(2).

[94] R. 8.

[95] *Kala Chand* v. *Jagannath*, AIR 1927 PC 108: (1926-27) 54 IA 190.

person to or upon whom such interest has come or devolved. Rule 10 is based on a principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has devolved upon another during the pendency of the suit, but that the suit may be continued against the person acquiring interest with the leave of the court.[96]

[96] *Rikhu Dev* v. *Som Dass*, (1976) 1 SCC 103 at p. 106: AIR 1975 SC 2159 at p. 2160; *Ghafoor Ahmad* v. *Bashir Ahmad*, (1982) 3 SCC 486: AIR 1983 SC 123; *Pavitri Devi* v. *Darbari Singh*, (1993) 4 SCC 392; *Karuppaswamy* v. *C. Ramamurthy*, (1993) 4 SCC 41: AIR 1993 SC 2324.

PART II

# 14 Trial

SYNOPSIS


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## 1. GENERAL

AFTER THE plaint has been presented by the plaintiff and the written statement by the defendant in court and the issues have been framed by the court, a stage is reached when the parties to the suit are in a position to know what facts and what documents should be proved by them. For this purpose, any party to the suit may apply to the court for summons to persons whom he proposes to call as his witnesses. Sections 30 to 32 and Orders 16 to 18 contain necessary provisions for summoning, attendance and examination of witnesses. Order 16 provides for summoning and attendance of witnesses. Order 16-A makes special provisions for attendance of witnesses confined or detained in

prisons. Order 17 deals with adjournments whereas Order 18 makes provisions for hearing of suits and examination of witnesses.

## 2. SUMMONING AND ATTENDANCE OF WITNESSES: ORDER 16

### (a) Summons to witnesses: Rule 1

Sub-rule (1) of Rule 1 requires the parties to the suit to submit in court a list of witnesses whom they propose to call either to give evidence or to produce documents and to obtain summonses for their attendance in court. Such list must be filed on or before such date as the court may appoint but not later than fifteen days after the issues are framed.

The object underlying this provision is to give notice to a party about the witnesses which his adversary is to examine in the case so that he could be in a position to know the nature of evidence he has to meet. The legislature has not put total prohibition on a party to produce witnesses for proof of his case. But when he seeks the assistance of the court, he has to give reasons why he has not filed an application within the prescribed time limit.[1] Sub-rule (3) of Rule 1 empowers the court to permit a party to call any witness whose name has not been mentioned in the list filed under sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

Ordinarily, it is for the parties to move the court to issue summonses to witnesses. Rule 1-A enables a party to bring any witness to give evidence or to produce documents without applying for summons. Rules 1 and 1-A operate in two different areas and cater to two different situations. Where a party wants the assistance of the court to ensure presence of a witness on being summoned through the court, it is obligatory for him to follow the procedure laid down in Rule 1. But where he wants to produce his witnesses without the assistance of the court, he can do so under Rule 1-A and the court has no jurisdiction to decline to examine such witnesses.[2]

The court has also power to summon any person as a witness if it thinks that the ends of justice so require or that the case before it needs that kind of evidence.[3] The power of the court to examine a witness *suo motu* (on its own motion) is discretionary. It should be exercised to secure the attendance of a witness whose evidence appears

[1] Sub-rules (2), (3) of Rule 1, see also *Lalitha J. Rai* v. *Aithappa Rai*, (1995) 4 SCC 244: AIR 1995 SC 1766.

[2] *Mange Ram* v. *Brij Mohan*, (1983) 4 SCC 36 at pp. 41-43: AIR 1983 SC 925; *Lalitha J. Rai* v. *Aithappa Rai, supra*; *Vidyadhar* v. *Manikrao*, (1999) 3 SCC 573: AIR 1999 SC 1441.

[3] S. 30(*b*), Or. 16 R. 14; *R.M. Seshadri* v. *G. Vasantha Pai*, (1969) 1 SCC 27: AIR 1969 SC 692; *Lalitha J. Rai* v. *Aithappa Rai, supra*.

to the court to be necessary.[4] The court, however, should not exercise *suo motu* power unless there are compelling reasons to do so.[5] Rules 2 to 4 provide for travelling and other expenses and remuneration of a witness for his attendance in court. A witness cannot be ordered to attend in person unless he resides within the territorial jurisdiction of the court or within certain limits.[6]

**(b) Contents of summons**

Every summons issued to a witness should contain the following particulars:

(*a*) the time and place at which he is required to attend;

(*b*) the purpose of his attendance, i.e. whether his attendance is required for the purpose of giving evidence or to produce a document, or for both the purposes;

(*c*) the document which he is called upon to produce should be described with reasonable accuracy.[7]

**(c) Service of summons: Rule 8**

Every summons to a witness should be served as nearly as may be in the same manner as a summons to the defendant as contemplated by Order 5.[8] It should give a reasonable time to a witness for preparation and for travelling to the place at which his attendance is required.[9] Rule 7-A provides for direct service of summons (*dasti* summons) by a party and the procedure for such service.

**(d) Failure to comply with summons: Rule 10**

The court has power to enforce the attendance of any person to whom a summons has been issued and for that purpose, may (*a*) issue a warrant for his arrest; (*b*) attach and sell his property; (*c*) impose a fine upon him not exceeding five thousand rupees; and (*d*) order him to furnish security for his appearance and in default commit him to the civil prison.[10]

Rule 10 enumerates consequences for non-appearance by a party in spite of service of summons. It states that where a person to whom a summons has been issued, either to attend to give evidence or to produce a document, fails to comply with such summons without lawful

[4] *Ibid*, see also *Bishwanath Rai* v. *Sachhidanand Singh*, (1972) 4 SCC 707: AIR 1971 SC 1949; *K.S. Agha* v. *Mir Mudassir Shah*, AIR 1944 PC 100: (1943-44) 71 IA 171.

[5] *Khaji Khanavar Khadirkhan* v. *Siddavanballi Nijalingappa*, (1969) 1 SCC 636: AIR 1969 SC 1034.

[6] R. 19.

[7] R. 5.

[8] R. 8. *See also supra*, Chap. 7.

[9] R. 9.

[10] S. 32.

excuse or intentionally avoids service of summons, the court may issue a proclamation requiring him to attend to give evidence or to produce a document at a time and place mentioned therein and a copy of such proclamation should be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.[11] The court may also issue a warrant for arrest of such person.[12] Where the person appears after the attachment of his property and satisfies the court that he did not fail to comply with the summons without lawful excuse or did not intentionally avoid service and that he had no notice of the proclamation, the court shall release the property from attachment.[13] If, however, such person does not appear or appears but fails to satisfy the court, the court may impose upon him a fine not exceeding five hundred rupees as it thinks fit, having regard to his condition of life and all the circumstances of the case and attach and sell the property for recovery of the same.[14]

The above provisions enact the machinery for procuring attendance of witnesses. It is the duty of the court to enforce the attendance of witnesses summoned by the parties, if necessary by coercive process.[15] These provisions are essential and have been enacted with a purposeful eye, because the contesting parties in a suit usually have no control over witnesses who may be required to give evidence. The machinery of the court for redress of injustice will be rendered altogether ineffective if a party is not enabled to examine such witnesses as may be necessary in order to procure a just decision from the court on the matter at issue between the parties.[16]

All that a litigant can do in regard to a person over whom he has no control is to request him to attend the court. The said person, however, may, either on account of his preoccupation, or on account of his disinclination to take the trouble to attend the court, refuse to oblige the litigant. In such an event, the litigant would be rendered utterly helpless. And if there were no coercive machinery built in the Code, courts themselves would also be equally helpless. That is the reason why the provisions have been made in Order 16 Rule 10 and the court has been empowered to issue summons to a witness and also to secure compliance with the requisition contained in the summons either

[11] R. 10(1), (2).

[12] R. 10(2).

[13] R. 11.

[14] Rr. 12 & 13.

[15] *National Rice & Dal Mills* v. *Food Corpn. of India*, AIR 1972 P&H 163 at p. 164; *Vasant Trading Corpn.* v. *Dhamanvala Arvind Silk Mills*, (1974) 15 Guj LR 869 at pp. 870-71; *Dwarka Prasad* v. *Rajkunwar Bai*, AIR 1976 MP 214.

[16] *National Rice & Dal Mills* v. *Food Corpn. of India, supra.*

to give evidence or to produce documents.[17] Rule 10 thus exhibits the authority of the court.[18]

It should not, however be forgotten that a party runs a serious risk by invoking coercive machinery for compelling his witness to remain present. It is quite likely that on account of such process being issued, he may turn hostile and may not support the case of the party at whose instance he is called as a witness.[19]

Since the provisions of Rule 10 are of a penal nature, the procedure laid down therein must be strictly followed.[20]

It is the duty of the person summoned to give evidence or produce or cause to produce a document.[21] Unless the court otherwise directs, the person summoned should attend the court at each hearing till the suit is disposed of.[22] Rule 18 prescribes the procedure where the witness is arrested and is unable to give evidence or produce documents. Where any party to a suit present in the court, without lawful excuse, refuses when required by the court to give evidence or to produce any document there and then in his possession or power, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.[23] Rule 19 deals with cases where a witness cannot be ordered to attend in person unless he is residing within certain limits.

### 3. ATTENDANCE OF WITNESSES IN PRISON: ORDER 16-A

Order 16-A, added by the Amendment Act of 1976, provides for the attendance of prisoners to give evidence if the court is of the opinion that their evidence is material in the suit except where they are physically unfit to do so. However, if the prison is situated at a distance of more than 25 kilometres from the courthouse, no such order shall be made unless the court is satisfied that the examination of such person on commission will not be adequate.

### 4. SUMMONS TO PRODUCE DOCUMENTS: SECTION 30

The provisions relating to issue of summons to give evidence will apply to summons to produce documents or other material objects.[24]

[17] *Vasant Trading Corpn.* v. *Dhanamvala Arvind Silk Mills, supra.*

[18] *Katta Venkatayyagari* v. *Gowra Lakshmayya,* AIR 1937 Mad 811; *Suresh Nath* v. *Jorawarmal,* AIR 1999 Raj 357.

[19] *Dwarka Prasad* v. *Rajkunwar Bai, supra; Kishan Chand* v. *Nirmala Devi,* (1975) 77 Punj LR 746.

[20] *Dwarka Prasad* v. *Rajkunwar Bai,* AIR 1976 MP 214 at p. 215.

[21] R. 15.

[22] Rr. 16 & 17.

[23] R. 20.

[24] S. 30; Or. 16, 16-A.

## 5. ADJOURNMENTS: ORDER 17

### (a) General rule

After the court starts hearing of a suit, it will be continued till the final disposal of the suit. As a general rule, when hearing of evidence has once begun, such hearing shall be continued day to day and the adjournment should be granted only for unavoidable reasons.[25]

### (b) Discretion of court

A party to the suit, however, may ask for an adjournment of the matter. Normally, to grant or refuse adjournment is at the discretion of the court. The power to grant adjournment is not subject to any definite rules, but it should be exercised judicially and reasonably and after considering the facts and circumstances of each case.[26] The provision limiting adjournments cannot be held to be *ultra vires* or unconstitutional.[27]

### (c) When adjournment may be granted?

An adjournment may be granted by a court *inter alia* on the grounds of sickness of a party, his witness or his advocate; non-service of summons, reasonable time for preparation of case, withdrawal of appearance by a pleader at the last moment, etc.[28]

### (d) When adjournment may be refused?

An adjournment may be refused by a court *inter alia* on the grounds of engagement of an advocate in another court, unreasonable conduct of a party or his advocate, refusal to examine or cross-examine a witness present in the court, assurance or undertaking by the party or his pleader at the previous hearing to proceed with the case at the next hearing, the case being very old, direction by a superior court to dispose of the matter expeditiously, etc.[29]

[25] Proviso to R. 1, Or. 17. See also *Kishan Lal Gupta* v. *Dujodwala Industries*, AIR 1977 Del 49 at p. 52.

[26] *Thakur Sukhpal Singh* v. *Thakur Kalyan Singh*, AIR 1963 SC 146 at p. 150: (1963) 2 SCR 733; *Jwala Prasad* v. *Ajodhya Prasad*, AIR 1983 SC 304; *Savithri Amma Seethamma* v. *Aratha Karthy*, (1983) 1 SCC 401: AIR 1983 SC 318; *Nirankar Nath* v. *Vth ADJ*, (1984) 3 SCC 531 at p. 537: AIR 1984 SC 1268; *R. Viswanathan* v. *Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1: (1963) 3 SCR 22; *Nanik Awtrai Chainani* v. *Union of India*, (1970) 2 SCC 321: (1971) 1 SCR 650; *Lachi Tewari* v. *Director of Land Records*, 1984 Supp SCC 431: AIR 1984 SC 41; *Ranjodh Singh* v. *State of Punjab*, 1988 Supp SCC 170; *Priddle* v. *Fisher & Sons*, (1968) 1 WLR 1478: 1969 Lab IC 384 at p. 386 (QB); *Shyam Kishore* v. *MCD*, (1993) 1 SCC 22: AIR 1992 SC 2279; *CIT* v. *Express Newspapers Ltd.*, (1994) 2 SCC 374 at p. 377: AIR 1994 SC 1389.

[27] *Salem Advocate Bar Assn.* v. *Union of India*, (2003) 1 SCC 49: AIR 2003 SC 189; *Salem Advocate Bar Assn. (II)* v. *Union of India*, (2005) 6 SCC 344: AIR 2005 SC 3353.

[28] For leading cases, see, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. IV, Or. 17.

[29] *Ibid.*

**(e) Power and duty of court**

In allowing or refusing adjournment, the court has first to ascertain whether the ground on which adjournment is sought is factually correct and then to decide whether that ground is sufficient to grant adjournment.[30]

Past conduct of a person may well be taken into account as a circumstance in judging whether what he is now saying is true or false, but the fact that a party has applied for adjournment of the hearing of a case in the past and the adjournment was granted on his application, could be no ground for refusing an adjournment if it is again sought on a ground which could reasonably be said to have prevented or disabled that party from producing his evidence or doing something else which is necessary to be done for the hearing of the case on that particular day.[31]

On the one hand, the court should not be too technical in the matter of granting an adjournment and it should not refuse to grant it if sufficient cause is shown. On the other hand, the court should not grant an adjournment if sufficient cause is not shown even on condition of payment of costs. What is a sufficient cause is a question of fact to be decided in the facts and circumstances of each case.

No adjournment shall be granted more than three times to a party during hearing of the suit.[32]

**(f) Maximum adjournments**

Proviso to sub-rule (1) of Order 17, as inserted by the Amendment Act, 1999 mandates that maximum three adjournments can be granted by the court to a party during the hearing of the suit.

In *Salem Advocate Bar Assn.* v. *Union of India (II)*, the Supreme Court held that in extreme and exceptional circumstances, this strict rule does not apply. The court also held that by "reading down" discretionary power to grant adjournment, the validity of the provision can be sustained.[33]

**(g) Adjournment granted: Illustrative cases**

The following are some of the circumstances which have been held to constitute sufficient cause for granting adjournment:

Sickness of a party, his witness or his counsel, non-service of summons, reasonable time for preparation of a case, withdrawal of

[30] *Haji Abdul Hafiz* v. *Nasir Khan*, AIR 1984 All 16; see also *Maharaja* v. *Harihar*, AIR 1990 All 49; *Brahma Swaroop* v. *Shamsher Bahadur*, AIR 1984 All 14.

[31] *Haji Abdul Hafiz* v. *Nasir Khan*, AIR 1984 All 16 at p. 20; see also *Maharaja* v. *Harihar*, AIR 1990 All 49.

[32] Proviso to Rule 1(1).

[33] (2005) 6 SCC 344 at p. 367: AIR 2005 SC 3353.

appearance by a counsel at the last moment, inability of a counsel to conduct the case, inability of a party to engage another advocate, etc.

**(h) Adjournment refused: Illustrative cases**

On the other hand, the following are some of the circumstances which have been held not to constitute sufficient cause for granting adjournment:

Engagement of a counsel in another court, dilatory conduct of the party, non-examination of a witness present in the court, abuse of process of court, undertaking by the party on the earlier occasion to proceed with the matter, inconvenience to the opposite party or his witnesses, the case being very old, the matter first on board, the argument of the other side is over, interlocutory proceedings, etc.

**(i) Costs of adjournment**

While granting an adjournment, the court shall, direct the party seeking an adjournment to pay costs or higher costs to the opposite party.[34]

Such amount, however, should be reasonable and commensurate with the costs incurred by the other side. No costs should be imposed by way of penalty or punishment.[35]

**(j) Failure to appear: Rule 2**

Rule 2 provides that where parties fail to appear even on the adjourned day, the court may either proceed to dispose of the suit in one of the modes mentioned in Order 9, or to proceed with the case even in the absence of a party where evidence or substantial portion thereof of such party has already been recorded as if such party were present, or make such other order as it thinks fit.[36] This rule confers on the court a discretion and the court must exercise it.[37] When any party to a suit to whom time has been granted, fails (*i*) to produce his evidence; or (*ii*) to cause the attendance of his witnesses; or (*iii*) to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, (*a*) if the parties are present, proceed to decide the suit forthwith; or (*b*) if the parties are, or any of them is, absent, proceed under Rule 2.[38]

[34] R. 1(2).

[35] *Junaram Bora* v. *Saruchoali Kuchuni*, AIR 1976 Gau 3; *Ram Piyari* v. *Lala Ram Narain*, AIR 1973 All 227: 1973 All LJ 257; *Gauhati Bank Ltd.* v. *Baliram Dutta*, AIR 1950 Ass 169; *Jadavbai* v. *Shrikisan*, AIR 1946 Bom 113: (1945) 47 Bom LR 978: 224 IC 547.

[36] R. 2.

[37] *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425: (1955) 2 SCR 1. See also *Prakash Chander* v. *Janki Manchanda*, (1986) 4 SCC 699: AIR 1987 SC 42.

[38] R. 3.

Before an order under Rule 3 can be passed, the following conditions must be satisfied:

(*i*) the adjournment must have been granted at the instance of a party;

(*ii*) the adjournment must have been granted to enable such party (*a*) to produce his evidence; or (*b*) to cause the attendance of his witnesses; or (*c*) to perform any other act necessary for the further progress of the suit; and

(*iii*) the party must have failed to perform any of the acts for which the time had been granted.

## 6. HEARING OF SUIT: ORDER 18

### (a) Trial in open court: Section 153-B

As a general rule, the evidence of witnesses shall be taken orally in open court in the presence and under the personal direction and superintendence of the judge.[39] It is well-settled that, in general, all cases brought before the courts, whether civil, criminal or others, must be heard in open court. Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear causes in the open and must permit public admission to the courtroom.

As Bentham[40] has observed:

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. *It keeps the judge himself while trying under trial in the sense that the security of securities is publicity.*"
>
> (emphasis supplied)

[39] Or. 18 R. 19, S. 153-B; see also *Naresh Shridhar* v. *State of Maharashtra*, AIR 1967 SC 1: (1966) 3 SCR 744; *P.N. Eswara Iyer* v. *Registrar, Supreme Court of India*, (1980) 4 SCC 680: AIR 1980 SC 808.

[40] *Scott* v. *Scott*, 1913 AC 417: (1911-13) All ER Rep 1 at p. 30 (HL). *See also*, similar observations of Cooley, "The courts could survive only by the strength of public confidence. The public confidence can be fostered by exposing courts more and more to public gaze"; *Constitutional Law* (8th Edn.) Vol. I at p. 647.

**(b) Trial in camera**

A case may, however, occur where the requirement of the administration of justice itself may make it necessary for the court to hold a trial in camera. If the primary function of the court is to do justice in causes before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal, and it is held that it admits of no exceptions whatever, cases may arise where, by following the principle, justice itself may be defeated.[41]

The overriding consideration which must determine the conduct of proceedings before a court is fair administration of justice. Indeed, the principle that all cases must be tried in public is really and ultimately based on the view that it is such public trial of cases that assists the fair and impartial administration of justice. The administration of justice is thus the primary object of the work done in courts; and so, *if there is a conflict between the claims of the administration of justice itself and those of public trial, public trial must yield to the administration of justice.*[42]

(emphasis supplied)

**(c) Right to begin and reply: Rules 1-3**

The right to begin follows from the rules of evidence. Sections 101 to 114 of the Evidence Act, 1872 deal with burden of proof. Section 102 of the Act provides that the burden of proof lies on that party who would fail if no evidence at all were given on either side. Accordingly, as a general rule, the plaintiff has to prove his claim and, therefore, he has right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either on point of law (e.g. *res judicata*, limitation, etc.) or on some additional facts alleged by him, the plaintiff is not entitled to any relief. In that case, the defendant has right to begin.[43]

The party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. The other party shall then state his case and produce his evidence, if any, and may then address the court generally on the whole case. The party beginning may then reply generally on the whole case.[44]

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either

[41] *Naresh Shridhar* v. *State of Maharashtra*, AIR 1967 SC 1 at p. 8: (1966) 3 SCR 744.

[42] *Ibid*, at p. 10 (AIR). See also *Kehar Singh* v. *State (Delhi Admn.)*, (1988) 3 SCC 609 at pp. 672-76; *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271: AIR 1982 SC 710; *see also infra*, Or. 32-A, Chap. 16.

[43] R. 1.

[44] R. 2.

produce his evidence generally on those issues or reserve it by way of answer to the evidence produced by the other party.[45] But if the plaintiff's counsel is absent at the time of hearing or arrives late, and in the meantime the counsel for the defendant starts his arguments, the counsel for the plaintiff has no right of interruption.[46] Where a party wishes to be examined as a witness, he should first other himself for examination before other witnesses are examined.[47]

### (d) Recording of evidence: Rules 4-13

*(i) General*

Radical changes have been made by the Code of Civil Procedure (Amendment) Act, 2002 in relation to recording of oral evidence of witnesses.[48] Before the amendment, such evidence could be recorded "in open court in the presence and under the personal direction and superintendence of the judge"[49]. A lot of time of the court was consumed in that process which was the main cause of delay in disposal of cases.

Under the new provision, oral evidence can now be recorded by the Court Commissioner. The Court Commissioner may also record remarks respecting demeanour of witnesses. The report of the Commissioner shall be submitted to the court which shall form part of the record of the suit.[50]

*(ii) Appealable cases*

In appealable cases, the evidence of each witness shall be taken down by the judge in the language of the court or in English if the parties or their pleaders do not object. It should be in the form of a narrative and shall be read over to the witness, interpreted to him and signed by the judge. The court may (*a*) for any special reason, take down any particular question and answer, or any objection to any question; (*b*) record such remarks as it thinks material respecting the demeanour of any witness; (*c*) recall any witness at any stage of the suit who has been examined and put such questions as it thinks fit; (*d*) permit any party to the suit to produce the evidence which was not within his

[45] R. 3.

[46] *Sheela Barse* v. *Union of India*, (1988) 4 SCC 226 at pp. 243-44: AIR 1988 SC 2211.

[47] R. 3-A.

[48] Or. 18 R. 4 (as amended by the Amendment Act, 2002) (Act 22 of 2002).

[49] R. 4 as it stood before the amendment read thus;

"Witness to be examined in open court. The evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal direction and superintendence of the Judge". See also *M.M. Amonkar* v. *S.A. Johari*, (1984) 2 SCC 354: AIR 1984 SC 931.

[50] Rule 4(1), (2), (3), (4), (5). For analytical discussion and case law, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. IV, Or. 18.

knowledge or could not be produced by him despite due diligence; or (*e*) make local inspection and make a memorandum of any relevant facts observed at such inspection.[51]

(*iii*) *Non-appealable cases*

In non-appealable cases, the judge shall make or dictate directly on a typewriter or cause to be mechanically recorded, a memorandum of the substance of the deposition of witnesses.[52]

(*iv*) *Examination de bene esse*[53]*: Rule 16*

Generally, witnesses are examined at the hearing of the suit. Rule 16, however, provides for examination of a witness before the hearing, when he is about to leave the jurisdiction of the court or other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately. This is called *de bene esse* examination and it is permitted to do justice between the parties. A witness may be examined on commission in certain circumstances.[54]

(*v*) *Evidence recorded by another judge: Rule 15*

Where a judge is prevented by death, transfer or other cause from conducting the trial of a suit, his successor may deal with the evidence recorded by him and proceed with the suit from the stage at which it was left.[55]

**(e) Oral arguments: R. 2 (3-A, 3-D)**

A court may permit a party or his pleader to argue a case orally. For such oral arguments, it is open to the court to fix time limits, as it thinks fit.[56]

**(f) Written arguments: R. 2 (3-A, 3-B, 3-C)**

A court may allow a party or his pleader to submit written arguments in support of his case. Such written arguments shall form part of the record. A copy of such written arguments should be supplied to the other side. Normally, no adjournment should be granted for submitting written arguments.[57]

[51] Ss. 137, 138, Rr. 5-12, 17, 17-A & 18. See also *M.M. Amonkar* v. *S.A. Johari*, (1984) 2 SCC 354 at pp. 362-63: AIR 1984 SC 931; *Laxman Das* v. *Deoji Mal*, AIR 2003 Raj 74; *F.D.C. Ltd.* v. *Federation of Medical Representatives Assn. India*, AIR 2003 Bom 371; *Ameer Trading Corpn. Ltd.* v. *Shapoorji Data Processing Ltd.*, (2004) 1 SCC 702: AIR 2004 SC 355.

[52] R. 13.

[53] R. 16.

[54] *See supra*, Chap. 11.

[55] R. 15.

[56] For detailed discussion and case law, *see*, V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt. V, Chap. 2.

[57] *Ibid.*

PART II

# 15 Judgment and Decree

SYNOPSIS


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## 1. GENERAL

AFTER THE hearing is completed, the court will pronounce the judgment. Rules 1 to 5 of Order 20 deal with judgments and Rules 6 to 19 with decrees. Rules 6-B and 20 provide for furnishing of copies of judgment and decree to the parties on application made by them on payment of specified charges. Whereas Sections 34 and 35 relate to interest and costs, Sections 35-A and 35-B make provisions for compensatory costs for false and vexatious claims or defences and for causing delay.

## 2. JUDGMENT

### (a) Definition: Section 2(9)

"Judgment" means the statement given by the judge of the grounds of a decree or order.[1] In the words of Vivian Bose, J., a judgment may be said to be "the final decision of the court intimated to the parties and to the world at large by formal 'pronouncement' or 'delivery' in open court".[2]

### (b) Essentials[3]

### (c) Judgment and decree[4]

### (d) Pronouncement of judgment: Rule 1

After the hearing has been completed, the court shall pronounce the judgment in open court, either at once or on some future day, after giving due notice to the parties or their pleaders.[5] Once the hearing is over, there should not be a break between the reservation and pronouncement of judgment.

Before the Amendment Act of 1976, no time-limit was provided between the hearing of arguments and the delivery of the judgment. There was a persistent demand all over India for imposing a time-limit for the delivery of a judgment after the conclusion of hearing of a case. Even the Supreme Court had to observe in the case of *R.C. Sharma* v. *Union of India*[6] thus:

> "The Civil Procedure Code does not provide a time-limit for the period between the hearing of arguments and the delivery of a judgment. Nevertheless, we think that an unreasonable delay between hearing of arguments and delivery of a judgment, unless explained by exceptional or extraordinary circumstances, is highly undesirable even when written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice. But, what is more important is that litigants must have complete confidence in the results of litigation. This confidence tends to be shaken if there is excessive delay between hearing of arguments and delivery of judg-

[1] S. 2(9).

[2] *Surendra Singh* v. *State of U.P.*, AIR 1954 SC 194 at p. 196: 1954 SCR 330.

[3] *See supra*, Pt. I, Chap. 2.

[4] *See supra*, Pt. I, Chap. 2.

[5] S. 33, Or. 20 R. 1(1). See also *Surendra Singh* v. *State of U.P.*, AIR 1954 SC 194 at pp. 196-97: 1954 SCR 330; *Nirankar Nath* v. *Vth ADJ*, (1984) 3 SCC 531 at p. 537: AIR 1984 SC 1268; *Anil Rai* v. *State of Bihar*, (2001) 7 SCC 318: AIR 2001 SC 3173.

[6] (1976) 3 SCC 574 at p. 578: AIR 1976 SC 2037 at p. 2041.

ments. *Justice, as we have often observed, must not only be done but must manifestly appear to be done.*" (emphasis supplied)

The Joint Committee, therefore, suggested that a time-limit should be prescribed for delivery of judgments after the conclusion of the hearing of cases.[7] Accordingly, it is provided that if a judgment is not pronounced at once, it should ordinarily be delivered within thirty days from the conclusion of the hearing. Where, however, it is not practicable to do so due to exceptional and extraordinary circumstances, it may be pronounced within sixty days. Due notice of the day fixed for pronouncement of judgment shall be given to the parties or their pleaders.[8] The judge need not read out the whole judgment and it would be sufficient if the final order is pronounced.[9] The judgment must be dated and signed by the judge.[10] Rule 2 enables a judge to pronounce a judgment which is written but not pronounced by his predecessor.

A reference in this connection may be made to a decision of the Supreme Court in *Anil Rai* v. *State of Bihar*[11]. In that case, after the arguments of the counsel were over but the judgment was reserved by the High Court which was pronounced after two years. The action was strongly deprecated by the Supreme Court.

The Court was conscious that for High Courts no particular period was prescribed for pronouncement of judgment, but the judgment must be pronounced expeditiously. Sethi, J. stated, "In a country like ours where people consider judges only second to God, efforts be made to strengthen that belief of the common man. Delay in disposal of the cases facilitates the people to raise eyebrows, sometime genuinely, which, if not checked, may shake the confidence of the people in the judicial system."[12]

Pronouncement of a judgment is essential for the validity of the judgment. It is a judicial act which must be performed in a judicial way. Small irregularities in the manner of pronouncement or the mode of delivery may not matter much but the substance must be present and it should neither be vague nor left to inference or conjecture.[13]

Moreover, the judgment must be based on the grounds and points in the pleadings and not outside the case put forward by the parties in their pleadings. On the one hand, the court should record findings on

[7] Statement of Objects and Reasons.

[8] Proviso to R. 1(1).

[9] R. 1(2).

[10] R. 3.

[11] (2001) 7 SCC 318: AIR 2001 SC 3173.

[12] *Ibid*, at p. 330 (SCC): at p. 3180 (AIR); see also *S.K. Verma* v. *M.P. High Court*, (2003) 10 SCC 243.

[13] *Surendra Singh* v. *State of U.P.*, AIR 1954 SC 194 at p. 196: 1954 SCR 330.

all the points raised by the parties. And, on the other hand, it should not decide any question which does not arise from the pleadings of the parties or is unnecessary.[14]

A statement of fact recorded in the judgment is conclusive of the fact so stated and no one should be allowed to assail it as incorrect or contradict it by filing an affidavit or otherwise. If a party to the proceedings thinks that the happenings in the court have not been correctly recorded in the judgment, a party should approach the same court, to call the attention of the very judge who has recorded the statement and to have it deleted altogether or amended accordingly.[15]

Finally, all judicial pronouncements must be truly judicial in nature and should not depart from sobriety, moderation and reserve. The language of the judgment should be dignified and restrained. Disparaging and defamatory remarks should not be made and, even where criticism is justified, it must be in the language of utmost restraint, keeping in mind that the person making the comment is also a human being and fallible.[16]

### (e) Copy of judgment

After the judgment is pronounced, copies of the judgment should be made available to the parties immediately on payment of charges.[17]

### (f) Contents of judgment: Rules 4 & 5

Judgments other than those 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. The judgments of a Court of Small Causes need not contain more than the point for determination and the decisions thereon.[18]

In suits in which issues have been framed, the court must record its finding on each separate issue with the reasons therefor.[19] Recording

[14] *Swaran Lata* v. *H.K. Banerjee*, (1969) 1 SCC 709: AIR 1969 SC 1167; *Bhagwati Prasad* v. *Delhi State Mineral Development Corpn.*, (1990) 1 SCC 361: AIR 1990 SC 371; *Sanjeev Coke Mfg. Co.* v. *Bharat Coking Coal Ltd.*, (1983) 1 SCC 147: AIR 1983 SC 239; *A.R. Antulay* v. *R.S. Nayak*, (1984) 2 SCC 183 at p. 242: AIR 1984 SC 684.

[15] *State of Maharashtra* v. *Ramdas Shrinivas*, (1982) 2 SCC 463 at p. 467: AIR 1982 SC 1299; *Bhagwati Prasad* v. *Delhi State Mineral Development Corpn.* (*ibid.*); *Poonam Lata* v. *M.L. Wadhwan*, (1987) 4 SCC 48 at p. 51.

[16] *Alok Kumar Roy* v. *Dr. S.N. Sarma*, AIR 1968 SC 453 at pp. 456-57: (1968) 1 SCR 813; *State of M.P.* v. *Nandlal*, (1986) 4 SCC 615: AIR 1987 SC 251 at p. 287; *Ashok Kumar* v. *State of Haryana*, (1985) 4 SCC 417: AIR 1987 SC 454 at pp. 461-63; *A.M. Mathur* v. *Pramod Kumar Gupta*, (1990) 2 SCC 533 at p. 539: AIR 1990 SC 1737 at p. 1741.

[17] R. 6-B.

[18] Rr. 4 & 6. *See also supra*, Pt. I, Chap. 2.

[19] R. 5. See also *Fomento Resorts and Hotels Ltd.* v. *G.R. Da Cruz Pinto*, (1985) 2 SCC 152 at p. 162: AIR 1985 SC 736 at p. 741; *State of Punjab* v. *Hardyal*, (1985) 2 SCC 629 at p. 636: AIR 1985 SC 920 at pp. 923-24.

of reasons in support of a judgment may or may not be considered to be one of the principles of natural justice, but it cannot be denied that recording of reasons in support of a decision is certainly one of the visible safeguards against possible injustice and arbitrariness and affords protection to the person adversely affected.[20]

A judgment must be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to a particular conclusion and decreed or dismissed the suit should clearly be reflected in the judgment.[21]

Whether it is a case contested by the defendant by filing a written statement, or a case which proceeds *ex parte* and is ultimately decided in the absence of the defendant, or a case in which no written statement was filed and was decided under Order 8 Rule 10, the court has to write a judgment which must be in conformity with the provisions of the Code.[22]

Rule 6-B provides for furnishing of a copy of judgment to the party on payment of charges for preferring an appeal. Rule 5-A states that where the parties are not represented by pleaders, the court should inform the parties as to the court to which an appeal lies against the judgment pronounced and the period of limitation for filing such appeal, and place on record the information so given to the parties. Rule 20 provides for furnishing of certified copies of judgments and decrees to parties.

### (*g*) Alteration in judgment: Rule 3

A judgment once signed cannot afterwards be amended or altered except (*i*) to correct clerical or arithmetical mistakes, or errors due to accidental slips or omissions (Section 152); or (*ii*) on review (Section 114).[23]

## 3. DECREE

### (a) Definition[24]

### (b) Essentials[25]

[20] For detailed discussion of recording of reasons, *see*, Author's *Lectures on Administrative Law* (2008) Lecture VI.

[21] *Balraj Taneja* v. *Sunil Madan*, (1999) 8 SCC 396: AIR 1999 SC 3381 at p. 3390.

[22] *Ibid*, at pp. 414-15 (SCC): at p. 3391 (AIR).

[23] R. 3. See also *Samarendra Nath* v. *Krishna Kumar*, AIR 1967 SC 1440: (1967) 2 SCR 18; *Kewal Chand* v. *S.K. Sen*, (2001) 6 SCC 512: AIR 2001 SC 2569.

[24] S. 2 (2); *see also supra*, Pt. I, Chap. 2.

[25] *See supra*, Pt. I, Chap. 2.

**(c) Decree and judgment**[26]

**(d) Deemed decree**[27]

**(e) Types of decree**[28]

**(f) Necessity of decree**

The Code requires passing of decree in all suits. A decree is thus an essential part of the ultimate outcome of the suit. Decree is an indispensable requisite. An appeal lies against a decree and not against a judgment.[29] Without decree an appeal cannot be "put in motion". A decree is, therefore, an absolute necessity.

**(g) Drawing up of decree: Rule 6-A**

A decree should be drawn up within fifteen days from the date of the judgment. If the decree is not drawn up, an appeal can be preferred without filing a copy of the decree.[30]

**(h) Form of decree**

A decree should be in the form prescribed by Appendix D to the (First) Schedule with necessary variations.

**(i) Contents of decree: Rule 6**

The decree shall follow the judgment, agree with it and bear (*i*) the number of the suit; (*ii*) the names and description of the parties and their registered addresses; (*iii*) the particulars of the claim; (*iv*) the relief granted; (*v*) the amount of costs incurred in the suit, and by whom or out of what property and in what proportions they are to be paid; (*vi*) the date on which the judgment was pronounced; and (*vii*) the signature of the judge.[31] Rule 8 authorises a successor judge to sign a decree drawn up by his predecessor.

**(j) Decrees in special cases: Rules 9-19**

Rules 9 to 19 deal with decrees in particular cases. In a suit for recovery of immovable property, the decree shall contain a description of such property sufficient to identify it, e.g. boundaries, survey numbers, etc.[32] A decree for delivery of movable property must state the amount

[26] *See supra*, Pt. I, Chap. 2.

[27] *See supra*, Pt. I, Chap. 2.

[28] *See supra*, Pt. I, Chap. 2.

[29] S. 96; *see also infra*, Pt. III, Chap. 2.

[30] R. 6-A.

[31] S. 33, Rr. 6 & 7. See also *Jagat Dhish* v. *Jawahar Lal*, AIR 1961 SC 832: (1961) 2 SCR 918.

[32] R. 9.

of money to be paid as an alternative if delivery cannot be had.[33] In a decree for payment of money, the court may order that the payment of decretal amount shall be postponed or shall be made by instalments with or without interest.[34] In a suit for recovery of possession of immovable property, the court may pass a decree (1) for possession of property; (2)(*a*) for past rent or mesne profits; or (*b*) direct an inquiry as to such rent or mesne profits; (*c*) direct an inquiry as to future rent or mesne profits; and (3) final decree in respect of rent or mesne profits in accordance with the result of such inquiry.[35]

A decree for specific performance of a contract for sale or lease of immovable property shall specify the period within which the purchase money or other sum is to be paid by the purchaser or the lessee.[36]

In a suit for an account of any property and for its due administration under the decree of the court, before passing a final decree, the court should pass a preliminary decree ordering accounts to be taken and inquiries to be made. Thereafter a final decree shall be passed in accordance with the result of the preliminary inquiry.[37] A decree in a pre-emption suit, where the purchase money has not been paid into court, shall specify a day on or before which the purchase money shall be paid and direct that on payment into court of such purchase money, the defendant shall deliver possession of the property to the plaintiff, but that if the payment is not made, the suit shall be dismissed with costs. Where the court has adjudicated upon rival claims to pre-emption, the decree shall direct (*i*) if the claims decreed are equal in degree, that the claim of each pre-emptor shall take effect proportionately; and (*ii*) if the claims decreed are different in degree, the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to make payment.[38]

In a suit for dissolution of partnership or taking of partnership accounts, the court, before passing a final decree may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved and directing accounts to be taken and other acts to be done.[39] In a suit for accounts between a principal and an agent, the court, before passing a final decree, shall pass a preliminary decree directing the accounts to be

[33] R. 10.
[34] R. 11.
[35] R. 12.
[36] R. 12-A.
[37] R. 13.
[38] R. 14.
[39] R. 15.

taken.[40] The court can give special directions regarding mode of taking accounts.[41]

In a decree passed in a suit for the partition of property or for the separate possession of a share therein, (*i*) if the estate is assessed to the payment of revenue to the government, the decree shall declare the rights of several parties interested in the property but shall direct partition or separation to be made by the Collector (Section 54);[42] (*ii*) in other cases of immovable property, if the partition or separation cannot conveniently be made without further inquiry, the court may pass a preliminary decree declaring the rights of parties in the property and giving necessary directions and thereafter a final decree shall be passed.[43] A decree where the defendant has been allowed a set-off or counterclaim against the claim of the plaintiff shall state what amount is due to the plaintiff and what amount is due to the defendant.[44]

## 4. INTEREST: SECTION 34

### (a) Interest: Meaning

The term "interest" is not defined in the Code. It may mean "a charge that is paid to borrow for use of money". It is thus a compensation allowed by law to the person who has been prevented to use the amount to which he was entitled.[45]

### (b) Award of interest

Where the decree is for payment of money, the court may award interest at such rate as it thinks reasonable on the "principal sum adjudged".[46]

### (c) Divisions of interest

Interest awarded by the court may conveniently be divided under three heads:

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

Let us consider all the heads:

[40] R. 16.
[41] R. 17.
[42] R. 18(1).
[43] R. 18(2).
[44] R. 19.
[45] *Concise Oxford English Dictionary* (2002) at p. 737; *Union Bank of India* v. *Dalpat Gaurishankar*, AIR 1992 Bom 482 at p. 489: 1992 Mah LJ 686 (FB); *Rural Engg. Division, Cuttack* v. *Surendranath Kanungo*, AIR 1980 Ori 119.
[46] Section 34. For detailed discussion, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 606-41.

*(i) Interest prior to suit*

Section 34 has no application to interest prior to the institution of the suit since it is a matter of substantive law. It can be awarded only when there is an agreement, express or implied, between the parties; or mercantile usage; or under a statutory provision; or by way of damages.[47]

*(ii) Interest pendente lite*

The award of interest from the date of the suit to the date of the decree is at the discretion of the court.[48] The discretion, however, must be exercised on sound judicial principles. As a general rule, the court should award interest at the contractual rate except where it would be inequitable to do so.[49]

*(iii) Interest from date of decree*

The award of interest from the date of decree to the date of payment is also at the discretion of the court.[50] The proviso as added by the Amendment Act of 1976 empowers the court to grant further interest at a rate exceeding six per cent per annum but not exceeding the contractual rate of interest, and in the absence of a contract to that effect, at the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions, provided that the liability arises out of a commercial transaction.

**(d) Rate of interest**

Rate of interest is also at the discretion of the court. If there is an agreement between the parties, normally, the court will adhere to it and will award interest as agreed unless there are reasons to depart therefrom.[51] From the date of the suit such rate would be six per cent per annum.[52] Where the plaintiff is a bank or financial institution, the

[47] *Union of India* v. *Watkins Mayor & Co.*, AIR 1966 SC 275; *Mahabir Prasad* v. *Durga Datta*, AIR 1961 SC 990: (1961) 3 SCR 639; *Vithaldas* v. *Rup Chand*, AIR 1967 SC 188: 1966 Supp SCR 164; *E.I.D. Parry (India) Ltd.* v. *Labour Court, Madras*, 1991 Supp (1) SCC 326: AIR 1991 SC 1544; *Supdt. Engineer* v. *Subba Reddy*, (1999) 4 SCC 423: AIR 1999 SC 1747.

[48] *Mahabir Prasad case, supra*; *State of M.P.* v. *Nathabhai*, (1972) 4 SCC 396: AIR 1972 SC 1545; *Indian Insurance & Banking Corpn. Ltd.* v. *Mani Paravathu*, (1971) 3 SCC 893; *W.B. Financial Corpn.* v. *Bertram Scott (I) Ltd.*, AIR 1983 Cal 381; *Executive Engineer* v. *Abhaduta Jena*, (1988) 1 SCC 418: AIR 1988 SC 1520: (1988) 1 SCR 253.

[49] *Rangalal* v. *Utkal Rasterbhasa Prachar Coop. Press & Publishing Society Ltd.*, AIR 1975 Ori 137 at p. 138; *Tika Sao* v. *Hari Lal*, AIR 1941 Pat 276 at p. 280; *Abdul Hussain* v. *Seth Fazalbhai*, ILR 1957 Bom 529 at p. 531; *K. Appa Rao* v. *V.L. Varadraj*, AIR 1981 Mad 94.

[50] *Amar Chand* v. *Union of India*, AIR 1964 SC 1658; *LIC* v. *Gangadhar*, (1989) 4 SCC 297: AIR 1990 SC 185; *Trojan & Co.* v. *RM.N.N. Nagappa Chettiar*, AIR 1953 SC 235: 1953 SCR 789; *Vijaya Bank* v. *Art. Trend Exports*, AIR 1992 Cal 12.

[51] *Mahesh Chandra* v. *Krishna Swaroop*, (1997) 10 SCC 681; *Union Bank of India* v. *Narendra Plastics*, AIR 1991 Guj 67: (1990) 2 Guj LR 1283: (1990) 2 Guj LH 555; *Associated Construction & Engg. Co.* v. *Dhanlaxmiben*, AIR 1997 Guj 39: (1997) 1 Guj LR 256.

[52] *Indian Insurance & Banking Corpn. Ltd.* v. *Mani Paravathu*, (1971) 3 SCC 893.

rate of interest would be that on which advance is made by such an institution.[53]

**(e) Recording of reasons**

Where the court grants interest at the agreed rate, it need not record reasons. But where it awards interest at a lesser rate than the agreed rate between the parties, it should record reasons so that it can be considered whether the discretion has been exercised judicially or not.[54]

**(f) Commercial transactions**

Where the transaction in question is a "commercial transaction", i.e. a transaction connected with industry, trade or business, the rate of interest would be that on which moneys are lent or advanced by nationalised banks in relation to commercial transactions.[55]

"In commercial transactions, grant of interest at the contractual rate ought to be the rule and grant of interest at reduced rate is a rare exception."[56]

**(g) Compound interest**

Compound interest means interest on interest. Normally, compound interest is not allowed by a court under Section 34 of the Code. But if there is an agreement to that effect or it has been charged during the course of transaction, such interest can be awarded.[57]

**(h) Inflation**

In some cases, judicial notice of inflation has been taken by courts for awarding higher rate of interest. "Inflation is a phenomenon of which this court (Supreme Court) has to strike a balance between the competing equities."[58]

**(i) Decree silent as to interest: Effect**

Where the decree does not provide for interest, it will be deemed to have been refused.[59]

[53] *Union Bank of India* v. *Narendra Plastics*, *supra*. *See also infra*, "Commercial transactions".

[54] *Vijaya Bank* v. *Art. Trend Exports*, AIR 1992 Cal 12.

[55] Proviso to S. 34(1).

[56] *Karnataka State Financial Corpn.* v. *Nithyananda Bhavan*, AIR 1982 Kant 179 at p. 181; *Bank of Baroda* v. *Tiger Electric Motors Co.*, 1985 Guj LH 1021; *Gurdev Singh* v. *Punjab National Bank*, AIR 1998 P&H 106: (1998) 2 P&H 116: (1998) 118 Punj LR 537.

[57] *Panna Lal* v. *Nihal Chand*, AIR 1922 PC 46; *State of Punjab* v. *Scheduled Caste Coop. Land Owning Society Ltd.*, AIR 1988 P&H 192.

[58] *Union of India* v. *Muffakam Jah (I)*, 1995 Supp (1) SCC 686: AIR 1995 SC 498 at p. 507; *Shree Hanuman Jute Mills* v. *Brij Kishore*, 1987 Supp SCC 61.

[59] S. 34(2); see also *State of Punjab* v. *Krishan Dayal Sharma*, AIR 1990 SC 2177.

**(j) Interest by arbitrator**

Interest can be awarded by an arbitrator.[60]

**(k) Interest in mortgage suits**

Interest can be awarded in mortgage suits.[61]

**(l) Interest in writ petitions**

In appropriate cases, interest can be awarded by a writ-court (Supreme Court or High Court) while exercising powers under Articles 32, 226, 227 or 136 of the Constitution.[62]

## 5. COSTS: SECTIONS 35, 35-A, 35-B; ORDER 20-A

**(a) General rule**

As a general rule, to award costs is at the discretion of the court. Normally, in civil proceedings, "costs shall follow the event".[63]

**(b) Kinds of costs**

The Code provides for the following kinds of costs:

(*i*) General costs—Section 35;
(*ii*) Miscellaneous costs—Order 20-A;
(*iii*) Compensatory costs for false and vexatious claims or defences—Section 35-A; and
(*iv*) Costs for causing delay—Section 35-B.

***(i) General costs: Section 35***

(*A*) *Object.*—Section 35 deals with general costs. The object of awarding costs to a litigant is to secure to him the expenses incurred by him in the litigation.[64] It neither enables the successful party to make any profit out of it nor punishes the opposite party.[65]

[60] For cases *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 630-33.

[61] Or. 34 R. 11.

[62] For detailed discussion, *see*, V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Vol. V, Chap. 2.

[63] S. 35. For detailed discussion and case law, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 645-47.

[64] *Nandlal Tanti* v. *Jagdeo Singh*, AIR 1962 Pat 36 at p. 38; *Ganesh Das* v. *Munsif, South Lucknow*, AIR 1976 All 111 at pp. 115-16; *N. Peddanna Ogeti* v. *Katta V. Srinivasayya Setti Sons*, AIR 1954 SC 26 at p. 28; *Mohd. Mahibulla* v. *Seth Chaman Lal*, (1991) 4 SCC 529: AIR 1993 SC 1241; *Ashok Kumar* v. *Ram Kumar*, (2009) 2 SCC 656.

[65] *N. Peddanna Ogeti* v. *Katta V. Srinivasayya Setti Sons*, AIR 1954 SC 26 at p. 28; *Anandji Haridas and Co.* v. *State*, AIR 1977 Guj 140 at p. 144: (1977) 18 Guj LR 271 (FB); *Gajadhar Mahton* v. *Ambika Prasad Tewari*, AIR 1925 PC 169; *Vernekar Industries* v. *Starit Engg. Co. (P) Ltd.*, AIR 1985 Bom 253.

(*B*) *"Costs shall follow the event".*—The general rule relating to costs is that costs should follow the event, i.e. a successful party must get the costs and the loosing party should pay to the other side.[66]

(*C*) *Principles.*—The primary rules in respect of award of general costs are as under:

(*A*) Costs are at the discretion of the court. The said discretion, however, must be exercised on sound legal principles and not by caprice, chance or humour. No hard and fast rules can be laid down and the discretion must be exercised considering the facts and circumstances of each case.

(*B*) Normally, costs should follow the event and the successful party is entitled to costs unless there are good grounds for depriving him of that right.[67] To put it differently, the loser pays costs to the winner. However, it does not always depend on who wins and who loses in the end. Even a successful party may be deprived of costs if he is guilty of misconduct or there are other reasons to do so.[68] Sub-section (2) of Section 35, however, expressly provides that when the court orders that costs should not follow the event, it must record reasons for doing so.[69]

### (*ii*) *Miscellaneous costs: Order 20-A*

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

### (*iii*) *Compensatory costs: Section 35-A*

(*A*) *Object.*—Section 35-A provides for compensatory costs. This section is an exception to the general rule on which Section 35 is based, viz. that the "costs are only an indemnity, and never more than indemnity".[70] This section is intended to deal with those cases in which Section 35

[66] *Tungabhadra Industries Ltd.* v. *Govt. of A.P.*, AIR 1964 SC 1372: (1964) 5 SCR 174; *Jugraj Singh* v. *Jaswant Singh*, (1970) 2 SCC 386: AIR 1971 SC 761; *Kali Prasad* v. *Ram Prasad*, (1974) 1 SCC 182: AIR 1974 SC 148; *Ashok Kumar* v. *Ram Kumar*, (2009) 2 SCC 656.

[67] *Jugraj Singh* v. *Jaswant Singh*, (1970) 2 SCC 386: AIR 1971 SC 761; *Kali Prasad* v. *Ram Prasad*, (1974) 1 SCC 182: AIR 1974 SC 148; *Tungabhadra Industries Ltd.* v. *Govt. of A.P.*, AIR 1964 SC 1372: (1964) 5 SCR 174; *Ashok Kumar* v. *Ram Kumar, supra.*

[68] *Col. A.S. Iyer* v. *V. Balasubramanyam*, (1980) 1 SCC 634: AIR 1980 SC 452; *Union of India* v. *Kamal Kumar*, AIR 1974 Cal 231; *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90: AIR 1984 SC 1562; *K.N. Guruswamy* v. *State of Mysore*, AIR 1954 SC 592: (1955) 1 SCR 305.

[69] *Jugraj Singh* v. *Jaswant Singh*, (1970) 2 SCC 386: AIR 1971 SC 761; *Ouseph Varghese* v. *Joseph Aley*, (1969) 2 SCC 539: (1970) 1 SCR 921.

[70] *Gundry* v. *Sainsbury*, (1910) 1 KB 645 at p. 650. See also *Anandji case, supra; Ashok Kumar* v. *Ram Kumar, supra; N. Peddanna Ogeti* v. *Katta V. Srinivasayya Setti Sons, supra.*

does not afford sufficient compensation in the opinion of the court. Under this provision, if the court is satisfied that the litigation was inspired by vexatious motive and was altogether groundless, it can take deterrent action.[71] This section applies only to suits and not to appeals or to revisions.

(*B*) *Conditions.*—The following conditions must exist before this section can be applied:[72]

(1) the claim or defence must be false or vexatious;
(2) objections must have been taken by the other party that the claim or defence was false or vexatious to the knowledge of the party raising it; and
(3) such claim must have been disallowed or withdrawn or abandoned in whole or in part.

(*C*) *Maximum amount.*—The maximum amount that can be awarded by the court is Rs 3000. But a person against whom an order has been passed is not exempt from any criminal liability. In a subsequent suit for damages or compensation for false, frivolous or vexatious claim or defence, the court will take into account the amount of compensation awarded to the plaintiff under this section.[73]

(*D*) *Other liability.*—A person against whom an order of costs is made is not exempted from any other liability in respect of false or vexatious claim or defence made by him.

(*E*) *Appeal.*—An order awarding compensatory costs is appealable.[74] But no appeal lies against an order refusing to award compensatory costs.[75] Since such an order can be termed as "case decided", a revision lies.[76]

### (*iv*) *Costs for causing delay: Section 35-B*

Section 35-B is added by the Amendment Act of 1976. It is inserted to put a check upon the delaying tactics of litigating parties. It empowers the court to impose compensatory costs on parties who are responsible for causing delay at any stage of the litigation. Such costs would be

For general principles as to costs, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 655-56.

[71] *T. Arivandanam* v. *T.V. Satyapal*, (1977) 4 SCC 467 at p. 470: AIR 1977 SC 2421 at p. 2423; *Priya Wart* v. *State of Haryana*, (1982) 2 SCC 142; *Milli Talimi Mission* v. *State of Bihar*, (1984) 4 SCC 500 at pp. 513-14: AIR 1984 SC 1757 at p. 1765; *Prem Narain* v. *Vishnu Exchange Charitable Trust*, (1984) 4 SCC 375 at p. 376: AIR 1984 SC 1896 at p. 1897; *Manmohan Kaur* v. *Surya Kant*, (1988) 4 SCC 698 at p. 704; *S.A. Kini* v. *Union of India*, 1985 Supp SCC 122: AIR 1985 SC 893; *Morgan Stanley Mutual Fund* v. *Kartick Das*, (1994) 4 SCC 225 at p. 246.

[72] S. 35-A(1).

[73] S. 35-A(3), (4).

[74] S. 104(1)(*ff*).

[75] S. 104(1), Proviso.

[76] *Purna Chandra* v. *Secy. of State*, AIR 1937 Pat 477; *see also infra*, Pt. III, Chap. 9.

irrespective of the ultimate outcome of the litigation.[77] The payment of costs has been a condition precedent for further prosecution of the suit, if the party concerned is a plaintiff and the defence, if he is a defendant.[78]

The provisions of this section are mandatory in nature and, therefore, the court should not allow prosecution of suit or defence, as the case may be, in the event of a party failing to pay costs as directed by the court. If, however, a party is unable to pay costs due to circumstances beyond his control, such as strike of advocates or staff, declaration of the last day for payment of costs as a holiday, etc. the court can extend the time.[79]

Very recently, in *Ashok Kumar* v. *Ram Kumar*[80], the Supreme Court observed that the present system of levying meagre costs in civil matters is wholly unsatisfactory and does not act as a deterrent to vexatious or luxury litigation. More realistic approach relating to costs is the need of the hour.

[77] Statement of Objects and Reasons.

[78] *Hakmi* v. *Pitamber*, AIR 1978 P&H 145 at p. 146; *Vernekar Industries* v. *Starit Engg. Co. (P) Ltd.*, AIR 1985 Bom 253; *Prem Sagar* v. *Phul Chand*, AIR 1983 P&H 385 (FB).

[79] *Anand Parkash* v. *Bharat Bhushan*, AIR 1981 P&H 269 (FB).

[80] (2009) 2 SCC 656 at p. 659.

PART II

# 16 Special Suits

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## 1. GENERAL

FOR THE purpose of procedure, suits may be divided into two classes, namely, (1) suits in general; and (2) suits in special cases. We have already discussed in the preceding chapters the procedure required to be followed in the former class of suits. Sections 79 to 93 and Orders 27 to 37 deal with suits in particular cases and the procedure to be followed in such suits.

## 2. SUITS IN SPECIAL CASES

### (1) Suits by or against Government or public officers: Sections 79-82; Order 27

*(a) General*

Sections 79 to 82 and Order 27 of the Code lay down procedure where suits are brought by or against the Government or public officers. The provisions, however, prescribe procedure and machinery and do not deal with rights and liabilities enforceable by or against the Government. Substantive rights are to be determined in accordance with the provisions of the Constitution.[1]

*(b) Requirement of notice: Section 80(1)*

In ordinary suits, i.e. suits between individuals and individuals, notice need not be given to the defendant by the plaintiff before filing a suit. Section 80 of the Code, however, declares that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of:

(*i*) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;

(*ii*) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;

(*iii*) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government

[1] *Bhagchand* v. *Secy. of State*, AIR 1927 PC 176: (1926-27) 54 IA 338; see also *State of Seraikella* v. *Union of India*, AIR 1951 SC 253 at p. 266: 1951 SCR 474; *Sawai Singhai Nirmal Chand* v. *Union of India*, AIR 1966 SC 1068 at pp. 1071-72: (1966) 1 SCR 986; Arts. 294-300, Constitution of India, *see also*, Authors' *Lectures on Administrative Law* (2008) Lecture X.

or any other officer authorized by that Government in that behalf;

(*iv*) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district; and

(*v*) in the case of a public officer, such public officer.[2]

(*c*) *Nature and scope*

Section 80 of the Code enacts a rule of procedure and mandates that no suit shall be instituted against the Government or against a public officer until a statutory notice required by the section is served.

The section enumerates two types of cases:

(1) Suits against the Government; and

(2) Suits against public officers in respect of acts done or purporting to be done by such public officers in their official capacity.

Regarding the first class of cases, the notice must be given in all cases. Regarding the second class of cases, however, notice is necessary only where the suit is in respect of any act "purporting to be done" by such public officer in the discharge of his duty, and not otherwise.[3]

(*d*) *Object of notice*

The primary object underlying Section 80 is to afford an opportunity to the Government or public officer to consider the legal position and to settle the claim put forward by the prospective plaintiff if the same appears to be just and proper. The Government, unlike private parties, is expected to consider the matter objectively and dispassionately and after obtaining proper legal advice, it can take an appropriate decision in the public interest within a period of two months allowed by the section by saving public time and money and without driving a person to avoidable litigation. The legislative intent behind the provision is that public money should not be wasted for unnecessary litigation. The section has been intended to alert the Government or a public officer to negotiate just claims and to settle them if well-founded without adopting an unreasonable attitude by inflicting wasteful expenditure on the public exchequer.[4]

[2] S. 80.

[3] *State of Bihar* v. *Jiwan Das*, AIR 1971 Pat 141: 1970 Pat LJR 387; *Kanailal Karmakar* v. *Governor General for India in Council*, AIR 1948 Pat 164; *Amalgamated Electricity Co. (Belgaum) Ltd.* v. *Municipal Committee, Ajmer*, AIR 1969 SC 227 at p. 231: (1969) 1 SCR 430; *State of Maharashtra* v. *Chander Kant*, (1977) 1 SCC 257 at pp. 259-60: AIR 1977 SC 148 at p. 150; *see also infra*, "Acts purporting to be done".

[4] *State of Madras* v. *C.P. Agencies*, AIR 1960 SC 1309; *Amar Nath* v. *Union of India*, AIR 1963 SC 424: (1963) 1 SCR 657; *Raghunath Das* v. *Union of India*, AIR 1969 SC 674: (1969) 1 SCR 450; *State of Punjab* v. *Geeta Iron & Brass Works Ltd.*, (1978) 1 SCC 68: AIR 1978 SC 1608; *Ghanshyam Dass* v. *Dominion of India*, (1984) 3 SCC 46: AIR 1984 SC 1004; *Bihari*

The provision of notice thus is intended to alert the Government or public officer to negotiate just settlement or at least have the courtesy to tell the "potential outsider" why his claim is being resisted.[5]

In *Bihari Chowdhary* v. *State of Bihar*[6], the purpose behind the provision has been highlighted by the Supreme Court thus:

> "When we examine the scheme of the section it becomes obvious that the section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinise the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay. The Government, unlike private parties, is expected to consider a matter covered by the notice in a most objective manner, after obtaining such legal advice as they may think fit, and take a decision in public interest within the period of two months allowed by the section as to whether the claim is just and reasonable and the contemplated suit should, therefore, be avoided by speedy negotiations and settlement or whether the claim should be resisted by fighting out the suit if and when it is instituted. There is clearly a public purpose underlying the mandatory provision contained in the section insisting on the issuance of a notice setting out the particulars of the proposed suit and giving two months' time to Government or a public officer before a suit can be instituted against them. *The object of the section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation.*"[7]
>
> (emphasis supplied)

(*e*) *Law Commission's view*

The Law Commission did not favour in retaining the provision of issuing notice under Section 80 before filing a suit by the aggrieved party.

Before more than fifty years, it noted that the section has worked hardship in a large number of cases where immediate relief was

*Chowdhary* v. *State of Bihar*, (1984) 2 SCC 627: AIR 1984 SC 1043; *Bhagchand* v. *Secy. of State*, AIR 1927 PC 176: (1926-27) 54 IA 338; *Dhian Singh* v. *Union of India*, AIR 1958 SC 274: 1958 SCR 781; *Beohar Rajendra Sinha* v. *State of M.P.*, (1969) 1 SCC 796: AIR 1969 SC 1256; *Ratan Lal* v. *Union of India*, (1989) 3 SCC 537: AIR 1990 SC 104.

[5] *State of Punjab* v. *Geeta Iron & Brass Works Ltd.*, (1978) 1 SCC 68: AIR 1978 SC 1608.

[6] (1984) 2 SCC 627: AIR 1984 SC 1043.

[7] *Ibid*, at pp. 629-30 (SCC): at p. 1044 (AIR).

needed. The evidence disclosed that in large majority of cases, the Government or the public officer made no use of opportunity afforded by the section. In most cases the notice remained unanswered. In large number of cases, Government and public officers utilised the provision as a "technical defence" and in a number of cases, the objection had been upheld by the court defeating just claims of the citizens.[8]

The Commission again considered the question. It noted that it was unable to find a parallel provision in any other country governed by the Anglo-Saxon system of law. It opined that in a democratic country like ours there should ordinarily be no distinction of the kind envisaged by Section 80 between the citizen and the State.[9]

In spite of the above well-considered reasoning and recommendation, the Joint Committee of Parliament favoured retention of the provision in "public interest".[10]

It is, however, submitted that the suggestion of the Law Commission should have been accepted and the provision as to notice ought to have been deleted as virtually it has not achieved the object for which it had been introduced. Moreover, even in absence of such a provision, it is always open to a court of law to issue notice and call upon the Authorities before granting any relief or without causing administrative inconvenience which can be seen from the exercise of extraordinary jurisdiction by the Supreme Court under Article 32 or by the High Courts under Article 226 of the Constitution.[11]

*(f) Essentials*

A notice under Section 80 must contain (*i*) name, description and place of residence of the person giving notice; (*ii*) a statement of the cause of action; and (*iii*) relief claimed by him.

In considering whether the essential requirements of the section have been complied with, the court should ask the following questions:[12]

(*i*) Whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person giving the notice?

(*ii*) Whether the cause of action and the relief which the plaintiff claims have been set out with sufficient particulars?

[8] Law Commission's Fourteenth Report at pp. 475-76.

[9] Law Commission's Twenty-seventh Report at pp. 21-22.

[10] Report of the Joint Committee.

[11] For detailed discussion, *see*, V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt. IV, Chap. II.

[12] *State of A.P.* v. *Gundugola Venkata*, AIR 1965 SC 11 at p. 15: (1964) 4 SCR 945; *Beohar Rajendra Sinha* v. *State of M.P.*, (1969) 1 SCC 796: AIR 1969 SC 1256; *Ghanshyam Dass* v. *Dominion of India*, (1984) 3 SCC 46: AIR 1984 SC 1004.

(*iii*) Whether such notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section? and

(*iv*) Whether the suit has been instituted after the expiration of two months after notice has been served, and the plaint contains a statement that such a notice has been so delivered of left?

(*g*) *Statutory notice whether empty formality*

Statutory notice is not an empty formality. The object is to afford an opportunity to the Government or a public officer to reconsider the matter in the light of the settled legal position and take an appropriate decision in accordance with law. Such notice has, however, become an empty formality. The administration is often unresponsive and shows no courtesy even to intimate the aggrieved party why his claim is not accepted.[13]

In *State of Punjab* v. *Geeta Iron & Brass Works Ltd.*[14], Krishna Iyer, J. also stated, "We like to emphasize that Governments must be made accountable by parliamentary social audit for wasteful litigative expenditure inflicted on the community by inaction. A statutory notice of the proposed action under Section 80 CPC is intended to alert the State to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted. Now Section 80 has become a ritual because the administration is often unresponsive and hardly lives up to Parliament's expectation in continuing Section 80 in the Code despite the Central Law Commission's recommendations for its deletion. An opportunity for settling the dispute through arbitration was thrown away by sheer inaction. A litigative policy for the State involves settlement of governmental disputes with citizens in a sense of conciliation rather than in a fighting mood. Indeed, it should be a directive on the part of the State to empower its law officer to take steps to compose disputes rather than continue them in Court. *We are constrained to make these observations because much of the litigation in which Governments are involved adds to the caseload accumulation in Courts for which there is public criticism. We hope that a more responsive spirit will be brought to bear upon governmental litigation so as to avoid waste of public money and promote expeditious work in Courts of cases which deserve to be attended to.*" (emphasis supplied)

[13] Report of the Joint Committee, Gazette of India, dt. 1-4-1976, Pt. II, S. 2, Extra. at pp. 804-09. See also *Ghanshyam Dass* v. *Dominion of India*, (1984) 3 SCC 46: AIR 1984 SC 1004; *Bihari Chowdhary* v. *State of Bihar*, (1984) 2 SCC 627: AIR 1984 SC 1043; *State of Punjab* v. *Geeta Iron & Brass Works Ltd.*, (1978) 1 SCC 68: AIR 1978 SC 1608; *Raghunath Das* v. *Union of India*, AIR 1969 SC 674: (1969) 1 SCR 450.

[14] (1978) 1 SCC 68 at p. 69: AIR 1978 SC 1608 at p. 1609.

*(h) Statutory notice whether mandatory*

The provisions of Section 80 are express, explicit and mandatory and admit no implications or exceptions. They are imperative in nature and must be strictly complied with. Notice under Section 80 is the first step in the litigation.[15] No court can entertain a suit unless the notice is duly served under sub-section (1) of Section 80. If the section has done injustice, it is a matter which can be rectified by a legislature and not by a court.[16]

As the Supreme Court[17] has observed, "The section is imperative and must undoubtedly be strictly construed; failure to serve a notice complying with the requirements of the statute will entail dismissal of the suit."

*(i) Construction of notice*

The provisions of Section 80 of the Code must be strictly complied with. But it cannot be overlooked that it is a procedural provision, a machinery by which courts impart justice. A notice under this section, therefore, should not be construed in a pedantic manner divorced from common sense.[18]

As Pollock, C.B. stated, "We must import a little common sense into notice of this kind. A statutory notice must be reasonably construed, keeping in mind the ultimate object that an interpretation should not lead to injustice. Every venial defect or error not going to the root of the matter cannot be allowed to defeat justice or to afford an excuse to the Government or a public officer to deny just claim of an aggrieved party."[19]

The question has to be decided by reading the notice as a whole in a reasonable manner. If on such reading, the court is satisfied that the plaintiff has shown to have given the necessary information which the statute requires him to give to the defendants, inconsequential defect or error is immaterial and it will not vitiate the notice. As observed by

[15] *State of Seraikella* v. *Union of India*, AIR 1951 SC 253: 1951 SCR 474.

[16] *Bhagchand* v. *Secy. of State*, AIR 1927 PC 176: (1926-27) 54 IA 338; *Dhian Singh* v. *Union of India*, AIR 1958 SC 274: 1958 SCR 781; *State of Madras* v. *C.P. Agencies*, AIR 1960 SC 1309; *Amar Nath* v. *Union of India*, AIR 1963 SC 424: (1963) 1 SCR 657; *Sawai Singhai Nirmal Chand* v. *Union of India*, AIR 1966 SC 1068: (1966) 1 SCR 986; *Ghanshyam Dass* v. *Dominion of India*, (1984) 3 SCC 46: AIR 1984 SC 1004.

[17] *State of A.P.* v. *Gundugola Venkata*, AIR 1965 SC 11 at p. 15: (1964) 4 SCR 945; *Ghanshyam Dass* v. *Dominion of India*, (1984) 3 SCC 46: AIR 1984 SC 1004.

[18] *State of Madras* v. *C.P. Agencies*, AIR 1960 SC 1309; *S.N. Dutt* v. *Union of India*, AIR 1961 SC 1449: (1962) 1 SCR 560; *State of A.P.* v. *Gundugola Venkata*, AIR 1965 SC 11 at p. 15: (1964) 4 SCR 945; *Dhian Singh* v. *Union of India*, AIR 1958 SC 274: 1958 SCR 781; *Raghunath Das* v. *Union of India*, AIR 1969 SC 674: (1969) 1 SCR 450.

[19] *Jones* v. *Nicholls*, (1844) 13 M&W 361 at p. 363: 153 ER 149 at p. 150.

the Supreme Court, the provisions of the section are not intended to be used as booby-traps against ignorant and illiterate persons.[20]

*(j) "Act purporting to be done in official capacity"*

The expression "any act purporting to be done by such public officer in his official capacity" takes within its sweep acts as also illegal omissions. Likewise, it also covers past as well as future acts. All acts done or which could have been done under the colour or guise by an officer in the ordinary course of his official duties would be included therein.[21]

If the allegations in the plaint relate to an act purporting to be done by a public officer, whatever the relief prayed for, the section is attracted and a notice is mandatory.[22] Again, an act does not mean any particular, specific or instantaneous act of a person but denotes a series of acts.[23] Moreover, the words "acts purporting to be done" apply to misfeasance as well as non-feasance.[24]

Such acts, however, must be *bona fide* and they must have some nexus with the duty of the officer.[25] The expression "any act purporting to be done by such public officer in his official capacity" connotes that the act must be such as could ordinarily be done by a person in the ordinary course of his official duties. It does not cover acts outside the sphere of his duties.[26] "There must be something in the nature of the act complained of which attaches to the official character of the person doing it."[27]

The test is whether the officer can reasonably claim protection for his act or it was performed by him purely in his private or individual

[20] *Ghanshyam Dass* v. *Dominion of India*, (1984) 3 SCC 46: AIR 1984 SC 1004; *State of A.P.* v. *Gundugola Venkata*, AIR 1965 SC 11 at p. 15: (1964) 4 SCR 945; *Raghunath Das* v. *Union of India*, AIR 1969 SC 674: (1969) 1 SCR 450.

[21] *Samanthala Koti* v. *Pothuri Subbiah*, AIR 1918 Mad 62: (1917) 41 Mad 792: 34 Mad LJ 494 (FB); *Gill* v. *R.*, AIR 1948 PC 128: (1947-48) 75 IA 41; *Pukhraj* v. *State of Rajasthan*, (1973) 2 SCC 701: AIR 1973 SC 2591; *K. Satwant Singh* v. *State of Punjab*, AIR 1960 SC 266.

[22] *State of Madras* v. *Chitturi Venkata*, AIR 1957 AP 675: ILR 1956 Andh 114: 1956 AnWR 54: 1956 ALT 106.

[23] S. 3(2), General Clauses Act, 1897; see also *Amalgamated Electricity Co. (Belgaum) Ltd.* v. *Municipal Committee, Ajmer*, AIR 1969 SC 227 at p. 231: (1969) 1 SCR 430; *State of Maharashtra* v. *Chander Kant*, (1977) 1 SCC 257 at p. 260: AIR 1977 SC 148 at p. 150.

[24] *State of Maharashtra* v. *Chander Kant*, (1977) 1 SCC 257 at p. 260: AIR 1977 SC 148 at p. 150; *Ramaswami Ayyangar* v. *State of T.N.*, (1976) 3 SCC 779 at p. 783: AIR 1976 SC 2027 at p. 2031, *see also*, S. 34, IPC.

[25] *Chhaganlal* v. *Collector, Kaira*, (1910) 35 Bom 42: 7 IC 993; *Samanthala Koti* v. *Pothuri Subbiah*, AIR 1918 Mad 62: (1917) 41 Mad 792: 34 Mad LJ 494 (FB).

[26] *Ibid.*

[27] *State of Maharashtra* v. *Chander Kant*, (1977) 1 SCC 257 at p. 260: AIR 1977 SC 148 at p. 150.

capacity. In the case of the former, a notice under Section 80 is necessary, in the case of the latter, it is not.[28]

(*k*) *Waiver of notice*

Though issuance of a notice under Section 80 is mandatory and a condition precedent for the institution of a suit, the provision is merely procedural in nature and not a substantive one. It does not affect the jurisdiction of the court. A notice under Section 80 is for the benefit of the Government or public officer. It is, therefore, open to the Government or public officer to waive such benefit.[29] The question whether, in fact, there is waiver or not would necessarily depend on the facts of each case and is liable to be tried by the same court if raised.[30]

(*l*) *Form of notice*

A notice under Section 80 need not be in a particular form as no form has been prescribed by the Code for the purpose. It is sufficient if the notice complies with the requirements of the section. It should contain details sufficient to inform the party of the nature and basis of the claim and the relief sought.[31]

(*m*) *Mode of service*

A notice under Section 80 of the Code should be delivered to, or left at the office of, the appropriate authority specified in the section.[32] It should be given to the Secretary of the department of the Government or the Collector of the District. Personal delivery of the notice is, however, not necessary. If such interpretation is adopted, the words "or left at his office" will become nugatory. Hence, such notice can either be served personally or be sent by registered post.

(*n*) *Technical defect in notice: Section 80*(3)

Sub-section (3) to Section 80 as inserted by the Code of Civil Procedure (Amendment) Act, 1976 clarifies that no suit instituted against the Government or public officer shall be dismissed merely on the ground of error or defect in the notice, if, in such notice, the name, description and residence of the plaintiff had been so given as to enable the authority or public officer to identify the person serving the notice and such notice had been delivered or left at the office of the authority

[28] *Ibid*, see also *Amalgamated Electricity Co. (Belgaum) Ltd.* v. *Municipal Committee, Ajmer*, AIR 1969 SC 227 at p. 231: (1969) 1 SCR 430; *Gill* v. *R.*, AIR 1948 PC 128: (1947-48) 75 IA 41; *Hori Ram (Dr.)* v. *Emperor*, AIR 1939 FC 43: 1939 FCR 159.

[29] *Vellayan* v. *Province of Madras*, AIR 1947 PC 197: (1946-47) 74 IA 223; *Dhian Singh* v. *Union of India*, AIR 1958 SC 274: 1958 SCR 781.

[30] *Ibid*, see also *Vasant Ambadas* v. *Bombay Municipal Corpn.*, AIR 1981 Bom 394 at p. 396 (FB); *Commr. of Taxes* v. *Golak Nath*, AIR 1979 Gau 10 at p. 12.

[31] *S.N. Barick* v. *State of W.B.*, AIR 1963 Cal 79; *Nannah* v. *Union of India*, AIR 1964 Raj 41; *Amar Nath* v. *Union of India*, AIR 1963 SC 424 at p. 428-29: (1963) 1 SCR 657.

[32] *State of A.P.* v. *Gundugola Venkata*, AIR 1965 SC 11: (1964) 4 SCR 945.

or public officer and the cause of action and the relief claimed by the plaintiff had been substantially indicated therein.

The above sub-section has been added with a view to ensuring that just claims of aggrieved parties will not be defeated on technical grounds. Now, a notice under Section 80 cannot be held invalid and no suit can be dismissed on the ground that there is technical defect or error in the notice or that the service of such notice is irregular.[33]

The Joint Committee stated:

> "The Committee also feel that with a view to seeing that the just claims of many persons are not defeated on technical grounds, the suit against the Government or the public officer should not be dismissed merely by reason of any technical defect or error in the notice or any irregularity in the service of the notice if the name, description and residence of the plaintiff have been so given in the notice as to enable the appropriate authority or public officer to identify the person serving the notice, and the notice had been delivered or left at the office of the appropriate authority, and the cause of action and the relief claimed have been substantially indicated in the notice."[34]

(*o*) *Exclusion of period of notice*

In computing the period of limitation for instituting a suit against the Government or public officer, the period of notice has to be excluded.[35]

(*p*) *Leave of court: Urgent relief: Section 80*(2)

Sub-section (2) of Section 80 as inserted by the Code of Civil Procedure (Amendment) Act, 1976 enables the plaintiff to institute a suit against the Government or public officer for obtaining urgent or immediate relief with the leave of the court even without serving notice to the Government or public officer.[36] This sub-section, thus, engrafts an exception to the rule laid down in sub-section (1) of Section 80 and allows the plaintiff to obtain urgent relief in grave cases even without issuing notice.[37]

[33] S. 80(3); see also *S.N. Dutt* v. *Union of India*, AIR 1961 SC 1449: (1962) 1 SCR 560; *Raghunath Das* v. *Union of India*, AIR 1969 SC 674: (1969) 1 SCR 450; *State of A.P.* v. *Gundugola Venkata*, AIR 1965 SC 11: (1964) 4 SCR 945.

[34] Report of the Joint Committee, Gazette of India, dt. 1-4-1976, Pt. II, S. 2, Extra., at pp. 804-09.

[35] S. 15(2), Limitation Act, 1963; see also *Jai Chand* v. *Union of India*, (1969) 3 SCC 642; *Amar Chand* v. *Union of India*, (1973) 1 SCC 115: AIR 1973 SC 313.

[36] S. 80(2); see also *Ghanshyam Dass* v. *Dominion of India*, (1984) 3 SCC 46: AIR 1984 SC 1004.

[37] *Ghanshyam Dass* v. *Dominion of India*, (1984) 3 SCC 46: AIR 1984 SC 1004 at p. 1011.

The object underlying this provision is to prevent failure or miscarriage of justice in urgent cases. It is the urgency and immediate relief which would weigh with the court while dealing with a prayer to dispense with the requirement of a notice and not the merits of the case.

Sub-section (2), however, enacts that in such a case, the court shall not grant relief, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit.[38]

(*q*) *Writ petition*

A writ petition under Article 32 or 226 of the Constitution cannot be said to be a "suit" within the meaning of Section 80 of the Code. Hence, giving of prior notice to the Government or public officer is not necessary before filing a petition in the Supreme Court or in a High Court.[39]

(*r*) *Computation of limitation*

In computing the period of limitation for filing a suit, the period of notice should be excluded.[40]

(*s*) *Premature suit*

A suit instituted before the expiry of two months of notice as required by Section 80 of the Code is liable to be dismissed only on that ground.[41]

(*t*) *Appeal*

An order passed under Section 80 is neither a "decree" nor an appealable order and, hence, no appeal lies against such order.[42]

(*u*) *Revision*

An order under Section 80 of the Code is a "case decided" under Section 115 of the Code and is, therefore, revisable. If a court subordinate to the High Court makes an order which is patently illegal and suffers from jurisdictional error, it can be corrected by the High Court.[43]

[38] S. 79.

[39] *Soorajmull* v. *Controller of Customs*, AIR 1952 Cal 103; *Province of Bombay* v. *Khushaldas S. Advani*, AIR 1950 SC 222: 1950 SCR 621; *N. Parameswara Kurup* v. *State of T.N.*, AIR 1986 Mad 126.

[40] S. 15(2), Limitation Act, 1963.

[41] *Bihari Chowdhary* v. *State of Bihar*, (1984) 2 SCC 627 at p. 631: AIR 1984 SC 1043 at p. 1045.

[42] *State of Gujarat* v. *K.R. Nayar*, 1982 Guj LH 987; *Kailash Chandra* v. *State of M.P.*, AIR 1992 MP 242: 1991 MP LJ 754: 1991 Jab LJ 524.

[43] *Ishwarlal* v. *State of Maharashtra*, ILR 1966 Guj 660: (1966) 7 Guj LR 589; *Muktarei Devi* v. *State of Manipur*, AIR 1978 Gau 17.

(*v*) *Title of suit: Section 79*

In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be:

(*a*) in the case of a suit by or against the Central Government, the Union of India; and

(*b*) in the case of a suit by or against the State Government, the State.[44]

(*w*) *Statement in plaint*

A plaint can be presented after the expiration of two months of notice, which must contain a statement that a statutory notice under Section 80 of the Code has been delivered or left as required by sub-section (1) of the said section. An omission to make such a statement is fatal and, in its absence, the plaint will be rejected by the court.[45]

(*x*) *Parties*

Where a suit is filed against a public officer in respect of any act purporting to be done by him in his official capacity, the Government should be joined as a party to the suit.[46]

(*y*) *Procedure: Order 27*

In a suit by or against the Government, the plaint or written statement shall be signed by any person appointed by the Government who is acquainted with the facts of the case.[47] Persons authorized to act for the Government shall be deemed to be recognized agents under the Code.[48] A Government Pleader can receive summons on behalf of the Government.[49] A counsel for the State need not file a *vakalatnama*. Reasonable time should be granted to the Government for filing a written statement.[50] In all suits against the Government or public officers, it is the duty of the court to assist in arriving at a settlement.[51]

Order 27-A provides that in a suit (or appeal) in which substantial question of law relating to interpretation of the Constitution is involved, the court must issue notice to the Attorney General of India if the question of law concerns the Central Government and to the

[44] *State of A.P.* v. *Gundugola Venkata*, AIR 1965 SC 11 at p. 15: (1964) 4 SCR 945; *Gangappa Gurupadappa* v. *Rachawwa*, (1970) 3 SCC 716 at p. 721: AIR 1971 SC 442 at p. 446; *Bihari Chowdhary* v. *State of Bihar*, (1984) 2 SCC 627: AIR 1984 SC 1043.

[45] S. 79; *see also*, Or. 27 Rr. 3, 5-A.

[46] Or. 27 R. 1.

[47] R. 2.

[48] R. 4.

[49] R. 5.

[50] Ss. 81, 82; Or. 27; see also *Collector, Northern Sub-Division* v. *Comunidade of Bombolim*, (1995) 5 SCC 333.

[51] R. 5-B; *see also*, S. 89, as *inserted* by the Amendment Act of 1999.

Advocate General of the State if the question concerns the State Government.[52]

(z) *Other privileges*

Rule 5-A provides that when a suit is filed against a public officer in respect of any act alleged to have been done by him in his official capacity, the government should be joined as a party to the suit. Rule 5-B casts a duty on the Court in suits against the Government or public officers to assist in arriving at a settlement. Rule 7 provides for extension of time to enable a public officer to make a reference to the Government where he is the defendant. Rule 8-A provides that no security shall be required from the Government or from any public officer sued in respect of an act alleged to have been done by him in his official capacity.

Section 81 provides that in a suit filed against a public officer in respect of any act purporting to be done by him in his official capacity, the court shall exempt him from appearing in person if it is satisfied that he cannot absent himself from his duty without detriment to the public service. He shall not be liable to arrest, nor his property shall be liable to be attached otherwise than in execution of a decree.

Section 82 enacts that no execution shall be issued on any decree passed against the Government or a public officer unless it remains unsatisfied for three months from the date of the decree.[53]

**(2) Suits by aliens: Section 83**

Alien enemies residing in India, with the permission of the Central Government, and alien friends, may sue in any court otherwise competent to try a suit, as if they were citizens of India. Alien enemies residing in India without such permission or residing in a foreign country, cannot sue in any court.[54] Every person residing in a country which is at war with India shall be deemed to be an Indian enemy.[55]

**(3) Suits by or against Foreign Rulers, Ambassadors and Envoys: Sections 84 to 87-A**

A foreign State may sue in any competent court, provided that such suit is for the enforcement of private right vested in the Ruler of that State or in any officer of such State in his public capacity.[56] "Foreign

[52] For detailed discussion, *see infra*, "Suits involving questions as to interpretation of Constitution or validity of statutory instrument: Order 27-A".

[53] S. 82. For detailed discussion, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, Ss. 79-82 at pp. 1-107.

[54] S. 83.

[55] Explanation to S. 83.

[56] S. 84.

State" means any State outside India which has been recognized by the Central Government.[57]

A Ruler of a foreign State may sue in the name of his State. Likewise, a Ruler of a foreign State may be sued in the name of his State.[58] The term "Ruler", in relation to a foreign State, means the person who is for the time being recognized by the Central Government to be the head of that State.[59]

The Central Government may, at the request of the Ruler of a foreign State, appoint any person to prosecute or defend a suit on behalf of such Ruler. Such a person appointed by the Central Government shall be deemed to be a recognized agent under the Code of the Ruler of a foreign State.[60]

Section 86(1) enacts that no suit shall be instituted against a foreign State, a Ruler of a foreign State, or an Ambassador or Envoy of a foreign State without the consent of the Central Government. Such consent shall not be given unless the Central Government is satisfied that the conditions laid down in sub-section (2) of Section 86 have been fulfilled.

Likewise, no decree can be executed against the property of any foreign State or a Ruler of a foreign State or an Ambassador or Envoy of a foreign State, except with the consent of the Central Government. Similarly, a Ruler of a foreign State, an Ambassador, an Envoy, a High Commissioner of a Commonwealth country or any other member of his staff, as the Central Government may specify, cannot be arrested under the Code.

It is, however, made clear that where a request is made to the Central Government for the grant of consent, before refusing the request either as a whole or in part, the Central Government must afford to the person seeking such consent reasonable opportunity of being heard.[61]

**(4) Suits against Rulers of former Indian States: Section 87-B**

In the case of any suit by or against the Ruler of any former Indian State which is based wholly or partly upon a cause of action which arose before the commencement of the Constitution the same can be

[57] S. 87-A(*a*).

[58] S. 87.

[59] S. 87-A(*b*).

[60] S. 85.

[61] *Gaekwar Baroda State Rly.* v. *Hafiz Habib-ul-Haq*, AIR 1938 PC 165: (1937-38) 65 IA 182; *Mohanlal Jain* v. *Sawai Man Singhji*, AIR 1962 SC 73: (1961) 1 SCR 702; *Mirza Ali Akbar Kashani* v. *United Arab Republic*, AIR 1966 SC 230: (1966) 1 SCR 319; *Veb Deutfracht* v. *New Central Jute Mills Co. Ltd.*, (1994) 1 SCC 282: AIR 1994 SC 516; *Harbhajan Singh* v. *Union of India*, (1986) 4 SCC 678: AIR 1987 SC 9.

filed in accordance with the provisions in relation to suits by or against foreign Rulers, Ambassadors and Envoys.[62]

"Former Indian State" means any such Indian State as the Central Government may, by notification in the Official Gazette, specify for the purpose of Section 87-B of Code.[63]

**(5) Suits by or against soldiers, sailors and airmen: Order 28**

Where any soldier, sailor or airman is a party to the suit who is in actual service, and is unable to obtain leave for prosecuting or defending the suit *in personam*, he may authorize any person to sue or defend him.[64] The person so authorized may himself prosecute or defend the suit or appoint a pleader.[65] Summons on a soldier, sailor or airman may be served through his commanding officer.[66]

**(6) Suits by or against corporations: Order 29**

A "corporation" is a fictitious or imaginary person invested by law with the attribute of a person. It can sue and be sued in its corporate name, e.g.

*"A.B. Company Ltd.* having its registered office at... ."

Rule 1 of Order 29 provides that in suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by (*i*) the secretary; or (*ii*) any director; or (*iii*) other principal officer of the corporation able to depose to the facts of the case. Summons may be served as provided in Rule 2.[67] The Court may at any stage of the suit require the personal appearance of any of the abovenamed officers, who may be able to answer material questions relating to the suit.[68]

**(7) Suits by or against partnership firms: Order 30**

(*a*) *Suits by or against partners: Rule 1*

Two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm

[62] S. 87-B(1); see also *Tokendra Bir Singh* v. *Govt. of India*, AIR 1964 SC 1663; *Usmanali Khan* v. *Sagar Mal*, AIR 1965 SC 1798: (1965) 3 SCR 201; *Mohan Lal* v. *Sawai Man Singh, supra.*

[63] S. 87-B(2), see also *Narottam Kishore Deb* v. *Union of India*, AIR 1964 SC 1590: (1964) 7 SCR 55; *Tripura Goods Transport Assn.* v. *Commr. of Taxes*, (1998) 2 SCC 264: AIR 1998 SC 465.

[64] Or. 28 R. 1.

[65] R. 2.

[66] R. 3.

[67] *See supra*, Chap. 7; see also *Shalimar Rope Works* v. *Abdul Hussain*, (1980) 3 SCC 595.

[68] Or. 29 R. 3; see also *Ram Chand & Sons Sugar Mills (P) Ltd.* v. *Kanhayalal Bhargava*, AIR 1966 SC 1899: (1966) 3 SCR 856; *United Bank of India* v. *Naresh Kumar*, (1996) 6 SCC 660: AIR 1997 SC 3.

of which they were partners when the cause of action accrued. Any party to a suit may, in such a case, apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accrual of the cause of action, partners in such firm. In a suit by or against a firm, any pleading may be signed and verified by any one of the partners.[69]

Rule 2 enables a defendant to ask for the disclosure of the names of the partners where the suit is filed by the partners in the name of the firm.[70] If any of the partners dies before filing or during the pendency of the suit, it is not necessary to join his legal representative as a party to the suit.[71]

(*b*) *Service of summons: Rule 3*

Rule 3 provides for service of summons upon the firm and its partners.[72] Rule 5 lays down that when a summons is issued to a firm under Rule 3, every person served shall be informed by notice whether he is served as a partner or as a person having control or management of the partnership business, or in both capacities. In the absence of such a notice, the person shall be deemed to be served as a partner.

(*c*) *Appearance by partners: Rules 6-8*

The defendant-partners shall appear individually in their own names. All subsequent proceedings, however, shall continue in the name of the firm.[73] If a notice is served on a person having control or management over the partnership business, he need not appear unless he is a partner.[74] Rule 8 enables a person who is served with a summons as a partner to appear under protest and deny that he was a partner at the material time and have the issue as to his being a partner tried at the trial. If the Court holds that he was a partner at the material time, it does not preclude him from denying the liability of the firm. On the other hand, if the Court holds that he was not a partner of the firm and is not liable as such, it does not preclude the plaintiff from serving a summons on the firm and proceeding with the suit.[75]

[69] Or. 30 R. 1; see also *Gambhir Mal* v. *J.K. Jute Mills Co. Ltd.*, AIR 1963 SC 243: (1963) 2 SCR 190; *Purushottam Umedbhai & Co.* v. *Manilal & Sons*, AIR 1961 SC 325: (1961) 1 SCR 982; *Mandalsa Devi* v. M. *Ramnarain (P) Ltd.*, AIR 1965 SC 1718: (1965) 3 SCR 421.

[70] *Gambhir Mal* v. *J.K. Jute Mills Co. Ltd.* (*ibid.*).

[71] R. 4.

[72] *See supra*, Chap. 7.

[73] R. 6.

[74] R. 7.

[75] *Mohatta Bros.* v. *Bharat Suryodaya Mills Co. Ltd.*, (1976) 4 SCC 420 at p. 426: AIR 1976 SC 1703 at p. 1709-10; *Ganesh Trading Co.* v. *Moji Ram*, (1978) 2 SCC 91: AIR 1978 SC 484.

(*d*) *Suits between co-partners: Rule 9*
Order 30 applies also to suits between a firm and one or more of its partners therein and to suits between firms having one or more partners in common. No execution, however, can be issued in such suits except with the leave of the court.[76]

(*e*) *Suits against persons carrying on business in names of others: Rule 10*
Any person carrying on business in a name or style other than his own name, or a Hindu undivided family carrying on business under any name, may be sued in such name or style as if it were a firm name, and, insofar as the nature of such case permits, all rules under Order 30 shall apply accordingly.[77]

(*f*) *Decree in partnership suits*
Order 20 Rule 15 of the Code provides for passing of a preliminary decree by the court before passing a final decree in a suit for dissolution of partnership or taking of partnership accounts.

(*g*) *Execution of decree against partnership firm*
Order 21 Rules 49 and 50 provide for execution of a decree against a partnership firm and for attachment of partnership property.[78]

**(8) Suits by or against trustees, executors and administrators: Order 31**

In suits between strangers and persons beneficially interested in the property vested in trustees, executors or administrators, it is not necessary to join the beneficiaries as parties to the suit. They can be presented by trustees, executors or administrators, as the case may be. The court may, if it thinks fit, order all or any of the beneficiaries as parties.[79]

Where a suit is filed against trustees, executors or administrators, all of them should be joined as parties, except (*i*) the executors who have not proved the will of the testator; or (*ii*) trustees, executors or administrators staying outside India.[80]

**(9) Suits by or against minors and lunatics: Order 32**

(*a*) *Minor: Definition: Rule 1*
A minor is a person who has not attained the age of 18 years. But in the case of a minor of whose person or property a guardian or next

[76] R. 9.
[77] R. 10.
[78] *Topanmal* v. *Kundomal*, AIR 1960 SC 388; *see also infra*, "Execution", Pt. IV.
[79] Or. 31 R. 1.
[80] R. 2.

friend has been appointed by a court, or whose property is under the superintendence of a Court of Wards, the age of majority is 21 years.[81]

(*b*) *Nature and scope*

Order 32 prescribes the procedure of suits to which minors or persons of unsound mind are parties.[82]

(*c*) *Object*

Order 32 has been specially enacted to protect the interests of minors and persons of unsound mind and to ensure that they are represented in suits or proceedings by persons who are qualified to act as such.[83] An infant is, in law, regarded as of immature intelligence and discretion,[84] and owing to his want of capacity and judgment is disabled from binding himself except where it is for his benefit. Thus the law will, as a general principle, treat all acts of an infant which are for his benefit on the same footing as those of an adult, but will not permit him to do anything prejudicial to his own interests.[85] Thus, a decree passed against a minor or a lunatic without appointment of a guardian is a nullity and is void and not merely voidable.[86]

(*d*) *Suits by minors: Rules 1 to 2-A*

Every suit by a minor should be instituted in his name through his guardian or next friend.[87] If it is not done, the plaint will be taken off the file.[88] Where such minor is a plaintiff, the Court may, at any stage of the suit, order his guardian or next friend, either on the application of the defendant or suo motu, for reasons to be recorded, to furnish security for costs of the defendant.[89] This provision seeks to discourage vexatious litigation by guardians or next friends of minors.[90]

(*e*) *Suits against minors: Rule 3*

Where a suit is instituted against a minor, the court should appoint a guardian *ad litem* to defend the suit. Such appointment should continue throughout all the proceedings including an appeal or revision and in execution of a decree unless it is terminated by retirement, removal or death of such guardian.[91]

[81] S. 3, Majority Act, 1875.

[82] Or. 32 R. 15.

[83] *Ramchandar Singh* v. *B. Gopi Krishna*, AIR 1957 Pat 260 at p. 264; *Tulsiram* v. *Shyamlal Ganpatlal*, AIR 1960 MP 73 at p. 74.

[84] *Coke's Institutes* at p. 291.

[85] *Halsbury's Laws of England*, Vol. XVII at p. 46.

[86] *Ram Chandra* v. *Man Singh*, AIR 1968 SC 954 at p. 955: (1968) 2 SCR 572.

[87] R. 1.

[88] R. 2.

[89] R. 2-A.

[90] Statement of Objects and Reasons.

[91] R. 3.

*(f) Who may be appointed as guardian or next friend?: Rule 4*

Any person who has attained majority and is of sound mind, may act as a guardian or next friend, provided his interest is not adverse to that of the minor, who is not the opposite party in the suit and who gives consent in writing to act as a guardian or next friend. In the interest of a minor, however, the court may permit another person to act as the next friend or guardian of the minor. In the absence of a fit and willing person to act as a guardian, the court may appoint any of its officers to be such guardian.[92]

*(g) Powers and duties of guardian or next friend: Rules 5-7*

No guardian or a next friend can, without the leave of the court, (*i*) receive any amount or movable property on behalf of a minor by way of compromise, nor enter into any agreement or compromise on his behalf in the suit. An application for leave of the court should be accompanied by an affidavit of the next friend or guardian, and if the minor is represented by a pleader, with the certificate of the pleader that such compromise is, in his opinion, for the benefit of the minor. Such certificate or opinion expressed in the affidavit, however, cannot preclude the court from examining whether the agreement or compromise proposed is for the benefit of the minor. An agreement or compromise entered into without the leave of the court is voidable at the instance of the minor. Once such an agreement or compromise is avoided by a minor, it has no effect at all.[93]

Rules 6 and 7 provide that no next friend or guardian of a minor for the suit shall, without the leave of the court, (*a*) receive any money or other movable property on behalf of a minor either by way of compromise before decree or order in favour of the minor, (*b*) enter into any agreement or compromise on behalf of a minor with reference to the suit, unless such leave is expressly recorded in the proceedings.

The application for such leave must be accompanied by an affidavit of the next friend or guardian of the minor, as the case may be, and if the minor is represented by a pleader, by the certificate of the pleader to the effect that such compromise is in his opinion for the benefit of the minor. The opinion so expressed in the affidavit or certificate cannot preclude the court from examining whether in fact the compromise is for the benefit of the minor.

Any compromise entered into without the leave of the court shall be voidable against all parties other than the minor. Therefore, the

[92] R. 4.

[93] Rr. 6 and 7; see also *Bishundeo Narain* v. *Seogeni Rai*, AIR 1951 SC 280: 1951 SCR 548; *Kaushalya Devi* v. *Baijnath Sayal*, AIR 1961 SC 790 at p. 792: (1961) 3 SCR 769.

compromise is good unless the minor chooses to avoid it.[94] But once it is avoided by a minor, it ceases to be effective as regards the other parties also.[95]

Rules 6 and 7 are designed to safeguard the interests of a minor during the pendency of a suit against hostile, negligent or collusive acts of a next friend or guardian.[96] They are based upon the general principle that infant litigants become wards of the court and the court has got the right and also the duty to see that the next friends or guardians act properly and *bona fide* in the interests of minors and that no suits are instituted or carried on by them for their own benefits only irrespective of the benefits of minors.[97]

(*h*) *Interest of infants of paramount consideration*

The provisions of the Code have been based on the general principle that interest of infants is of paramount consideration. It is, therefore, the duty of the court to ensure that guardians and next friends act honestly and exercise their discretionary powers *bona fide* in the interests of minors.[98]

(*i*) *Retirement, removal or death of guardian or next friend: Rules 8-11*

A next friend or guardian of a minor cannot retire without first procuring a fit person for substituting him and giving security for the costs already incurred by him.[99]

The court may remove a next friend or guardian of a minor, if it satisfied that (*i*) his interest is adverse to that of the minor; or (*ii*) he is so connected with the opposite party that it is unlikely that the interest of the minor will be properly protected by him; or (*iii*) he does not discharge his duty; or (*iv*) he ceases to stay in India during the pendency of the suit; or (*v*) there is any other sufficiently justifiable cause.[100]

[94] *Bishundeo Narain* v. *Seogeni Rai*, AIR 1951 SC 280: 1951 SCR 548; *Kaushalya Devi* v. *Baijnath Sayal*, AIR 1961 SC 790 at p. 792: (1961) 3 SCR 769; *Dokku Bhushayya* v. *Katragadda Ramakrishnayya*, AIR 1962 SC 1886 at p. 1891: (1963) 2 SCR 499; *Rangasayi* v. *Nagarathnamma*, AIR 1933 Mad 890 at p. 911 (FB); *Dhirendra Kumar* v. *Sughandhi Bain*, (1989) 1 SCC 85: AIR 1989 SC 147.

[95] *Kaushalya Devi* v. *Baijnath Sayal*, *supra*.

[96] *Dokku Bhushayya* v. *Katragadda Ramakrishnayya*, AIR 1962 SC 1886 at p. 1891: (1963) 2 SCR 499.

[97] *Rangasayi* v. *Nagarathnamma*, AIR 1933 Mad 890 at p. 911 (FB); *Dhirendra Kumar* v. *Sughandhi Bain*, (1989) 1 SCC 85: AIR 1989 SC 147.

[98] *Bishundeo Narain* v. *Seogeni Rai*, AIR 1951 SC 280: 1951 SCR 548; *Kaushalya Devi* v. *Baijnath Sayal*, AIR 1961 SC 790 at p. 792: (1961) 3 SCR 769; *Dokku Bhushayya* v. *Katragadda Ramakrishnayya*, AIR 1962 SC 1886 at p. 1891: (1963) 2 SCR 499; *Rangasayi* v. *Nagarathnamma*, AIR 1933 Mad 890 at p. 911 (FB); *Dhirendra Kumar* v. *Sughandhi Bain*, (1989) 1 SCC 85: AIR 1989 SC 147.

[99] R. 8.

[100] R. 9.

Where the guardian or next friend of a minor desires to retire or fails to discharge his duty or where there are other sufficiently justifiable grounds, the court may permit such guardian or next friend to retire or may remove him and may also make such order as to costs as it thinks fit. It should also appoint a new next friend or guardian.[101]

On retirement, removal or death of a guardian or next friend, further proceedings in the suit shall remain stayed until another guardian or next friend is appointed.[102]

(*j*) *Decree against minors: Rule 3-A*

A decree passed against a minor without appointment of next friend or guardian is null and void. But a decree passed against a minor cannot be said to be illegal nor can be set aside only on the ground that the next friend or a guardian of the minor had an interest in the subject-matter of the suit adverse to that of the minor. If the minor is prejudiced by reason of adverse interest of the next friend or guardian, it can be made a ground for setting aside a decree. The minor may also obtain appropriate relief for misconduct or gross negligence on the part of his next friend or guardian.[103]

(*k*) *Minor attaining majority: Rules 12-14*

On attaining the age of majority, a minor plaintiff may adopt any of the following courses:

(*i*) He may proceed with the suit. In that case he shall apply for an order discharging the next friend or guardian and for leave to proceed in his own name.[104]

(*ii*) He may abandon the suit and apply for its dismissal on repayment of costs to the defendant or to his guardian or next friend.[105]

(*iii*) He may apply for dismissal of the suit on the ground that it was unreasonable or improper.[106]

(*iv*) Where he is a co-plaintiff, he may repudiate the suit and may apply to have his name struck off as co-plaintiff. If the Court finds that he is not a necessary party, it may dismiss him from the suit. But if he is a necessary party, the Court may make him a defendant.[107]

[101] R. 11.

[102] R. 10.

[103] R. 3-A; see also *Ram Chandra* v. *Man Singh*, AIR 1968 SC 954 at p. 955: (1968) 2 SCR 572; *Kameshwari Devi* v. *Barhani*, (1997) 10 SCC 273.

[104] R. 12(1), (2), (3).

[105] R. 12(4).

[106] R. 14.

[107] R. 13.

(*l*) *Persons of unsound mind*

The provisions of Order 32 also apply to lunatics and persons of unsound mind.[108]

**(10) Suits concerning family matters: Order 32-A**

Order 32-A, as inserted by the Code of Civil Procedure (Amendment) Act, 1976 lays down the procedure where suits or proceedings relate to matters concerning a family.[109]

Ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigation concerning affairs of the family require special approach keeping in mind serious emotional aspects involved. Family counselling as one of the methods of achieving the ultimate object of preservation of the family, hence, should be kept in the forefront. Proceedings in such suits, therefore, may not always be held in open court but may be conducted *in camera*.[110]

The Supreme Court[111], while dealing with the Family Courts Act, 1984, observed that the said Act was enacted with a view to promote conciliation in, and secure speedy settlement of, disputes relating to family matters. The said Act was enacted despite the fact that Order 32-A of the Code of Civil Procedure was inserted by reason of the Code of Civil Procedure (Amendment) Act, 1976, which could not bring out desired result.

Every endeavour should be made by the court to assist parties in arriving at an amicable settlement. For that purpose, it is open to the court to secure services of such persons (preferably women where they are available).[112]

**(11) Friendly suits: Section 90, Order 36**

(*a*) *Nature and scope*

A "friendly suit". (Special case) is a suit where the parties do not approach a court by presentation of a plaint as is done in ordinary civil litigation. They are, however, interested in the decision of any question of fact or of law. For the said purpose, they enter into an agreement in writing stating such question in the form of a case for the purpose of obtaining the opinion of the court. The court may decide the question if it is satisfied that such question is "fit" to be decided.[113]

[108] R. 15; see also *Sharda* v. *Dharmpal*, (2003) 4 SCC 493: AIR 2003 SC 493; *Raj Kumar* v. *Rameshchand*, (1999) 8 SCC 29: AIR 1999 SC 3511.

[109] Or. 32-A Rr. 1, 6.

[110] R. 2, *see also*, Statement of Objects and Reasons.

[111] *K.A. Abdul Jaleel* v. *T.A. Shahida*, (2003) 4 SCC 166: AIR 2003 SC 2525.

[112] Rr. 3-5.

[113] S. 90; Or. 36 R. 1.

(*b*) *Object*

In the Statement of Objects and Reasons, it was stated that where parties agree to state a case for the opinion of the court, the court would try and determine such question by registering it as a suit. Upon the judgment so pronounced, a decree will follow. Such decree could be a compromise decree.[114]

(*c*) *Conditions*

The following conditions must be satisfied before a court will hear a friendly suit:[115]

(1) The agreement is duly executed by the parties;

(2) The parties have a *bona fide* interest in the question stated; and

(3) The case is fit to be decided.

(*d*) *Procedure*

Order 32 provides procedure to be followed in friendly suits. Rules 1 and 2 speak of form and contents of an agreement. Such agreement duly entered into between the parties should be filed in the court having jurisdiction to entertain the suit. It shall be registered as a suit and shall be heard and disposed of by a judgment which will be followed by a decree. Thus, virtually, the decree is a consent decree. No appeal lies against such a decree.[116]

The procedure provided by Section 90 and Order 36, however, is rarely invoked because a litigant does not get apparent benefit under it.[117]

(*e*) *Appeal*

A decree passed in a "friendly" suit is in the nature of compromise decree. It is, therefore, not appealable.[118]

**(12) Interpleader suit: Section 88; Order 35**

(*a*) *Meaning*

"To interplead" means "to litigate with each other to settle a point concerning a third party".[119]

[114] *Trustees of the Port of Bombay* v. *Municipal Corpn. Bombay*, AIR 1930 Bom 232: (1930) 54 Bom 825; *Nilima* v. *Prakriti Bhushan*, AIR 1982 Cal 12: (1981) 85 CWN 998.

[115] Rr. 36 R. 1.

[116] Rr. 2-5.

[117] Statement of Objects and Reasons.

[118] R. 6.

[119] *Concise Oxford English Dictionary* (2002) at p. 740; *Chamber's 20th Century Dictionary* (1992) at p. 659.

In *Halsbury's Laws of England*, it has been stated:[120]

> "Where a person is under liability in respect of a debt or in respect of any money, goods or chattels and he is, or expects to be, sued for or in respect of that debt or money, or those goods or chattels, by two or more persons making adverse claims thereto, he may apply to the court for relief by way of interpleader."

(*b*) *Nature and scope*

An interpleader suit is a suit in which the real dispute is not between a plaintiff and a defendant but between the defendants who interplead against each other, unlike in an ordinary suit. In a majority of cases, there is a dispute between a plaintiff and a defendant. In an interpleader suit, the plaintiff is not really interested in the subject-matter of the suit.[121]

Section 88 of the Code enacts that two or more persons claiming adversely to one another the same debt, sum of money or other property, movable or immovable, from a person who does not claim any interest therein except the charges and costs incurred by him and is ready to pay or deliver the same to the rightful claimant, may file an interpleader suit.

(*c*) *Object*

The primary object of filing an interpleader suit is to get claims of rival defendants adjudicated. It is the process wherein the plaintiff calls upon the rival claimants to appear before the court and get their respective claims decided. The decision of the court in an interpleader suit affords indemnity to the plaintiff on payment of money or delivery of property to the person whose claim has been upheld by the court.[122]

(*d*) *Conditions: Section 88*

Before an interpleader suit can be instituted, the following conditions must be satisfied:

(*i*) There must be some debt, sum of money or other property movable or immovable in dispute;

(*ii*) Two or more persons must be claiming it adversely to one another;

(*iii*) The person from whom such debt, money or property is claimed must not be claiming interest therein other than the charges and costs and he must be ready and willing to pay or deliver it to the rightful claimant; and

[120] *Halsbury's Laws of England* (4th Edn.) Vol. 37 at p. 200, para 264.

[121] Mulla, *Code of Civil Procedure* (2007) Vol. IV at pp. 167-71; *Groundnut Extractions Export Development Assn.* v. *State Bank of India*, (1977) 79 Bom LR 184.

[122] *Groundnut Extractions Export Development Assn.* v. *State Bank of India*, (1977) 79 Bom LR 184; *Sobhanandrirao* v. *Jaggayya*, AIR 1966 AP 92 at p. 95.

(*iv*) There must be no suit pending wherein the rights of rival claimants can be properly adjudicated.

(*e*) *Illustrations*

Let us consider some illustrations to understand the ambit and scope of interpleader suits:

(1) *A* is in possession of property claimed by *B* and *C* adversely. *A* does not claim any interest in the property and is ready to deliver it to the rightful owner. *A* can institute an interpleader suit.

(2) *A*, a railway company, is in possession of goods as a consignee. It does not claim any interest in the goods except lien for wharfage, demurrage and freight but rival claims have been made by *B* and *C* adversely to each other. *A* can institute an interpleader suit.

(3) *A* is liable to pay Rs 40,000. The amount is claimed by *B* and *C* adversely to each other. According to *A*, he has already paid Rs 10,000. An interpleader suit would be competent for Rs 30,000.

(4) *A* is liable to pay Rs 50,000. The said amount is claimed by *B* and *C* adversely. *A* does not dispute his liability and is willing to pay the amount either to *B* or to *C* declared to be the rightful claimant by the Court. *A* may file a suit under this section by making *B* and *C* as defendants (Or. 35 R. 1). He can deposit Rs 50,000 in Court (Or. 35 R. 2). On such deposit, the Court may discharge him from liability by awarding costs to him and by removing his name from the suit. (Or. 35 R. 4).

(5) *A* holds Rs 50,000 claimed by *B* and *C* adversely to each other. *A* institutes an interpleader suit by joining *B* and *C* as defendants. It is revealed that *A* had a secret agreement with *B* before the institution of the suit that if *B* succeeded in the suit, he would accept Rs 40,000 in full and final satisfaction of his claim. In view of the agreement, *A* has interest in the subject-matter of the suit and he cannot bring an interpleader suit. The suit must be dismissed.

(*f*) *Who may file interpleader suit?*

A person who has no interest in any debt, sum of money or other property, movable or immovable, except the charges or costs and is ready to pay or deliver the property to the rightful claimant may file an interpleader suit.[123]

[123] *Robinson* v. *Jenkins*, (1890) 24 QB 275: 59 LJ QB 147; *G. Hari Karmarkar* v. *J.A. Robin*, AIR 1927 Rang 91; *National Insurance Co. Ltd.* v. *Dhirendra Nath*, AIR 1938 Cal 287.

(*g*) *Who cannot file interpleader suit?: Rule 5*

An agent cannot sue his principal, or a tenant or his landlord, for the purpose of compelling them to interplead with persons other than persons claiming through such principals or landlords.[124] The reason for the rule seems to be that ordinarily an agent cannot dispute the title of his principal. Likewise, a tenant cannot dispute the title of his landlord during the subsistence of the tenancy.[125]

(*h*) *Test*

In order to decide whether a suit is in the nature of an interpleader suit, the court must have regard to all the prayers in the plaint. A suit does not become an interpleader suit merely because the plaintiff requires the defendants to interplead with each other as regards one of the prayers in the plaint.[126]

(*i*) *Procedure: Order 35 Rules 1-4*

Order 35 lays down the procedure for interpleader suits. In every interpleader suit, in addition to other statements, the plaint also must state (*i*) that the plaintiff claims no interest in the subject-matter in dispute other than the charges and costs; (*ii*) the claims have been made by the defendants severally; and (*iii*) there is no collusion between the plaintiff and any of the defendants.[127]

The court may order the plaintiff to deposit the amount or place the property in the custody of the court and provide costs incurred by him by giving him a charge on the thing claimed.[128]

At the first hearing, the court may declare that the plaintiff is discharged from all liability, award him costs and dismiss him from the suit.[129] On the basis of evidence available, the court may also adjudicate the title to the thing claimed. Where it is not possible, the court may direct that an issue or issues between the parties be framed and tried, one of the claimants be made a plaintiff in lieu of or in addition to the original plaintiff and the suit shall proceed in an ordinary manner.[130]

[124] R. 5.

[125] S. 116, Evidence Act, 1872.

[126] *Jagganath* v. *Tulka Hera*, (1908) 32 Bom 592 at p. 597; *Vyvyan* v. *Vyvyan*, 4 De GF&J 183; *National Insurance Co. Ltd.* v. *Dhirendra Nath*, AIR 1938 Cal 287; *Mariyala Sambayya* v. *Narala Bala*, AIR 1952 Mad 564.

[127] Or. 35 R. 1.

[128] Rr. 2, 6.

[129] R. 4.

[130] Rr. 4, 5.

*(j) Appeal*

An order dismissing the interpleader suit filed by the plaintiff is a "decree". Likewise an adjudication upon the claims of defendants is also appealable as "decree".[131]

A decision under Rules 3, 4 and 6 of Order 35 is an appealable order.[132]

**(13) Suits by indigent persons: Order 33**

*(a) Nature and scope*

Order 33 provides for filing of suits by indigent persons. It enables persons who are too poor to pay court fees and allows them to institute suits without payment of requisite court fees.

*(b) Object*

The provisions of Order 33 are intended to enable indigent persons to institute and prosecute suits without payment of any court fees. Generally, a plaintiff suing in a court of law is bound to pay court fees prescribed under the Court Fees Act *at the time of presentation of plaint.* But a person may be too poor to pay the requisite court fee. This order exempts such person from paying the court fee *at the first instance* and allows him to prosecute his suit in *forma pauperis,* provided he satisfies certain conditions laid down in this order.[133]

*(c) Indigent person: Meaning: Order 33 Rule 1*

A person is an "indigent person" (*i*) if he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit; or (*ii*) where no such fee is prescribed, when he is not entitled to property worth one thousand rupees. In both the cases, the property exempt from attachment in execution of a decree and the subject-matter of the suit should be excluded.[134]

Any property acquired by the applicant after the presentation of the application for permission to sue as an indigent person and the decisions thereon should also be taken into consideration for deciding the question whether the applicant is an indigent person.[135]

The word "person" includes juristic person.[136]

[131] *R.G. Orr* v. *R.M.M.S.T.V.E. Chidambaram,* ILR (1909) 33 Mad 220; *Maharaj Singh* v. *Chittarmal,* ILR (1908) 30 All 22: 4 All LJ 683.

[132] Or. 43 R. 1 (*p*).

[133] *Lim Pin Sin* v. *Eng Wan Hock,* AIR 1928 Rang 306; *Sumathykutty Amma* v. *Narayani Panikkathy,* AIR 1973 Ker 19 at p. 20.

[134] Expln. I to R. 1, Or. 33.

[135] Expln. II to R. 1, *supra.*

[136] *Union Bank of India* v. *Khader International Construction,* (2001) 5 SCC 22.

*(d) Contents of application: Rule 2*

Every application for permission to sue as an indigent person should contain the following particulars:

(1) The particulars required in regard to plaints in suits;
(2) A schedule of any movable or immovable property belonging to the applicant with the estimated value thereof; and
(3) Signature and verification as provided in Order 6 Rules 14 and 15.[137]

The application should be presented by the applicant to the court in person unless exempted by the court.[138] Where there are two or more plaintiffs, it can be presented by any of them.[139] The suit commences from the moment an application to sue in *forma pauperis* is presented.[140]

*(e) Rejection of application: Rule 5*

The court will reject an application for permission to sue as an indigent person in the following cases:[141]

(*i*) Where the application is not framed and presented in the prescribed manner; or
(*ii*) Where the applicant is not an indigent person; or
(*iii*) Where the applicant has, within two months before the presentation of the application, disposed of any property fraudulently or in order to get permission to sue as an indigent person; or where there is no cause of action; or
(*iv*) Where the applicant has entered into an agreement with reference to the subject-matter of the suit under which another person has obtained interest; or
(*v*) Where the suit appears to be barred by law; or
(*vi*) Where any other person has entered into an agreement with the applicant to finance costs of the litigation.

*(f) Inquiry: Rule 1-A*

In the first instance, an inquiry into the means of the applicant should be made by the Chief Ministerial Officer of the court. The court may adopt the report submitted by such officer or may itself make an inquiry.[142]

[137] R. 2.
[138] R. 3. See also *Dipo* v. *Wassan Singh*, (1983) 3 SCC 376: AIR 1983 SC 846.
[139] Proviso to R. 3.
[140] *Vijai Pratap* v. *Dukh Haran Nath*, AIR 1962 SC 941: 1962 Supp (2) SCR 675; *Jugal Kishore* v. *Dhanno Devi*, (1973) 2 SCC 567: AIR 1973 SC 2508.
[141] R. 5; see also *M.L. Sethi* v. *R.P. Kapur*, (1972) 2 SCC 427: AIR 1972 SC 2379.
[142] R. 1-A.

Where the application submitted by the applicant is in proper form and is duly represented, the court may examine the applicant regarding the merits of the claim and the property of the applicant.[143]

The court shall then issue notice to the opposite party and to the Government Pleader and fix a day for receiving evidence as the applicant may adduce in proof of his indigency or in disproof thereof by the opposite party or by the Government Pleader. On the day fixed, the court shall examine the witnesses (if any), produced by either party, hear their arguments and either allow or reject the application.[144]

(*g*) *Where permission is granted?: Rules 8 to 9-A*

Where an application to sue as a indigent person is granted, it shall be deemed to be a plaint in the suit and shall proceed in the ordinary manner, except that the plaintiff will not have to pay court fees or process fees.

The court may assign a pleader to an indigent person if he is not represented by a pleader. The Central Government or the State Government may make provisions for rendering free legal aid and services to indigent persons to prosecute their cases. A defendant can also plead set-off or counterclaim as an indigent person.[145]

(*h*) *Where permission is rejected?: Rules 15 to 15-A*

Where the court rejects an application to sue as an indigent person, it will grant time to the applicant to pay court fees.[146] An order refusing to allow an applicant to sue as an indigent person shall be a bar to a subsequent similar application. However, this does not debar him from suing in an ordinary manner, provided he pays the costs incurred by the Government Pleader and the opposite party in opposing the application.[147]

(*i*) *Revocation of permission: Rule 9*

The Court may, on an application by the defendant or by the Government Pleader, revoke permission granted to the plaintiff to sue as an indigent person in the following cases:[148]

(*i*) Where he is guilty of vexatious or improper conduct in the course of the suit; or

(*ii*) Where his means are such that he ought not to continue to sue as an indigent person; or

[143] R. 4.
[144] Rr. 6, 7.
[145] Rr. 8, 9-A, 18.
[146] R. 15-A.
[147] R. 15.
[148] R. 9.

(*iii*) Where he has entered into an agreement under which another person has obtained an interest in the subject-matter of the suit.

(*j*) *Costs*

The costs of an application to sue as an indigent person shall be the costs in the suit.[149]

(*k*) *Recovery of court fees and costs*

(*A*) *Where indigent person succeeds.*—Where the plaintiff (indigent person) succeeds in the suit, the court shall calculate the amount of court fees and costs and recover from the party as ordered by the court.[150]

(*B*) *Where indigent person fails.*—Where the plaintiff (indigent person) fails or the suit abates, the court shall order him (plaintiff) to pay court fees and costs.[151]

(*l*) *Right of State Government*

The State Government has right to recover court fees. For that purpose, it is deemed to be a party to the suit.[152]

(*m*) *Realization of court fees: Rule 14*

Where an indigent person succeeds in a suit, the State Government can recover court fees from the party as per the direction in the decree and it will be the first charge on the subject-matter of the suit. Where an indigent person fails in the suit, the court fees shall be paid by him. Where the suit abates on account of the death of a plaintiff, such court fees would be recovered from the estate of the deceased plaintiff.[153]

(*n*) *Appeal*

An order rejecting an application to sue as an indigent person is appealable.[154]

(*o*) *Appeals by indigent persons: Order 44*

A person unable to pay court fees on memorandum of appeal may apply to allow him to appeal as an indigent person. The necessary inquiry as prescribed in Order 33 will be made before granting or refusing the prayer. But where the appellant was allowed to sue as an indigent person in the trial court, no fresh inquiry will be necessary if he files an affidavit that he continues to be an indigent person.[155]

[149] R. 16.
[150] R. 10.
[151] Rr. 11, 11-A.
[152] R. 13.
[153] R. 14.
[154] Or. 43 R. 1 (*na*).
[155] Or. 44.

### (14) Suits involving questions as to interpretation of Constitution or validity of statutory instrument: Order 27-A

Order 27-A provides that in a suit or appeal in which a substantial question of law as to the interpretation of the Constitution, as referred to in Article 132(1) or 147 of the Constitution of India, is involved, the Court shall not proceed to determine the question until after notice to the Attorney General of India if the question of law concerns the Central Government and to the Advocate General of the State if the question of law concerns the State Government.[156]

If such officers apply, they may be made party to the suit or appeal.[157] In such a case, the Attorney General or the Advocate General shall not be entitled to or liable for costs.[158] Rules 1-A and 2-A as added by the Amendment Act of 1976 prescribe the procedure in suits or appeals involving the validity of any statutory instrument.

### (15) Mortgage suits: Order 34

(*a*) *Nature and scope*

Order 34 lays down procedure with regard to suits relating to mortgages of immovable property. It provides for the frame of the suit relating to sale, foreclosure and redemption of mortgaged property and also to enforce charges. The procedure laid down in Order 34 is distinct and different for execution of decrees in mortgage suits than the procedure prescribed in Order 21 for execution of decrees passed in other suits.[159]

(*b*) *Mortgage: Definition*

Mortgage is defined in the following words:

> "A mortgage is the transfer of interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.
>
> The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage money and the instrument (if any) by which the transfer is effected is called a mortgage-deed."[160]

[156] Or. 27-A Rr. 1 and 4; see also *United Provinces* v. *Atiqa Begum*, AIR 1941 FC 16; *State of Gujarat* v. *Kasturchand*, 1991 Supp (2) SCC 345: AIR 1991 SC 695.

[157] R. 2.

[158] R. 3.

[159] *S. Sivaprakasam* v. *B.V. Muniraj*, (1997) 9 SCC 636.

[160] S. 58(*a*) of the Transfer of Property Act, 1882.

(c) *Essentials*

From the above definition, it becomes clear that there are always two parties to a mortgage transaction: (*i*) mortgagor; and (*ii*) mortgagee. The mortgagor has a right to redeem his property from the mortgage encumbrance while the mortgagee has the right to sell the mortgaged property and the right to foreclose by depriving the mortgagor of his right of redemption.

(d) *Object*

The provisions of Order 34 have been enacted with the avowed object of avoiding multiplicity of suits by deciding all claims in the presence of the interested parties.

(e) *Parties: Rule 1*

Rule 1 of Order 34 enacts that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any such suit relating to mortgage.[161]

The object underlying joinder of parties in mortgage suits is to avoid multiplicity of proceedings and to ensure that all the claims effecting the mortgage security or the right of redemption may be disposed of in the same suit.

This provision is, however, subject to the provisions of the Code; and Order 1 Rule 9 lays down that no suit shall be defeated by reason of non-joinder of parties.[162]

(f) *Suit for foreclosure: Rules 2-3*

(*i*) *Preliminary decree.*—In suit for foreclosure, if the plaintiff succeeds, the court shall pass a preliminary decree (*a*) ordering that an account be taken of what was due to the plaintiff at the date of such decree for principal and interest on the mortgage, the costs of the suit awarded to him; and other costs, charges and expenses properly incurred by him; or (*b*) declaring the amount so due; and (*c*) directing that if the defendant pays into court the said amount, on or before such date fixed or extended by the court, the plaintiff shall deliver to the defendant all documents relating to the mortgaged property and retransfer the property to the defendant free from the mortgage and all encumbrances created by the plaintiff and put the defendant in possession thereof. If the payment is not made by the defendant, the plaintiff shall be entitled to apply for a final decree debarring the defendant from his right to redeem the mortgage.[163]

[161] Or. 34 R. 1; see also *Chhaganlal* v. *Patel Narandas,* (1982) 1 SCC 223: AIR 1982 SC 121.

[162] *Ibid; see also supra,* Chap. 5; *N.K. Mohd. Sulaiman* v. *N.C. Mohd. Ismail,* AIR 1966 SC 792: (1966) 1 SCR 937.

[163] Or. 34 R. 2.

(*ii*) *Final decree.*—Where the defendant makes payment of all amounts on or before the date fixed or extended by the court for such payment, the court shall, on an application being made by him, pass a final decree directing the plaintiff to deliver to the defendant all the documents referred to in the preliminary decree, to retransfer the property and to put the defendant in possession thereof. Where no payment has been made by the defendant on or before the date fixed or extended by the court for such payment, the court shall on application being made by the plaintiff pass a final decree declaring that the defendant is debarred of his right to redeem the mortgage and, if necessary, by directing the defendant to put the plaintiff in possession of the mortgaged property. On passing of a final decree, the defendant shall be deemed to have been discharged from all his liabilities in respect of the mortgage.[164]

(*g*) *Suit for sale: Rules 4-6*

(*i*) *Preliminary decree.*—In a suit for sale, if the plaintiff succeeds, the court shall pass a preliminary decree in the aforesaid manner. In case of default by the defendant, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property be sold and the sale proceeds be applied in payment of amount due to the plaintiff be.[165]

(*ii*) *Final decree.*—Where on or before the day fixed or at any time before the confirmation of sale, the defendant makes payment into court all amounts due, the court shall on application being made by him pass a final decree directing the plaintiff to deliver to the defendant all the documents referred to in the preliminary decree, to retransfer the mortgaged property and to put the defendant in possession thereof. Where the payment has not been made by the defendant, the court shall, on an application being made by the plaintiff pass a final decree directing sale of mortgaged property.[166]

If the net proceeds of such sale are less than the amount due, the court may pass a decree for the balance if it is legally recoverable from the defendant.[167]

(*h*) *Suit for redemption: Rules 7-9*

(*i*) *Preliminary decree.*—In a suit for redemption, if the plaintiff succeeds, the court shall pass a preliminary decree in the aforesaid manner. If the plaintiff does not make the payment, the defendant shall be entitled to apply for a final decree that the mortgaged property be sold

[164] R. 3.
[165] R. 4.
[166] R. 5.
[167] R. 6.

or that the plaintiff be debarred of his right to redeem the mortgaged property, depending upon the nature of the mortgage.[168]

(*ii*) *Final decree.*—Where before a final decree debarring the plaintiff of his right to redeem the mortgage has been passed or before the confirmation of a sale, the plaintiff pays all amounts due, the court shall, on application being made by him pass a final decree directing the defendant to deliver to the plaintiff all the documents referred to in the preliminary decree, to retransfer the mortgaged property and to put the plaintiff in possession thereof. Where no payment has been made by the plaintiff, the court shall, on application being made by the defendant, pass a final decree declaring that the plaintiff is debarred of his right to redeem the mortgage or directing that the mortgaged property be sold and proceeds thereof be applied in payment of amount found due to the defendant and the balance, if any, be paid to the plaintiff.[169]

If the net proceeds of such sale are less than the amount due, the court may pass a decree for the balance if it is legally recoverable from the plaintiff.[170] If it appears that nothing is due to the defendant or that he has been overpaid, the court shall pass a decree directing him to retransfer the property and to pay to the plaintiff the amount which may be found due to him and he may be put in possession of the mortgaged property.[171]

The Code also makes provisions for payment of costs, mesne profits and interest in mortgage suits.[172]

**(16) Summary suits: Order 37**

(*a*) *Nature and scope*

Order 37 provides summary procedure in suits based on negotiable instruments or where the plaintiff seeks to recover debt or liquidated amount. The essence of summary suits is that the defendant is not, as in an ordinary suit, entitled as of right to defend the suit. He must apply for leave to defend within the stipulated period of ten days. Such leave will be granted only if the affidavit filed by the defendant discloses such facts as will make it incumbent upon the plaintiff to prove consideration or such other facts as the court may deem sufficient.[173] The provisions of Order 37 are merely rules of procedure. They do not alter the nature of the suit or jurisdiction of courts.[174]

[168] R. 7.
[169] R. 8.
[170] R. 8-A.
[171] R. 9.
[172] Rr. 10, 10-A, 11.
[173] Or. 37 Rr. 1-3.
[174] *Prayag Deb* v. *Rama Roy*, AIR 1977 Cal 1 (FB).

(*b*) *Object*

The object underlying the summary procedure is to prevent unreasonable obstruction by the defendant who has no defence and to assist expeditious disposal of cases.[175]

Trading and commercial operations will be seriously impeded if money disputes between the parties are not adjudicated upon immediately.[176]

Taken by and large, the object of the provision is to ensure that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining a decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of commercial transactions.[177]

(*c*) *Discretionary power*

The discretionary power conferred upon the court under Order 37 should be exercised judicially, judiciously and on well-settled principles of natural justice. Wherever defence raises a "triable issue", leave should be granted unconditionally. If it is not done, leave may become illusory.[178]

Care should be taken to see that the object of the rule to assist the expeditious disposal of commercial causes should not be defeated. But it also must be ensured that real and genuine triable issues are not shut out by unduly severe orders as to deposit.[179]

(*d*) *Extent and applicability*

The provisions of Order 37 apply to High Courts, City Civil Courts, Courts of Small Causes and other superior courts. They apply to (*a*) suits based upon bills of exchange, *hundies* and promissory notes; and (*b*) suits in which the plaintiff seeks to recover a debt or liquidated amount payable by the defendant with or without interest arising (*i*) on a written contract; or (*ii*) on an enactment, where the sum sought to be recovered is a fixed sum of money or debt other than penalty; or (*iii*) on a guarantee, where the claim against the principal is in respect of a debt or liquidated amount.[180]

[175] *Milkhiram India (P) Ltd.* v. *Chamanlal Bros.*, AIR 1965 SC 1698: (1966) 68 Bom LR 36.

[176] *Ibid.*

[177] *Ibid*, see also *Santosh Kumar* v. *Bhai Mool Singh*, AIR 1958 SC 321: 1958 SCR 1211.

[178] *Santosh Kumar* v. *Bhai Mool Singh, supra; Milkhiram India (P) Ltd.* v. *Chamanlal Bros., supra; Larsen & Toubro Ltd.* v. *Arun Kumar*, (2000) 4 JT 556.

[179] *Ibid*, see also *Kamlesh Kohli* v. *Escotrac Finance & Investment Ltd.*, (2000) 1 SCC 324; *Mechelec Engineers & Manufacturers* v. *Basic Equipment Corpn.*, (1976) 4 SCC 687: AIR 1977 SC 577.

[180] Rr. 1, 7; see also *Prayag Deb* v. *Rama Roy, supra.*

*(e) Procedure*

Rules 2 and 3 provide the procedure of summary suits. Rule 2 provides that after the summons of the suit has been issued to the defendant, the defendant must appear and the plaintiff will serve a summons for judgment on the defendant. The defendant is not entitled to defend a summary suit unless he enters an appearance. In default of this, the plaintiff will be entitled to a decree which will be executed forthwith.

Rule 3 prescribes the mode of service of summons and leave to defend. The defendant must apply for leave to defend within ten days from the date of service of summons upon him and such leave will be granted only if the affidavit filed by the defendant discloses such facts as may be deemed sufficient to entitle him to defend. Such leave may be granted to the defendant unconditionally or upon such terms as may appear to the court or judge to be just.[181]

Leave to defend, however, should not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put by him is frivolous or vexatious. If a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend should not be granted unless such admitted amount is deposited by him in the court.[182]

At the hearing of such summons for judgment, if the defendant does not apply for leave to defend or such leave is refused, the plaintiff is entitled to a decree forthwith. The court or judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit. No hard and fast rule can be laid down as to in what cases leave to defend can be granted. Each case must be decided on its own facts and circumstances and the discretion must be exercised judicially and in consonance with the principles of natural justice which form the foundations of our laws.[183]

*(f) Test*

The test whether leave to defend should be granted or not is to see whether the defence raises a real, honest and *bona fide* dispute and raises a triable issue or not. If the court is satisfied that the defence has raised a triable issue or a fair dispute has arisen, leave to defend should not be refused.[184] Again, it is hazardous and unfair to pronounce a categorical opinion on such matter before the evidence is taken. It is only

[181] *Mechelec Engineers & Manufacturers* v. *Basic Equipment Corpn.*, (1976) 4 SCC 687: AIR 1977 SC 577.

[182] *Ibid, see also supra*, "discretionary power".

[183] *Ibid*, see also *Santosh Kumar* v. *Bhai Mool Singh*, AIR 1958 SC 321: 1958 SCR 1211.

[184] *Raj Duggal* v. *Ramesh Kumar*, 1991 Supp (1) SCC 191: AIR 1990 SC 2218.

in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion to grant unconditional leave can be refused.[185]

As the matter is in the discretion of the court, no hard and fast rule can be laid down as to when the discretion should be exercised by granting unconditional leave to the defendant. In general, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good or even plausible, defence on those facts.[186]

Under special circumstances, the court can set aside the decree and stay the execution and may grant leave to the defendant to appear and defend the suit.[187] However, inherent power under Section 151 of the Code cannot be exercised for setting aside such decree.[188]

(*g*) *Difference between summary suit and ordinary suit*

Whereas in an ordinary suit the defendant is entitled to defend the suit as of right, in a summary suit he is not so entitled except with the leave of the court.[189] While in an ordinary suit the decree cannot be set aside by the trial court except on review, in a summary suit the trial court may set it aside under special circumstances.[190]

(*h*) *Recording of reasons*

*Generally*, a court while granting conditional leave, should record reasons. Absence to record reasons, however, will not make the order invalid.[191]

(*i*) *Revision*

An order passed under Order 37 is a "case decided" under Section 115 of the Code and is revisable though a High Court generally does not interfere with the discretion exercised by the trial court.[192]

[185] *Mechelec Engineers & Manufacturers* v. *Basic Equipment Corpn., supra*, at pp. 690 (SCC): at p. 580 (AIR).

[186] *Santosh Kumar* v. *Bhai Mool Singh*, AIR 1958 SC 321: 1958 SCR 1211.

[187] R. 4.

[188] *Ramkarandas* v. *Bhagwandas*, AIR 1965 SC 1144 at p. 1145: (1965) 2 SCR 186.

[189] R. 3.

[190] R. 4.

[191] *V. Kamalanathan* v. *E.I.D. Parry Ltd.*, (1978) 1 Mad LJ 25: AIR 1978 NOC 271; *Fateh Lal* v. *Sunder Lal*, AIR 1980 Raj 220; *Vijaykumar K. Shah* v. *Firm of Pari Naresh Chandra*, AIR 1968 Guj 247; *Bombay Enamel Works* v. *Purshottam*, AIR 1975 Bom 128; *Milkhiram India (P) Ltd.* v. *Chamanlal Bros.*, AIR 1965 SC 1698; *Ashok Umraomal Sancheti* v. *Rispalchand*, (2000) 9 SCC 737.

[192] *Mechelec Engineers* v. *Basic Equipment Corpn., supra.*

(*j*) *Principles*

In *Kiranmoyee Dassi* v. *Dr. J. Chatterjee*[193], the High Court of Calcutta—laid down the following principles relating to suits of a summary nature:

(*i*) If the defendant satisfies the court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(*ii*) If the defendant raises a triable issue indicating that he has a fair or *bona fide* or reasonable defence although not a positively good defence, the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(*iii*) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but, in such a case, the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(*iv*) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(*v*) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence.[194]

**(17) Suits relating to public nuisance: Section 91**

(*a*) *Nature and scope*

Section 91 of the Code provides for filing of a suit in the case of public nuisance or other wrongful acts affecting the public at large. It states

[193] AIR 1949 Cal 479: 49 CWN 246: ILR (1945) 2 Cal 145.

[194] *Ibid*, at p. 486 (AIR): at p. 253 (CWN); approved in *Mechelec Engineers & Manufacturers* v. *Basic Equipment Corpn.*, (1976) 4 SCC 687.

that such a suit can be instituted for declaration, injunction or such other relief which may be appropriate in the circumstances of the case.

(*b*) *Object*

Ratanlal and Dhirajlal stated, "Though not so dangerous as occasion for keeping the peace or good behaviour, nor so urgent as unlawful assemblies, they (nuisances) are yet sufficiently fraught with potential danger as to warrant a summary action on the part of the majistry."[195]

In the leading case of *Municipal Council, Ratlam* v. *Vardichan*[196], the Supreme Court observed that a public nuisance is a challenge to the social justice component of the Rule of Law. In case of public nuisance it is the power coupled with duty of the Government c authority to take appropriate steps to remove it.

(*c*) *Public nuisance: Meaning*

The expression "public nuisance" has not been defined in the Code. It can, however, be said to be an act or omission which causes common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to the persons who may have occasion to use public rights.[197]

Thus, obstruction of a public highway, pollution of public waterways, storage of inflammable materials, endangering life, health or property of public, ringing of bell day and night, etc. are instances of public nuisances.

(*d*) *Who may sue?*

Any of the following persons may bring a suit in relation to public nuisance or other wrongful acts:

(*i*) Advocate General;[198]

(*ii*) Two or more persons with the leave of the court.[199]

(*iii*) Any private person if he has sustained special damage.[200]

(*e*) *Remedies*

The following remedies are available against public nuisance:

(1) A person committing a public nuisance may be punished under the Indian Penal Code;[201]

[195] Ratanlal & Dhirajlal, *Code of Criminal Procedure*, 2006, at p. 191.

[196] (1980) 4 SCC 162 at p. 171: AIR 1980 SC 1622 at p. 1628; *see also*, Law Commission's Fifty-fourth Report at pp. 10-11.

[197] S. 268, IPC.

[198] S. 91(1)(*a*), CPC.

[199] S. 91(1)(*b*), CPC.

[200] S. 91(2), CPC

[201] S. 290, IPC, 1860.

(2) Magistrates may remove public nuisance in certain circumstances by exercising summary powers;[202]
(3) A suit can be instituted for declaration, injunction or other appropriate relief without proof of special damage;[203] and
(4) A suit may also be filed by a private individual, where he has suffered special damage.[204]

*(f) Appeal*

An appeal lies against an order refusing to grant leave to file a suit for public nuisance or other wrongful acts affecting public.[205]

**(18) Suits relating to public trusts: Section 92**

*(a) Nature and scope*

Section 92 of the Code provides for filing of a suit in respect of breach of trust created for public purposes of a charitable or religious nature by the Advocate General or two or more persons having an interest in the trust with the leave of the Court for reliefs specified therein.

*(b) Extent and applicability*

A suit under Section 92 of the Code is of a special nature for the protection of public rights in public trusts and charities. Such a suit is basically on behalf of all persons interested in the trust. The beneficiaries choose two or more persons for filing the suit and that is how their names are shown as plaintiffs. But the plaintiffs are merely representatives of all the beneficiaries and the action is instituted on behalf of all. The suit is thus a representative suit and a decision in such suit would also attract the doctrine of *res judicata*.[206]

*(c) Object*

The main object of this provision is to afford protection to public trusts of a charitable or religious nature from being subjected to harassment by suits being filed against them[207] and to prevent multifarious and

[202] Ss. 133-43, CrPC, 1973.
[203] S. 90(1), CrPC.
[204] S. 91(1), CPC.
[205] S. 104 (*ffa*), CPC.
[206] *R. Venugopala* v. *Venkatarayulu Naidu Charities*, 1989 Supp (2) SCC 356: AIR 1990 SC 444; *Ahmad Adam Sait* v. *M.E. Makhri*, AIR 1964 SC 107: (1964) 2 SCR 647; *Raje Anandrao* v. *Shamrao*, AIR 1961 SC 1206: (1961) 3 SCR 930.
[207] *Madappa* v. *M.N. Mahanthadevaru*, AIR 1966 SC 878 at p. 881: (1966) 2 SCR 151; *Swami Paramatmanand* v. *Ramji Tripathi*, (1974) 2 SCC 695 at p. 699: AIR 1974 SC 2141 at p. 2144; *R.M. Narayana Chettiar* v. *N. Lakshmanan Chettiar*, (1991) 1 SCC 48: AIR 1991 SC 221; *Vidyodaya Trust* v. *Mohan Prasad*, (2008) 4 SCC 115: AIR 2008 SC 1633; *see also*, Statement of Objects and Reasons, Gazette of India, Pt. II, S. 2, Extra., dated 8-4-1974 at p. 306.

vexatious suits being filed by irresponsible persons against the trustees whose duty is to administer such trusts.[208]

Before the Advocate General files a suit or before the court grants leave for filing a suit under Section 92, *prima facie* satisfaction regarding breach of trust or of the necessity for obtaining directions of the court must be there.[209]

(*d*) *Conditions*

Before an action can be taken under this section, the following conditions must be fulfilled:[210]

(1) The trust must have been created for public purposes of a charitable or religious nature;
(2) There must be a breach of trust or direction of the court must be necessary in the administration of such a trust; and
(3) The relief claimed must be one or the other of the reliefs specified in Section 92.

If any of the three conditions is not satisfied, the suit falls outside the scope of the said section.[211]

(*e*) *Section whether mandatory*

The provisions are mandatory and must be complied with. Where the conditions laid down in the section have not been fulfilled, no suit can be instituted. The defect is basic and fundamental and goes to the root of the matter.[212]

(*f*) *Who may sue?*

A suit under Section 92 may be filed:

(*i*) by the Advocate General in Presidency Towns and outside Presidency Towns by the Collector or such officer as the State Government may appoint on that behalf; or
(*ii*) by two or more persons having an interest in the trust and who have obtained the leave of the court.[213]

[208] *Narendrasingji Ranjitsingji* v. *Udesinghji*, AIR 1947 Bom 451 at p. 460: (1947) 49 Bom LR 318.

[209] *Madappa* v. *M.N. Mahanthadevaru, supra.*

[210] *Bishwanath* v. *Thakur Radha Ballabhli*, AIR 1967 SC 1044: (1967) 2 SCR 618; *Sugra Bibi* v. *Hazi Kummu*, AIR 1969 SC 884: (1969) 3 SCR 83; *Harendra Nath* v. *Kaliram Das*, (1972) 1 SCC 115: AIR 1972 SC 246 at p. 250; *Pragdasji* v. *Ishwarlalbhai*, AIR 1952 SC 143 at p. 144: 1952 SCR 513; *Swami Paramatmanand* v. *Ramji Tripathi, supra*; *Kintali China Jaganadham* v. *K. Laxmi Naidu*, AIR 1988 Ori 100: (1987) 64 Cut LT 493.

[211] *Bishwanath Thakur Radha Ballabhli*, AIR 1967 SC 1044: (1967) 2 SCR 618.

[212] *R.M. Narayana Chettiar* v. *N. Lakshmanan Chettiar*, (1991) 1 SCC 48: AIR 1991 SC 221; *P.V. Mathew* v. *K.V. Thomas*, AIR 1983 Ker 5: 1982 Ker LT 493; *Kintali China Jaganadham* v. *K. Laxmi Naidu*, AIR 1988 Ori 100: (1987) 64 Cut LT 493; *Narain Lal* v. *Sunderlal Tholia*, AIR 1967 SC 1540; *Swami Paramatmanand* v. *Ramji Tripathi*, (1974) 2 SCC 695: AIR 1974 SC 2141.

[213] Ss. 92-93 CPC.

(*g*) *Who may be sued?*

A suit may be brought against the persons in possession of trust property who claim adversely to the trust or against trustees who have committed breach of trust.[214]

(*h*) *Notice*

Considering the object underlying Section 92 of the Code, the court should normally issue a notice to the defendants before granting leave to file a suit. The defendants may satisfy the court that the allegations made in the plaint are false and frivolous, or the persons who have applied for leave want to harass the trust. But if the suit is filed without notice to the defendants, it would not be bad and non-maintainable.[215]

(*i*) *Relief*

A suit may be instituted for any one or more of the following reliefs:[216]

(*i*) removing any trustee;
(*ii*) appointing a new trustee;
(*iii*) vesting any property in a trustee;
(*iv*) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;
(*v*) directing accounts and inquiries;
(*vi*) declaring what proportion of the trust property or of the interest therein shall be allotted to any particular object of the trust;
(*vii*) authorising the whole or any part of the trust property to be let, mortgaged or exchanged;
(*viii*) settling a scheme;
(*ix*) granting such further or other relief as the nature of the case may require.

[214] *Syed Mohd. Salie Labbai* v. *Mohd. Hanifa*, (1976) 4 SCC 780 at pp. 813-14: AIR 1976 SC 1569 at p. 1598; *Venkatanarasimha* v. *Subba Rao*, AIR 1923 Mad 376; *Perla* v. *Collector of Vizag*, AIR 1953 Mad 908; *Anjuman Isamila* v. *Latapat Ali*, AIR 1950 All 109; *Satya Charan* v. *Rudranand*, AIR 1953 Cal 716.

[215] *R.M. Narayana Chettiar* v. *N. Lakshmanan Chettiar*, (1991) 1 SCC 48: AIR 1991 SC 221.

[216] S. 92(1), Code of Civil Procedure, 1908; see also *Pragdasji* v. *Ishwarlalbhai*, AIR 1952 SC 143 at p. 144: 1952 SCR 513; *Bishwanath* v. *Thakur Radha Ballabhli*, AIR 1967 SC 1044: (1967) 2 SCR 618; *Sugra Bibi* v. *Hazi Kummu*, AIR 1969 SC 884: (1969) 3 SCR 83; *Harendra Nath* v. *Kaliram Das*, (1972) 1 SCC 115: AIR 1972 SC 246; *Charan Singh* v. *Darshan Singh*, (1975) 1 SCC 298: AIR 1975 SC 371; *Syed Mohd. Salie Labbai* v. *Mohd. Hanifa*, (1976) 4 SCC 780 at p. 813-14: AIR 1976 SC 1569 at p. 1598; *Sarat K. Mitra* v. *Hem Ch. Dey*, AIR 1960 Cal 558 at p. 559.

If the suit is not for any of the above reliefs, it is not maintainable and should be dismissed.[217]

(*j*) *Appeal*

An appeal lies against an order refusing leave to file a suit for breach of trust.[218]

(*k*) *Doctrine of cy-pres*

(*i*) *Meaning.*—Cy-pres means "as nearly as possible to the testator's or donor's intentions when these cannot be precisely followed".[219]

(*ii*) *Doctrine explained.*—Where there is a gift or trust for a charity which can be substantially, but not literally, fulfilled, it will be effectuated by moulding it so that as nearly as practicable the intention of the benefactor may be carried out. The doctrine of cy-pres, thus, makes possible the application of funds to purposes as nearly as possible to those selected by the donor.[220]

In *Ratilal* v. *State of Bombay*[221], the Supreme Court explained the doctrine thus:

> "When the particular purpose for which a charitable trust is created fails or by reason of certain circumstances the trust cannot be carried into effect either in whole or in part, or where there is a surplus left after exhausting the purposes specified by the settlor, the court would not, when there is a general charitable intention expressed by the settlor, allow the trust to fail but would execute it cy-pres, that is to say, in some way as nearly as possible to that which the author of the trust intended. In such cases, it cannot be disputed that the court can frame a scheme and give suitable directions regarding the objects upon which the trust money can be spent."[222]

(*iii*) *Recommendation of Law Commission.*—On the recommendation of the Law Commission, the doctrine of cy-pres has been applied to suits under Section 92 of the Code. Sub-section 3 to Section 92 as inserted by the Code of Civil Procedure (Amendment) Act, 1976 incorporates

[217] *Pragdasji* v. *Ishwarlalbhai*, AIR 1952 SC 143: 1952 SCR 513; *Harendra Nath* v. *Kaliram Das*, (1972) 1 SCC 115: AIR 1972 SC 246.

[218] S. 104 (*ffa*).

[219] *Concise Oxford English Dictionary* (2007) at p. 357; *Stroud's Judicial Dictionary* (5th Edn.) Vol. I at p. 612; *Halsbury's Modern Equity* (11th Edn.) at p. 509.

[220] *Ibid*, see also *Ratilal* v. *State of Bombay*, *infra*.

[221] AIR 1954 SC 388: 1954 SCR 1055.

[222] *Ibid*, at p. 394 (AIR); see also *N.S. Rajabathar* v. *M.S. Vadivelu*, (1970) 1 SCC 12: AIR 1970 SC 1839.

# Part Three
# Appeals, Reference, Review and Revision

the doctrine of cy-pres, which is similar to Section 13 of the English Charities Act, 1960.[223]

The application of the doctrine of cy-pres, however, has its own limitations. The court has no power, authority or jurisdiction to deviate from the intention expressed by the settlor on the ground of expediency or on what the court considers to be much more beneficial than what the settlor directed.[224]

[223] Law Commission's 54th Report at pp. 65-67; Sarkar, *Law of Civil Procedure* (9th Edn.) at p. 459; *Ram Sarup* v. *Union of India*, AIR 1985 Del 318: (1985) 27 DLT 134: 1985 Raj LR 133.

[224] *Mayor of Lyons* v. *Advocate General of Bengal*, (1875-76) 3 IA 32: ILR (1876) 1 Cal 303 (PC); *Ratilal* v. *State of Bombay*, AIR 1954 SC 388: 1954 SCR 1055; *Halsbury's Laws of England* (3rd Edn.) Vol. 4 at p. 324.

PART III

# 1 General

ANY PERSON who feels aggrieved by any decree or order passed by the court may prefer an appeal in a superior court if an appeal is provided against that decree or order or may make an application for review or revision. In certain cases, a subordinate court may make a reference to a High Court. The provisions relating to Appeals, Reference, Review and Revision may be summarised thus:

(*A*) *Appeals.*— Sections 96 to 112 and Orders 41 to 45
First Appeals: Sections 96 to 99-A, 107 and Order 41
Second Appeals: Sections 100-103, 107, 108 and Order 42
Appeals from Orders: Sections 104-108 and Order 43
Appeals by Indigent Persons: Order 44
Appeals to the Supreme Court: Sections 109, 112 and Order 45

(*B*) *Reference.*—Section 113 and Order 46

(*C*) *Review.*—Section 114 and Order 47

(*D*) *Revision.*—Section 115

PART III

# 2 First Appeals

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## 1. APPEAL: MEANING

THE EXPRESSION "appeal" has not been defined in the Code. According to dictionary meaning, "appeal" is "the judicial examination of the decision by a higher court of the decision of an inferior court".[1]

Stated simply, appeal is a proceeding by which the defeated party approaches a higher authority or court to have the decision of a lower authority or court reversed.

In *Nagendra Nath Dey* v. *Suresh Chandra Dey*[2], speaking for the Judicial Committee of Privy Council, Sir Dinsha Mulla stated:

[1] *Chamber's 21st Century Dictionary* (1997) at p. 59; *Wharton's Law Lexicon* at p. 72; *Concise Oxford English Dictionary* (2002) at p. 63; *Nagendra Nath* v. *Suresh Chandra*, AIR 1932 PC 165 at p. 167: (1931-1932) 59 IA 283 at p. 287; *Garikapati Veeraya* v. *N. Subbiah Chaudhry*, AIR 1957 SC 540: 1957 SCR 488; *Lakshmiratan Engg. Works Ltd.* v. *Commr. (Judicial), Sales Tax*, AIR 1968 SC 488 at p. 492: (1968) 1 SCR 505.

[2] AIR 1932 PC 165 at p. 167: (1931-1932) 59 IA 283 at p. 287.

"There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate court, asking to set aside or reverse a decision of a subordinate court, is an appeal within the ordinary acceptation of the term." An appeal is thus a removal of a cause from an inferior court to a superior court for the purpose of testing the soundness of the decision of the inferior court. It is a remedy provided by law for getting the decree of the lower court set aside. In other words, it is a complaint made to the higher court that the decree passed by the lower court is unsound and wrong.[3] It is "a right of entering a superior court and invoking its aid and interposition to redress an error of the court below".[4]

## 2. ESSENTIALS

Every appeal has three basic elements:[5]

(*i*) A decision (usually a judgment of a court or the ruling of an administrative authority);

(*ii*) A person aggrieved (who is often, though not necessarily, a party to the original proceeding); and

(*iii*) A reviewing body ready and willing to entertain an appeal.

## 3. RIGHT OF APPEAL

A right of appeal is not a natural or inherent right.[6] It is well-settled that an appeal is a creature of statute and there is no right of appeal unless it is given clearly and in express terms by a statute.[7] Whereas sometimes an appeal is a matter of right, sometimes it depends upon discretion of the court to which such appeal lies. In the latter category of cases, the right is to apply to the court to grant leave to file an appeal; for instance, an appeal to the Supreme Court under Article 136 of the Constitution of India.[8] If a particular Act does not provide a right

[3] *Nagendra Nath* v. *Suresh Chandra*, AIR 1932 PC 165 at p. 167: (1931-1932) 59 IA 283; *Shankar Ramchandra* v. *Krishnaji Dattatreya*, (1969) 2 SCC 74: AIR 1970 SC 1.

[4] *Attorney General* v. *Sillem*, (1864) 10 HLC 704 at p. 715: 11 ER 1200 at p. 1209 (*per* Lord Westbury, LC); see also *Dayawati* v. *Inderjit*, AIR 1966 SC 1423: (1966) 3 SCR 275.

[5] Louis Blom, "Final Appeal: A Study of the House of Lords in its Judicial Capacity".

[6] *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393 at p. 397: AIR 1974 SC 1126 at p. 1129; *Rami Manprasad* v. *Gopichand*, (1973) 4 SCC 89 at p. 92: AIR 1973 SC 566; *Ramnarain (P) Ltd.* v. *State Trading Corpn. of India Ltd.*, (1983) 3 SCC 75: AIR 1983 SC 786.

[7] *Ibid*, see also *Anant Mills Co. Ltd.* v. *State of Gujarat*, (1975) 2 SCC 175 at p. 202: AIR 1975 SC 1234 at p. 1249; *Rami Manprasad Gordhandas* v. *Gopichand Shersingh Gupta*, *supra*; *Ramnarain (P) Ltd.* v. *State Trading Corpn. of India Ltd.*, *supra*; *Gujarat Agro-Industries Co. Ltd.* v. *Municipal Corpn. of the City of Ahmedabad*, (1999) 4 SCC 468: AIR 1999 SC 1818; *CCE* v. *Flock (India) (P) Ltd.*, (2000) 6 SCC 650.

[8] For detailed discussion and case law, *see*, V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt. IV, Chap. 2.

of appeal, it cannot be declared *ultra vires* only on that ground.[9] Again, the right of appeal is a substantive right and not merely a matter of procedure.[10] It is a vested right and accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.[11] This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary implication, and not otherwise.[11]

Thus, if an appeal lies against an order passed by a Single judge of the High Court under Sections 397 and 398 of the Companies Act, 1956, to the Division Bench, the said right cannot be taken away on the ground that the High Court has not framed the necessary rules for filing such an appeal.[12] Substitution of a new forum of appeal should not be readily inferred.[13] The right being a creature of statute, conditions can always be imposed by the statute for the exercise of such right.[14]

In *Anant Mills Co. Ltd.* v. *State of Gujarat*[15], speaking for the Supreme Court, Khanna, J. said:

> "It is well-settled by several decisions of this court that the right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so oner-

[9] *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569.

[10] *Garikapati Veeraya* v. *N. Subbiah Chaudhry*, AIR 1957 SC 540: 1957 SCR 488; *Custodian of Evacuee Property* v. *Khan Saheb Abdul Shukoor*, AIR 1961 SC 1087 at p. 1092: (1961) 3 SCR 855; *Vijay Prakash* v. *Collector of Customs*, (1988) 4 SCC 402: AIR 1988 SC 2010; *Special Military Estates Officer* v. *Munivenkataramiah*, (1990) 2 SCC 168 at p. 172: AIR 1990 SC 499 at p. 502.

[11] *Garikapati Veeraya* v. *N. Subbiah Chaudhry*, AIR 1957 SC 540: 1957 SCR 488; *Bhau Ram* v. *Baij Nath*, AIR 1961 SC 1327: (1962) 1 SCR 358; *P. Mohd. Meera* v. *Thirumalaya Gounder*, AIR 1966 SC 430 at p. 431: (1966) 1 SCR 574; *Mukund Deo* v. *Mahadu*, AIR 1965 SC 703 at p. 705; *Katikara Chintamani Dora* v. *Guntreddi Annamanaidu*, (1974) 1 SCC 567 at p. 582: AIR 1974 SC 1069 at p. 1081; *Ramnarain (P) Ltd.* v. *State Trading Corpn. of India Ltd., supra*; *Deep Chand* v. *Land Acquisition Officer*, (1994) 4 SCC 99 at p. 102: AIR 1994 SC 1901 at p. 1904.

[12] *Arti Dutta* v. *Eastern Tea Estate (P) Ltd.*, (1988) 1 SCC 523: AIR 1988 SC 325.

[13] *Stridewell Leathers (P) Ltd.* v. *Bhankerpur Simbhaoli Beverages (P) Ltd.*, (1994) 1 SCC 34 at p. 38: AIR 1994 SC 158 at pp. 163-64.

[14] *Anant Mills Co. Ltd.* v. *State of Gujarat, supra*; *Ramnarain (P) Ltd.* v. *State Trading Corpn. of India Ltd., supra*; *Vijay Prakash D. Mehta* v. *Collector of Customs, supra*; *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602 at p. 661: AIR 1988 SC 1531 (A right of appeal cannot be created by judiciary).

[15] (1975) 2 SCC 175: AIR 1975 SC 1234.

ous as to amount to unreasonable restrictions rendering the right almost illusory."[16]

## 4. ONE RIGHT OF APPEAL

A single right of appeal is more or less a universal requirement. It is based on the principle that all men are fallible and judges are human beings who may commit a mistake. Absence of even one right of appeal must be considered to be a glaring lacuna in a legal system governed by the Rule of Law.[17]

A hierarchy of courts with appellate powers each having its own power of judicial review has of course being found to be counter-productive but the converse is equally distressing in that there is not even a single judicial review.[18]

The Law Commission also observed, "An unqualified right of first appeal may be necessary for the satisfaction of the decretal litigant but a wide right of second appeal is more in the nature of luxury".[19]

The only ground upon which a suitor ought to be allowed to bring the judgment of one court for examination before the members of another is the certainty or extreme probability.[20]

Sections 96, 100, 104 and 109 of the Code of Civil Procedure confer the right of appeal on aggrieved persons in cases mentioned therein. Sections 96 to 99 and 107 read with Order 41 deal with first appeals.

## 5. SUIT AND APPEAL

There is a fundamental distinction between the right to file a suit and the right to file an appeal. The said distinction has been appropriately explained by Chandrachud, J. (as he then was) in the case of *Ganga Bai* v. *Vijay Kumar*[21] in the following words:

> "There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one

[16] *Ibid*, at p. 202 (SCC): at p. 1249 (AIR); see also *Seth Nand Lal* v. *State of Haryana*, 1980 Supp SCC 374: AIR 1980 SC 2097; *Rami Manprasad* v. *Gopichand*, (1973) 4 SCC 89: AIR 1973 SC 566; *Mela Ram* v. *CIT*, AIR 1956 SC 367; *D.N. Taneja* v. *Bhajan Lal*, (1988) 3 SCC 26; *Shyam Kishore* v. *MCD*, (1993) 1 SCC 22: AIR 1992 SC 2279; *CCE* v. *Flock (India) (P) Ltd.*, (2000) 6 SCC 650.

[17] *Sita Ram* v. *State of U.P.*, (1979) 2 SCC 656 at pp. 669, 676: AIR 1979 SC 745 at pp. 754, 759; *Lt. Col. Prithi Pal Singh* v. *Union of India*, (1982) 3 SCC 140 at pp. 177-80: AIR 1982 SC 1473 at pp. 1437-38; *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602: AIR 1988 SC 1531.

[18] *Ibid*, see also *Union of India* v. *Charanjit S. Gill*, (2000) 5 SCC 742: AIR 2000 SC 3425.

[19] Law Commission's 54th Report at p. 84; *see also*, Herbert, *Uncommon Law* (3rd Edn.) at p. 259.

[20] Herbert, *Uncommon Law* (3rd Edn.) at p. 259.

[21] (1974) 2 SCC 393: AIR 1974 SC 1126.

may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. *The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law.*"[22] (emphasis supplied)

Before more than hundred years, in *Zair Husain* v. *Khurshed Jan*[23], the High Court of Allahabad stated:

"Unless a right of appeal is clearly given by a statute, it does not exist. Whereas a litigant has independently of any statute a right to institute any suit of a civil nature in one court or another."

## 6. APPEAL IS CONTINUATION OF SUIT

An appeal is a continuation of a suit.[24] A decree passed by an appellate court would be construed to be a decree passed by the Court of the first instance. An appeal is virtually a rehearing of the matter. The appellate court possesses the same powers and duties as the original court. Once again the entire proceedings are before the appellate court which can review the evidence as a whole, subject to statutory limitations, if any, and can come to its own conclusion on such evidence.[25]

In *Dayawati* v. *Inderjit*[26], speaking for the Supreme Court, Hidayatullah, J. (as he then was) stated:

"An appeal has been said to be 'the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below'. The only difference between a suit and an appeal is that an appeal 'only reviews and corrects the proceedings in a cause already constituted but does not create the cause'."[27]

Moreover, where an appeal is provided by law and is filed against a decree or order passed by a lower court, the decision of the appellate court will be the operative decision. It is obvious that when an appeal is made, the appellate authority can do one of the three things, namely:

[22] *Ibid*, at p. 397 (SCC): at p. 1129 (AIR).

[23] (1906) 28 All 545 at pp. 549-50.

[24] *Garikapati Veeraya* v. *N. Subbiah Chaudhry*, AIR 1957 SC 540: 1957 SCR 488: *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165 at p. 1177: (1968) 3 SCR 163; *Mithilesh Kumari* v. *Prem Behari*, (1989) 2 SCC 95: AIR 1989 SC 1247; *Lakshmi Narayan* v. *Niranjan Modak*, (1985) 1 SCC 270; *Darshan Singh* v. *Ram Pal Singh*, 1992 Supp (1) SCC 191 at p. 212: AIR 1991 SC 1654 at p. 1665; *Most Rev. P.M.A. Metropolitan* v. *Moran Mar Marthoma*, 1995 Supp (4) SCC 286: AIR 1995 SC 2001; *Dilip* v. *Mohd. Azizul Haq*, (2000) 3 SCC 607: AIR 2000 SC 1976; *D.P. Reddy* v. *K. Sateesh*, (2008) 8 SCC 505.

[25] *Ramankutty* v. *Avara*, (1994) 2 SCC 642 at p. 645.

[26] AIR 1966 SC 1423: (1966) 3 SCR 275.

[27] *Ibid*, at p. 1427 (AIR).

(*i*) it may reverse the order under appeal; (*ii*) it may modify that order; and (*iii*) it may merely dismiss the appeal and thus confirm the order without any modification. In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. *[I]t is the appellate decision alone which subsists and is operative and capable of enforcement.*[28] (emphasis supplied)

In *Garikapati Veeraya* v. *N. Subbiah Chaudhry*[29], referring to various leading decisions on the subject, the Supreme Court laid down the following principles relating to a right of appeal:

(*i*) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(*ii*) The right of appeal is not a mere matter of procedure but is a substantive right.

(*iii*) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(*iv*) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists on and from the date the *lis* commences and, although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(*v*) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.[30]

## 7. APPEAL AND REVISION

The revisional jurisdiction of a High Court is a part and parcel of the appellate jurisdiction of the High Court. When the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below. Revisional jurisdiction is one of the modes of exercising

[28] *Collector of Customs* v. *East India Commercial Co. Ltd.*, AIR 1963 SC 1124 at p. 1126: (1963) 2 SCR 563. See also *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165 at p. 1177: (1968) 3 SCR 163; *Tarlok Singh* v. *Municipal Corpn., Amritsar*, (1986) 4 SCC 27: AIR 1986 SC 1957; *CIT* v. *Amritlal Bhogilal and Co.*, AIR 1958 SC 868 at p. 871: 1959 SCR 713.

[29] AIR 1957 SC 540: 1957 SCR 488.

[30] *Ibid*, at p. 543 (AIR) (*per* S.R. Das, J.); see also *LIC* v. *India Automobiles & Co.*, (1990) 4 SCC 286: AIR 1991 SC 884; *D.N. Taneja* v. *Bhajan Lal*, (1988) 3 SCC 26 at p. 32.

powers conferred by the statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense.[31]

There is, however, an essential distinction between the two. The distinction is based in the two expressions i.e. "appeal" and "revision". A right of appeal carries with it a right of rehearing on law as well as on fact, unless the statute conferring the right of appeal limits the rehearing in one way or the other. The power to hear a revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law.[32] The conferment of revisional jurisdiction is to keep subordinate courts within the bounds of their authority and to make them act according to the procedure established by law.[33] Revisional jurisdiction is not wide enough to make the High Court a second court of first appeal.[34] The High Court cannot, in exercise of revisional powers, substitute its own view for the view taken by a subordinate court.[35]

Again, an appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitations.[36] But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to re-examine, review or reassess the evidence and to substitute its own findings unless the statute expressly confers on it that power.[37] *That limitation is implicit in the concept of revision.*[38] (emphasis supplied)

In *Associated Cement Co. Ltd.* v. *Keshvanand*[39], the Supreme Court stated, "It is trite legal position that appellate jurisdiction is coextensive

[31] *Shankar Ramchandra* v. *Krishnaji Dattatreya*, (1969) 2 SCC 74: AIR 1970 SC 1.

[32] *Hari Shankar* v. *Rao Girdhari Lal*, AIR 1963 SC 698 at pp. 700-01: 1962 Supp (1) SCR 933; *Amarjit Kaur* v. *Pritam Singh*, (1974) 2 SCC 363: AIR 1974 SC 2068; *Sk. Jaffar* v. *Mohd. Pasha*, (1975) 1 SCC 25 at p. 28: AIR 1975 SC 794; *Manick Chandra* v. *Debdas Nandy*, (1986) 1 SCC 512 at pp. 516-17: AIR 1986 SC 446.

[33] *Sri Raja Lakshmi Dyeing Works* v. *Rangaswamy Chettiar*, (1980) 4 SCC 259: AIR 1980 SC 1253.

[34] *Dattonpant* v. *Vithalrao*, (1975) 2 SCC 246: AIR 1975 SC 1111.

[35] *Girdharbhai* v. *Saiyed Mohd. Mirasaheb Kadri*, (1987) 3 SCC 538 at p. 551: AIR 1987 SC 1782 at p. 1789.

[36] *Mohanlal* v. *Sawai Man Singhji*, AIR 1962 SC 73: (1961) 1 SCR 702; *Dayawati* v. *Inderjit*, AIR 1966 SC 1423: (1966) 3 SCR 275; *Amarjit Kaur* v. *Pritam Singh*, (1974) 2 SCC 363: AIR 1974 SC 2068; *Hasmat Rai* v. *Raghunath Prasad*, (1981) 3 SCC 103: AIR 1981 SC 1711; *Union of India* v. *Cyanamide India Ltd.*, (1987) 2 SCC 720: AIR 1987 SC 1802; *Mithilesh Kumari* v. *Prem Behari*, (1989) 2 SCC 95: AIR 1989 SC 1247.

[37] *State of Kerala* v. *K.M. Charia Abdulla & Co.*, AIR 1965 SC 1585 at p. 1587: (1965) 1 SCR 601; *Manick Chandra Nandy* v. *Debdas Nandy*, *supra*; *Lachhman Dass* v. *Santokh Singh*, (1995) 4 SCC 201.

[38] *Lachhman Dass* v. *Santokh Singh*, (1995) 4 SCC 201.

[39] (1998) 1 SCC 687: AIR 1998 SC 596.

with original court's jurisdiction as for appraisal and appreciation of evidence and reaching findings of facts and appellate court is free to reach its own conclusions on evidence untrammelled by any finding entered by the trial court. Revisional powers on the other hand belong to supervisory jurisdiction of a superior court. While exercising revisional powers the court has to confine itself to the legality and propriety of the findings and also whether the subordinate court has kept itself within the bounds of its jurisdiction, including the question whether the court has failed to exercise jurisdiction vested in it. *Though the difference between the two jurisdictions is subtle, it is quite real and has now become well recognised in legal provinces.*"[40]

(emphasis supplied)

It is submitted that the following observations of Hidayatullah, J. (as he then was) in *Hari Shanker* v. *Rao Girdhari Lal*[41] lay down correct law on the point. Speaking for the majority, His Lordship concluded:

> "The distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way as, we find, has been done in second appeal arising under the Code of Civil Procedure. The power to hear a revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law. Under Section 115 of the Code of Civil Procedure, the High Court's powers are limited to see whether in a case decided, there has been an assumption of jurisdiction where none existed, or refusal of jurisdiction where it did, or there has been material irregularity or illegality in the exercise of that jurisdiction. The right there is confined to jurisdiction and jurisdiction alone. In other Acts, the power is not so limited, and the High Court is enabled to call for the record of a case to satisfy itself that the decision therein is according to law and to pass such orders in relation to the case, as it thinks fit."[42]

## 8. FIRST APPEAL AND SECOND APPEAL

A first appeal lies against a decree passed by a court exercising original jurisdiction, a second appeal lies against a decree passed by a first appellate court. Whereas a first appeal can be filed in a superior court which may or may not be a High Court, a second appeal can be filed only in the High Court. A first appeal is maintainable on a question

[40] *Ibid*, at p. 692 (SCC): at p. 598 (AIR) (*per* Thomas, J.); see also *Sarla Ahuja* v. *United India Insurance Co. Ltd.*, (1998) 8 SCC 119.

[41] AIR 1963 SC 698: 1962 Supp (1) SCR 933.

[42] *Ibid*, at pp. 700-01 (AIR).

of fact, or on a question of law, or on a mixed question of fact and law. A second appeal can be filed only on a substantial question of law. No second appeal lies if the amount does not exceed Rs 3000.[43] No Letters Patent Appeal is maintainable against a "judgment" rendered by a Single judge of the High Court to a Division Bench of the same court either in First Appeal or in Second Appeal.[44]

## 9. CONVERSION OF APPEAL INTO REVISION

If an appeal is preferred in a case in which no appeal lies, the court may treat the memorandum of appeal as a revision or vice versa.[45] Since there is no specific provision for such conversion, the court would be justified in invoking the inherent powers under Section 151 and in passing appropriate orders as may be necessary in the interests of justice.[46] There is no period of limitation for making an application of conversion. But while exercising this power, the court should see if the appeal or the revision, as the case may be, has been filed within the time prescribed for filing such a proceeding.[47]

## 10. RIGHT OF APPEAL: MATERIAL DATE

The right of appeal is a substantive and vested right and accrues in favour of the litigant on the day the *lis* commences and although it may be actually exercised only after an adverse judgment is pronounced, such a right is governed by the law prevailing at the date of the institution of the suit and not by the law in force at the time when the judgment is rendered or an appeal is preferred.[48]

## 11. SECTION 96

Section 96 of the Code confers a right of appeal. It reads as under:

(1) Save where otherwise expressly provided in the body of this Code, or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decisions of such court.

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[43] S. 102.

[44] S. 100-A, *see also infra*, "Letters Patent Appeal".

[45] *Reliable Water Supply Service of India* v. *Union of India*, (1972) 4 SCC 168: AIR 1972 SC 2083 at p. 2085; *Karuppan* v. *Santaram*, AIR 1973 Ker 28; *Chhelaram* v. *Manak*, AIR 1997 Raj 284.

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

[47] *Bahori* v. *Vidya Ram*, AIR 1978 All 299: 1978 All WC 387; *Ram Prasad* v. *Nand Kumar & Bros.*, (1998) 6 SCC 748 at p. 751: AIR 1998 SC 2730; *J.K. Cotton Spg. & Wvg. Mills Co. Ltd.* v. *CCE*, (1998) 3 SCC 540 at p. 546: AIR 1998 SC 1270.

[48] *Colonial Sugar Refining Co. Ltd.* v. *Irving*, 1905 AC 369 (PC); *Garikapati Veeraya* v. *N. Subbiah Chaudhry*, AIR 1957 SC 540: 1957 SCR 488; *Dayawati* v. *Inderjit*, AIR 1966 SC 1423: (1966) 3 SCR 275; *Sita Ram* v. *State of U.P.*, (1979) 2 SCC 656: AIR 1979 SC 745.

(2) An appeal may lie from an original decree passed *ex parte*.
(3) No appeal shall lie from a decree passed by the court with the consent of parties.
(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees.

## 12. WHO MAY APPEAL?

Section 96 of the Code recognises the right of appeal from every decree passed by any court exercising original jurisdiction. It does not refer to or enumerate the persons who may file an appeal. But before an appeal can be filed under this section, two conditions must be satisfied:

(*i*) The subject-matter of the appeal must be a "decree", that is, a conclusive determination of "the rights of the parties with regard to all or any of the matters in controversy in the suit";[49] and

(*ii*) The party appealing must have been adversely affected by such determination.[50]

The ordinary rule is that only a party to a suit adversely affected by the decree or any of his representatives-in-interest may file an appeal.[51] But a person who is not a party to a decree or order may, with the leave of the court, prefer an appeal from such decree or order if he is either bound by the order or is aggrieved by it or is prejudicially affected by it.[52]

The test whether a person is an *aggrieved person* is to see whether he has a genuine grievance because an order has been made which prejudicially affects his interests either pecuniary or otherwise.[53] As has been observed in the case of *Krishna* v. *Mohesh*[54], "the question who may appeal is determinable by the common sense consideration that there can be no appeal where there is nothing to appeal about".

Generally speaking, a decision cannot be said to adversely affect a person unless it will operate as *res judicata* against him in any future suit.[55] In order to find out whether a decision will operate as *res judicata* and will thus adversely affect a party, the substance of the judgment

[49] S. 2(2). For detailed discussion of "decree", *see supra*, Pt. I, Chap. 2.

[50] *State of Punjab* v. *Amar Singh*, (1974) 2 SCC 70 at p. 89: AIR 1974 SC 994 at p. 1006.

[51] *Ibid.*

[52] *Ibid*; *Jatan Kumar* v. *Golcha Properties (P) Ltd.*, (1970) 3 SCC 573 at p. 575: AIR 1971 SC 374 at p. 376.

[53] *Adi Pherozshah Gandhi* v. *H.M. Seervai*, (1970) 2 SCC 484 at p. 503: AIR 1971 SC 385 at p. 399. For detailed discussion of "aggrieved person", *see*, Author's *Lectures on Administrative Law* (2008) Lecture IX.

[54] (1905) 9 CWN 584 at p. 588.

[55] *State of Punjab* v. *Amar Singh*, *supra*; *Adi Pherozshah Gandhi* v. *H.M. Seervai*, *supra*.

and decree, and not the form, must be considered. For this purpose the court may go behind the decree to see what really the adjudication was.

The question whether a party is or is not adversely affected by a decree is a question of fact to be determined in each case according to its particular circumstances and no rule of universal application can be laid down.

From the above general principles, the following persons are entitled to appeal under this section:

(*i*) A party to the suit who is aggrieved or adversely affected by the decree, or if such party is dead, his legal representatives.[56]

(*ii*) A person claiming under a party to the suit or a transferee of the interests of such party, who, so far as such interest is concerned, is bound by the decree, provided his name is entered on the record of the suit.[57]

(*iii*) A guardian *ad litem* appointed by the court in a suit by or against a minor.[58]

(*iv*) Any other person, with the leave of the court, if he is adversely affected by the decree.[59]

## 13. APPEAL BY ONE PLAINTIFF AGAINST ANOTHER PLAINTIFF

As a general rule, one plaintiff cannot file an appeal against a co-plaintiff. But where the matter in controversy in the suit forms subject-matter of dispute between plaintiffs *inter se*, an appeal can be filed by one plaintiff against another plaintiff.[60]

## 14. APPEAL BY ONE DEFENDANT AGAINST ANOTHER DEFENDANT

The principle which applies to filing of appeal by one plaintiff against another plaintiff equally applies to an appeal by one defendant against another defendant. It is only where the dispute is not only between the plaintiffs and the defendants but between defendants *inter se* and such decision adversely affects one defendant against the other that such appeal would be competent.[61]

[56] S. 146; see also *Kirpal Kuar* v. *Bachan Singh*, AIR 1958 SC 199: 1958 SCR 950; *Saila Bala Dassi* v. *Nirmala Sundari Dassi*, AIR 1958 SC 394 at p. 398: 1958 SCR 1287.

[57] *Ibid.*

[58] S. 147, Or. 32 R. 5.

[59] *State of Punjab* v. *Amar Singh*, *supra*; *Adi Pherozshah Gandhi* v. *H.M. Seervai*, *supra*.

[60] *Vithu* v. *Bhima*, ILR (1891) 15 Bom 145; *Bank of India* v. *Mehta Bros.*, AIR 1991 Del 194.

[61] *Nirmala Bala* v. *Balai Chand*, AIR 1965 SC 1874: (1965) 3 SCR 550; *P.N. Kesavan* v. *Lekshmy Amma*, AIR 1968 Ker 154; *Bhima Jally* v. *Nata Jally*, AIR 1977 Ori 59.

## 15. WHO CANNOT APPEAL?

If a party agrees not to appeal or waives his right to appeal, he cannot file an appeal and will be bound by an agreement if otherwise such agreement is valid.[62] Such an agreement, however, must be clear and unambiguous. Whether a party has or has not waived his right of appeal depends upon the facts and circumstances of each case.[63] Similarly, where a party has accepted the benefits under a decree of the court, he can be estopped from questioning the legality of the decree.[64]

As Scrutton, L.J.[65] observed, "It startles me that a person can say the judgment is wrong and at the same time accept the payment under the judgment as being right... . In my opinion, you cannot take the benefit of a judgment as being good and then appeal against it as being bad."

Finally, the vested right of appeal is destroyed if the court to which an appeal lies is abolished altogether without any forum being substituted in its place.[66]

## 16. AGREEMENT NOT TO APPEAL

A right of appeal is a statutory right. If a statute does not confer such right, no appeal can be filed even with the consent or agreement between the parties.[67]

But an agreement between the parties not to file an appeal is valid if it is based on lawful or legal consideration and if otherwise it is not illegal.[68]

## 17. APPEAL: NOMENCLATURE NOT MATERIAL

The use of expression "appeal", "first appeal" or "second appeal" is neither material nor decisive. It is the substance and not the form which is relevant.

In *Ramchandra Goverdhan Pandit* v. *Charity Commr.*[69], a first appeal was filed in the High Court against an order passed by the Charity Commissioner on an application under Section 72 of the Bombay Public

[62] *Ameer Ali* v. *Inderjeet Singh*, (1871) 14 MIA 203 (PC).

[63] *Ibid*, see also *Protap Chunder* v. *Arathoon*, ILR (1882) 8 Cal 455; *Mohd. Mia Pandit* v. *Osman Ali*, AIR 1935 Cal 239: (1935) 62 Cal 229.

[64] *Dexters Ltd.* v. *Hill Crest Oil Co.*, (1926) 1 KB 348: (1925) All ER Rep 273: 95 LJ KB 386, CA; *R.C. Chandiok* v. *Chuni Lal*, (1970) 3 SCC 140: AIR 1971 SC 1238; *see also supra*, Pt. II, Chap. 6.

[65] *Dexters Ltd.* v. *Hill Crest Oil Co.*, *supra*.

[66] *Daji Saheb* v. *Shankar Rao*, AIR 1956 SC 29 at p. 30: (1955) 2 SCR 872.

[67] For detailed discussion *see supra*, "Rights of appeal".

[68] *Katikara Chintamani Dora* v. *Guntreddi Annamanaidu*, (1974) 1 SCC 567: AIR 1974 SC 1069; *Ameer Ali* v. *Inderjeet Singh*, (1871) 14 MIA 203 (PC).

[69] (1987) 3 SCC 273: AIR 1987 SC 1598; see also *Parvez Rustamji* v. *Navrojji Sorabji*, AIR 2001 Guj 160.

Trusts Act, 1950. The Supreme Court held that the appeal before the Single judge of the High Court was in substance and in reality Second Appeal and Letters Patent Appeal was not maintainable against the "judgment" by the Single judge.

### 18. APPEAL AGAINST EX PARTE DECREE: SECTION 96(2)

As stated above,[70] one of the remedies available to the defendant, against whom an *ex parte* decree is passed, is to file an appeal against such a decree under Section 96(2) of the Code, though he may also file an application to set aside *ex parte* decree.

Both the remedies are concurrent and can be resorted to simultaneously. One does not debar the other. As has been rightly said:

> "Where two proceedings or two remedies are provided by a statute, one of them must not be taken as operating in derogation of the other."[71]

In an appeal against an *ex parte* decree, the appellate court is competent to go into the question of the propriety or otherwise of the *ex parte* decree passed by the trial court.

### 19. NO APPEAL AGAINST CONSENT DECREE: SECTION 96(3)

Section 96(3) declares that no appeal shall lie against a consent decree. This provision is based on the broad principle of estoppel. It presupposes that the parties to an action can, expressly or impliedly, waive or forgo their right of appeal by any lawful agreement or compromise or even by conduct. The consideration for the agreement involved in a consent decree is that both the sides give up their right of appeal.[72]

Once the decree is shown to have been passed with the consent of the parties, Section 96(3) becomes operative and binds them. It creates an estoppel between the parties as a judgment on contest.[73] Where there is a partial compromise and adjustment of a suit and a decree is passed in accordance with it, the decree to that extent is a consent decree and is not appealable.[74] This provision, however, does not apply where the factum of compromise is in dispute or the compromise de-

[70] *See supra*, Pt. II, Chap. 8.

[71] *Ajudhia Prasad* v. *Balmukund*, (1866) 8 All 354 at p. 361 (FB); *Rani Choudhury* v. *Suraj Jit Choudhury*, (1982) 2 SCC 596: AIR 1982 SC 1393; *Archana Kumar* v. *Purendu Prakash*, (2000) 2 MP LJ 491 (FB).

[72] *Katikara Chintamani Dora* v. *Guntreddi Annamanaidu*, (1974) 1 SCC 567 at pp. 584-85: AIR 1974 SC 1069 at p. 1081.

[73] *Ibid*, see also *Thakur Prasad* v. *Bhagwan Das*, AIR 1985 MP 171: 1985 MP LJ 149.

[74] *Ibid*, For detailed discussion, *see*, Author's *Code of Civil Procedure* (Lawyers' Edn.) Vol. II at pp. 329-32.

cree is challenged on the ground that such compromise had not been arrived at lawfully.[75]

### 20. NO APPEAL IN PETTY CASES: SECTION 96(4)

Section 96(4) has been inserted by the Amendment Act of 1976. It bars appeals except on points of law in certain cases. Prior to 1976, Section 96 allowed a first appeal against every decree. Now, sub-section (4) bars appeals on facts from decrees passed in petty suits where the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees, if the suits in which such decrees are passed are of a nature cognisable by Courts of Small Causes. The underlying object in enacting the said provision is to reduce appeals in petty cases. Such restrictions are necessary in the interests of the litigants themselves. They should not be encouraged to appeal on facts in trivial cases.[76]

### 21. APPEAL AGAINST PRELIMINARY DECREE

An appeal lies against a preliminary decree.[77] A preliminary decree is as much a final decree. In fact, a final decree is but a machinery for the implementation of a preliminary decree.[78] Failure to appeal against a preliminary decree, hence, precludes the aggrieved party from challenging the final decree.[79] Where an appeal is filed against a preliminary decree and is allowed and the decree is set aside, the final decree falls to the ground as ineffective since there is no preliminary decree to support the final decree.[80]

### 22. NO APPEAL AGAINST FINAL DECREE WHERE NO APPEAL AGAINST PRELIMINARY DECREE

As stated above, an appeal lies against a preliminary decree since a preliminary decree is as much a decree as a final decree. A final decree may be said to be but a machinery for the implementation of the preliminary decree. In fact, a final decree owes its existence to the preliminary decree. Therefore, a failure to appeal against a preliminary decree precludes the aggrieved party from disputing its correctness or

[75] *Banwari Lal* v. *Chando Devi*, (1993) 1 SCC 581: AIR 1993 SC 1139; see also *Thakur Prasad* v. *Bhagwan Das*, AIR 1985 MP 171: 1985 MP LJ 149: 1985 Jab LJ 248.

[76] Law Commission's Fifty-fourth Report at p. 72, Statement of Objects and Reasons; *see also*, Clause 9 on "Notes on Clauses" to the CPC (Amendment) Bill, 1997.

[77] *Phoolchand* v. *Gopal Lal*, AIR 1967 SC 1470: (1967) 3 SCR 153; *see also*, S. 97.

[78] *Venkata Reddy* v. *Pethi Reddy*, AIR 1963 SC 992 at pp. 994-95: 1963 Supp (2) SCR 616; *Mool Chand* v. *Director, Consolidation*, (1995) 5 SCC 631: AIR 1995 SC 2493; *Shankar* v. *Chandrakant*, (1995) 3 SCC 413: AIR 1995 SC 1211.

[79] *Ibid*, *see also*, S. 97.

[80] *Ibid*, see also *Sital Parshad* v. *Kishori Lal*, AIR 1967 SC 1236 at p. 1240: (1967) 3 SCR 101.

raising any objection to it in the appeal against the final decree.[81] The whole object of enacting Section 97 is to make it clear that any party being aggrieved by a preliminary decree must appeal against that decree; and if he fails to appeal against such a decree, the correctness of such a decree cannot be challenged by way of an appeal against the final decree, which means that the preliminary decree would be taken to have been correctly passed.[82]

### 23. APPEAL AGAINST JUDGMENT

The Code provides an appeal from a decree and not from a judgment. An aggrieved party, however, may file an appeal against the judgment, if a decree is not drawn up by the court.[83]

### 24. NO APPEAL AGAINST FINDING

Section 96 of the Code enacts that an appeal shall lie from every decree passed by any court exercising original jurisdiction. So also, Section 100 allows a second appeal to the High Court from every decree passed in appeal. Likewise, an appeal lies against an order under Section 104 read with Order 43 Rule 1 of the Code. It, however, states that no appeal shall lie from other orders.[84] Hence, an appeal lies only against a "decree" or an "order" which is expressly made appealable under the Code.

A finding recorded by a court of law may or may not amount to a "decree" or an "order". Where such a finding does not amount to a "decree" or an "order", no appeal lies against such adverse finding. Thus, where a suit is dismissed, the defendant against whom some adverse finding has been recorded on some issue has no right of appeal and he cannot question the finding by instituting an appeal.[85]

The Explanation to Rule 22 of Order 41, as added by the Amendment Act of 1976, however, enables the respondent to file cross-objections against any finding recorded against him even though the ultimate decree may be in his favour.[86]

[81] S. 97; see also *Venkata Reddy* v. *Pethi Reddy*, AIR 1963 SC 992 at p. 994-95; 1963 Supp (2) SCR 616; *Mool Chand* v. *Director, Consolidation*, (1995) 5 SCC 631: AIR 1995 SC 2493.

[82] *Kaushalya Devi* v. *Baijnath Sayal*, AIR 1961 SC 790 at p. 794: (1961) 3 SCR 769; *Chittoori* v. *Kudappa*, AIR 1965 SC 1325 at pp. 1332, 1339: (1965) 2 SCR 661.

[83] Or. 20 Rr. 6-A, 6-B; Or. 41 R. 1 (1); see also *Jagat Dhish* v. *Jawahar Lal*, AIR 1961 SC 832: (1961) 2 SCR 918; *Hari Shankar* v. *Jag Deyee*, (2000) 39 All LR 120.

[84] S. 105.

[85] *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393: AIR 1974 SC 1126; *Deva Ram* v. *Ishwar Chand*, (1995) 6 SCC 733; *Banarsi* v. *Ram Phal*, (2003) 9 SCC 606: AIR 2003 SC 1989.

[86] *Banarsi* v. *Ram Phal*, (2003) 9 SCC 606: AIR 2003 SC 1989; *Shyam Nath* v. *Durga Prasad*, AIR 1982 All 474 at pp. 476-77.

### 25. APPEAL AGAINST DEAD PERSON

No appeal can be instituted against a dead person. Such an appeal, therefore, can be regarded as a "stillborn" appeal. In such cases, an application can be made praying for the substitution of the legal representatives of the deceased respondent who died prior to the filing of the appeal. In that case, the appeal can be taken to have been filed on the date of the application for substitution of the legal representatives. If, by that time, the appeal is time-barred, the appellant can seek condonation of delay.[87]

### 26. FORM OF APPEAL[88]: RULES 1-4

As stated above, Sections 96 to 99-A enact the substantive law as regards First Appeals, while Order 41 lays down the procedure relating thereto. The expressions *appeal* and *memorandum of appeal* denote two distinct things. An appeal is the judicial examination by a higher court of the decision of an inferior court. The memorandum of appeal contains the grounds on which judicial examination is invited. For purposes of limitation and for purposes of the rules of the court, it is required that a memorandum of appeal shall be filed.[89]

In order that an appeal may be said to be validly presented, the following requirements must be complied with:[90]

(*i*) It must be in the form of a memorandum setting forth the grounds of objections to the decree appealed from;

(*ii*) It must be signed by the appellant or his pleader;

(*iii*) It must be presented to the court or to such officer as it appoints in that behalf;

(*iv*) The memorandum must be accompanied by a certified copy of the decree;

(*v*) It must be accompanied by a certified copy of the judgment, unless the court dispenses with it; and

[87] *Bank of Commerce Ltd.* v. *Protap Chandra Ghose*, AIR 1946 FC 13: 1946 FCR 32; *N. Jayaram Reddy* v. *Revenue Divisional Officer*, (1979) 3 SCC 578: AIR 1979 SC 1393; *M. Veerappa* v. *Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506; *Karuppaswamy* v. *C. Ramamurthy*, (1993) 4 SCC 41: AIR 1993 SC 2324.

[88] For Model First Appeal, see Appendix "D".

[89] *Lakshmiratan Engg. Works Ltd.* v. *Commr. (Judicial), Sales Tax*, AIR 1968 SC 488 at pp. 492-93: (1968) 1 SCR 505; *Shyam Kishore* v. *MCD*, (1993) 1 SCC 22: AIR 1992 SC 2279.

[90] Or. 41 R. 1. See also *Jagat Dhish* v. *Jawahar Lal*, AIR 1961 SC 832: (1961) 2 SCR 918; *Phoolchand* v. *Gopal Lal*, AIR 1967 SC 1470 at p. 1472: (1967) 3 SCR 153; *Shakuntala Devi* v. *Kuntal Kumari*, AIR 1969 SC 575: (1969) 1 SCR 1006; *Shastri Yagnapurushdasji* v. *Muldas Bhundardas*, AIR 1966 SC 1119: (1966) 3 SCR 242; *Dipo* v. *Wassan Singh*, (1983) 3 SCC 376: AIR 1983 SC 846; *Jogdhayan* v. *Babu Ram*, (1983) 1 SCC 26: AIR 1983 SC 57; *Ramnarain (P) Ltd.* v. *State Trading Corpn. of India Ltd.*, (1983) 3 SCC 75: AIR 1983 SC 786; *State of Rajasthan* v. *Raj Singh*, (1996) 5 SCC 516: AIR 1996 SC 2812.

(*vi*) Where the appeal is against a money decree, the appellant must deposit the decretal amount or furnish the security in respect thereof as per the direction of the court.

The memorandum of appeal must contain the grounds of objections to the decree appealed from, concisely, under distinct heads, without any argument or narrative and should be numbered consecutively.

Rule 2 precludes the appellant to urge, except with the leave of the court, any grounds of objection not set forth in the memorandum of appeal. The underlying object of this provision is to give notice to the respondent of the case he has to meet at the hearing of the appeal.[91]

The appellate court, however, is entitled to decide an appeal even on a ground not set forth in the memorandum of appeal.[92]

But when the appellate court *suo motu* proposes to do so, the party affected must be given an opportunity to contest the case on that ground. A memorandum of appeal should be prepared after carefully considering (*i*) the pleadings; (*ii*) the issues; (*iii*) the findings thereon; (*iv*) the judgment; and (*v*) the decree. Where the memorandum of appeal is not in a proper form, the court may reject it or return it to the appellant for the purpose of being amended.[93]

Rule 4 provides that where a decree proceeds upon a ground common to all the plaintiffs or defendants, any one of the plaintiffs or defendants may appeal from the whole decree, and thereupon the appellate court can reverse or vary the decree in favour of all the plaintiffs or the defendants, as the case may be.[94]

The general rule is that on an appeal by one of the several plaintiffs or defendants, an appellate court can reverse or vary the decree of the trial court only in favour of the party appealing. Rule 4 is an exception to this principle. It confers on the court the power to make an appropriate order needed in the interests of justice by reversing or varying the decree in favour of all the plaintiffs or defendants, as the case may be. In such a case, an appeal by one is virtually treated as an appeal on behalf of all, though they may not be parties to the appeal.[95] Rule 4 is based on two considerations; *firstly*, to give the appellate court full

[91] *Kalyanpur Lime Works Ltd.* v. *State of Bihar*, AIR 1954 SC 165 at p. 169: 1954 SCR 958; *Chittoori* v. *Kudappa*, AIR 1965 SC 1325 at p. 1336-37: (1965) 2 SCR 661; *Daman Singh* v. *State of Punjab*, (1985) 2 SCC 670 at p. 682: AIR 1985 SC 973 at p. 980.

[92] *Yeshwant Deorao* v. *Walchand Ramchand*, AIR 1951 SC 16 at p. 20: 1950 SCR 852; *Chittoori Subbanna* v. *Kudappa Subbanna*, *supra*, at pp. 1328-29 (AIR).

[93] R. 3.

[94] *Lal Chand* v. *Radha Krishan*, (1977) 2 SCC 88 at p. 93: AIR 1977 SC 789 at pp. 792-93.

[95] *Rameshwar Prasad* v. *Shambehari Lal*, AIR 1963 SC 1901 at p. 1904: (1964) 3 SCR 549; *Ratan Lal* v. *Lalmandas*, (1969) 2 SCC 70: AIR 1970 SC 108.

power to do justice to all parties, whether before it or not; and *secondly*, to prevent contradictory decisions in the matter in the same suit.[96]

## 27. MEMORANDUM OF APPEAL[97]

## 28. FORUM OF APPEAL

The right of appeal is undoubtedly a substantive right and its deprivation is a serious prejudice. But there is no vested right in procedure. Hence, no one can claim that one's appeal should be heard by a particular court. Change in the forum of appeal, therefore, cannot be said to cause prejudice to a party.[98]

## 29. VALUATION IN APPEAL

For the purpose of jurisdiction of the court, the appellant has to put valuation in appeal. Such valuation may be the same for jurisdiction as well as for court fees, for instance, an appeal for recovery of money due. It may differ also, for instance, in suits for partition, pre-emption, redemption of mortgage, etc.[99]

## 30. PRESENTATION OF APPEAL: RULES 9 & 10

Rule 9 states that the court from whose decree an appeal lies *shall* entertain the memorandum of appeal, *shall* make an endorsement thereon and *shall* register the appeal in register of appeals.[100]

[96] *Jagdei* v. *Sampat Dube*, AIR 1937 All 796 at p. 797; *Harihar Prasad* v. *Balmiki Prasad*, (1975) 1 SCC 212: AIR 1975 SC 733; *Har Narain* v. *Chandgi*, 1987 Supp SCC 738: AIR 1987 SC 1325; *Banarsi* v. *Ram Phal*, (2003) 9 SCC 606: AIR 2003 SC 1989; *see also supra*, Pt. II, Chap. 8.

[97] For detailed discussion, *see supra*, "Form of appeal".

[98] *Custodian of Evacuee Property* v. *Khan Saheb Abdul Shukoor*, AIR 1961 SC 1087: (1961) 3 SCR 855; *Ittyavira Mathai* v. *Varkey Varkey*, AIR 1964 SC 907: (1964) 1 SCR 495; *Maria Christina* v. *Amira Zurana*, AIR 1965 SC 432; *Garikapati Veeraya* v. *N. Subbiah Chaudhry*, AIR 1957 SC 540: 1957 SCR 488; *Gopalakrishna Pillai* v. *Meenakshi Ayal*, AIR 1967 SC 155: 1966 Supp SCR 128; *Francisco Luis* v. *Vithal*, AIR 1989 Bom 303; *Mohinder Singh* v. *Jagjit Singh*, AIR 1960 Punj 434; *Municipal Committee, Simla* v. *Gurdial Singh*, AIR 1973 HP 64; *Gopal* v. *Chimabai*, AIR 1938 Bom 464; *Shivaji* v. *Deoji*, AIR 1974 MP 123; *Kiran Singh* v. *Chaman Paswan*, AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117; *Stridewell Leathers (P) Ltd.* v. *Bhankerpur Simbhaoli Beverages (P) Ltd.*, (1994) 1 SCC 34: AIR 1994 SC 158.

[99] *Ramnarain (P) Ltd.* v. *State Trading Corpn. of India Ltd.*, (1983) 3 SCC 75: AIR 1983 SC 786. For detailed discussion, *see supra*, Pt. I, Chap. 1.

[100] R. 9 of O. 41 as amended from 1 July 2002 reads thus;

"9. *Registry of memorandum of appeal.*—(1) The Court from whose decree an appeal lies shall entertain the memorandum of appeal and shall endorse thereon the date of presentation and shall register the appeal in a book of appeal kept for that purpose.

(2) Such book shall be called the register of appeal.

It may be stated that in *Salem Advocate Bar Assn.* v. *Union of India*, (2003) 1 SCC 49: AIR 2003 SC 189. The Supreme Court held that the interpretation that Rule 9 requires

In view of the above provision of filing of appeals in the court which passed the decree, Rules 13, 15 and 18 requiring notice to the court whose decree is under challenge have been deleted.

It is, however, submitted that the provision relating to filing of appeals is vague, ambiguous, unclear and confusing. It is not clear whether Rule 9 is merely an enabling or permissive provision or is imperative and peremptory. No doubt, it uses the expression "shall". But suppose, the aggrieved appellant intends to file an appeal in an appellate court directly where an appeal lies, is he prevented from instituting such appeal in a court competent to hear the appeal? Can such court refuse to entertain an appeal though it is an appellate forum under the Code? Again, even after entertaining an appeal, what the trial court will do with the memorandum of appeal? How it will forward the said memorandum of appeal and records and proceedings to the appellate court in absence of any provision to that effect. It may be stated that there was a provision for transmission of record by a trial court to an appellate court (Rule 13), which has been deleted. At present, there is no specific or express provision relating to transmission of record by the trial court.[101]

The matter does not rest there. Suppose, the appellant wants to obtain stay, injunction or other interim order. Who will grant such relief? Rule 5(1) has remained unamended. Under that rule, only an appellate court can grant interim order. It, therefore, can safely be said that no such order can be made by the court which passed the decree, which is under challenge. Once an appeal is instituted, sub-rule (2) of Rule 5 gets exhausted and has no application.[102] What will happen then?

an appeal to be filed in the same court which passed the decree is not correct. An appeal must be filed in the court before which it is maintainable.

[101] R. 13 as it stood before the Amendment Act of 2002 ran thus;

"13. *Appellate Court to give notice to Court whose decree appealed from.*—(1)Where the appeal is not dismissed under Rule 11, the appellate court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

(2) *Transmission of papers to Appellate Court.*—Where the appeal is from the decree of a Court, the records of which are not deposited in the appellate court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such appears as may be specially called for the appellate court.

(3) *Copies of exhibits in Court whose decree appealed from.*—Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant."

[102] R. 5(1) and (2) read as under:

"5. *Stay by Appellate Court.*—(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the appellate court may for sufficient cause order stay of execution of such decree.

In the opinion of the author, all these questions, at least for the time being, have remained unanswered.

Under Rule 10(1) the appellate court may at its discretion require the appellant to furnish security for the costs of appeal or of the suit or of both. Where the appellant is residing out of India and does not possess sufficient immovable property within India other than the subject-matter of the appeal, it is obligatory on the court to demand security in such cases.[103]

The object of Rule 10 is to secure the respondent from the risk of having to incur further costs in an appeal which he might otherwise never recover from the appellant. An order for furnishing security may be made either before the respondent is called upon to appear and answer or afterwards on his application. Where the appellant fails to furnish security within the time granted by the court or the time subsequently extended by it, the court shall reject the appeal.[104] The appellate court may, however, at its discretion restore an appeal which has been rejected for failure to give security for costs.[105] An application for restoration can be filed within thirty days from the date of the rejection of an appeal.[106]

## 31. LIMITATION

The Code of Civil Procedure confers a right of appeal, but does not prescribe a period of limitation for filing an appeal. The Limitation Act, 1963, however, provides the period for filing appeals. It states that an appeal against a decree or order can be filed in a High Court within ninety days and in any other court within thirty days from the date of the decree or order appealed against.[107]

*Explanation.*—An order by the appellate court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the appellate court shall, pending the receipt from the appellate court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

(2) *Stay by Court which passed the decree.*—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

[103] Proviso to R. 10(1).

[104] R. 10(2).

[105] *Balwant Singh* v. *Daulat Singh*, ILR (1886) 8 All 315 (PC); *Basantlal* v. *Naidu*, AIR 1962 AP 10.

[106] Art. 122 of the Limitation Act, 1963.

[107] Art. 116, Limitation Act, 1963.

## 32. CONDONATION OF DELAY: RULE 3-A

Rule 3-A has been inserted by the Amendment Act of 1976. It provides that where an appeal has been presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application that the applicant had sufficient cause for not preferring the appeal within time.

Prior to insertion of Rule 3-A, the practice was to admit such an appeal subject to the objection regarding limitation. This practice was disapproved by the Privy Council,[108] and it stressed the expediency of adopting a procedure for securing the final determination of the question as to limitation before admission of the appeal. This rule is added to give effect to the recommendation of the Privy Council.[109]

As observed by the Supreme Court in *State of M.P.* v. *Pradeep Kumar*[110], the object of this provision is two-fold; *firstly,* to inform the appellant that the delayed appeal will not be entertained unless it is accompanied by an application explaining the delay; and *secondly,* to communicate to the respondent that it may not be necessary for him to get ready on merits as the court has to first deal with an application for condonation of the delay as a condition precedent. The provision is, however, directory and not mandatory. If the memorandum of appeal is filed without an accompanying application for condonation of delay, the consequence is not necessarily fatal. The defect is curable.[111]

Interpreting the provision in its proper perspective, the Court stated:

> "It is true that the pristine maxim *vigilantibus, non dormientibus, jura subeniunt* (law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism "to err is human" is more a practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judicature permanently closed before him. *The effort of the court should not be one finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine.*"[112]
>
> (emphasis supplied)

[108] *Krishnasami* v. *Ramasami Chettiar,* AIR 1917 PC 179: (1917-18) 45 IA 25.

[109] Statement of Objects and Reasons; see also *Naran Anappa* v. *Jayantilal,* AIR 1987 Guj 205: (1986) 1 Guj LR 206.

[110] (2000) 7 SCC 372.

[111] *Ibid,* at p. 378 (SCC).

[112] *Ibid,* at pp. 376-77 (SCC) (*per* Thomas, J.)

### 33. STAY OF PROCEEDINGS: RULES 5-8

Rule 5 provides for stay of an execution of a decree or an order. After an appeal has been filed, the appellate court may order stay of proceedings under the decree or the execution of such decree. But mere filing of an appeal does not suspend the operation of a decree. Stay may be granted if sufficient grounds are established.[113]

The object underlying Rule 5 is to safeguard the interests of both, the decree-holder and the judgment-debtor. It is the right of the decree-holder to reap the fruits of his decree. Similarly, it is the right of the judgment-debtor not merely to get barren success in case his appeal is allowed by the appellate court. This rule thus strikes a just and reasonable balance between these two opposing rights.

The following conditions must, therefore, be satisfied before stay is granted by the court[114]:

(*a*) The application has been made without unreasonable delay;

(*b*) Substantial loss will result to the applicant unless such order is made; and

(*c*) Security for the due performance of the decree or order has been given by the applicant.

The court may also make an *ex parte* order for stay of execution pending the hearing of the application if the above conditions are satisfied.[113]

Rule 3-A(3), however, lays down that the court shall not grant stay of the execution of a decree against which an appeal is proposed to be filed so long as the court does not, after hearing under Rule 11, decide to hear the appeal on merits.

In case of money decree, sub-rule (3) of Rule 1 as inserted by the Amendment Act, 1976 provides for the deposit of the decretal amount or for the furnishing of security. This provision has been made for the benefit of the decree-holder and with a view to lessen his hardship. Deposit of the decretal amount, however, is not a condition precedent for the presentation of an appeal.[115]

Sub-rule (5) of Rule 5 as added in 1976 mandates that no stay of execution of a decree shall be granted unless the deposit is made or security is furnished.

[113] R. 5(1)(2); see also *Kamla Devi* v. *Takhatmal*, AIR 1964 SC 859 at p. 862: (1964) 2 SCR 152; *Mool Chand* v. *Raza Buland Sugar Co. Ltd.*, (1982) 3 SCC 484; *Dilip Kumar* v. *Ramesh Chandra*, 1991 Supp (2) SCC 260; *Atma Ram Properties (P) Ltd.* v. *Federal Motors (P) Ltd.*, (2005) 1 SCC 705.

[114] R. 5(3), (4).

[115] *Mehta Teja Singh and Co.* v. *Grindlays Bank Ltd.*, (1982) 3 SCC 199; *Union Bank of India* v. *Jagan Nath Radhey Shyam and Co.*, AIR 1979 Del 36; *Dijabar* v. *Sulabha*, AIR 1986 Ori 38; *Malwa Strips (P) Ltd.* v. *Jyoti Ltd.*, (2009) 2 SCC 426.

Explanation to Rule 5(1) clarifies that the order of stay becomes effective from the date of communication to the court of first instance and not prior thereto.

Where an order has been made for the execution of a decree from which an appeal is pending, on sufficient cause being shown by the appellant, the court which passed the decree shall take security from the decree-holder for the restitution of any property which may be or has been taken in execution and for due performance of the decree or order of the appellate court. If such an application is made to the appellate court, it may direct the trial court to take such security.[116]

Where an order for sale of immovable property in execution of a decree has been passed and the appeal has been pending against such decree, on an application being made by the judgment-debtor, the court must stay the sale of immovable property on giving security or otherwise as it thinks fit.[117]

## 34. SUMMARY DISMISSAL: RULES 11 & 11-A

Rule 11 deals with the power of the appellate court to dismiss an appeal summarily. This rule refers to a stage after the memorandum of appeal has been filed and the appeal has been registered under Rule 9. Rule 11 embodies a general principle that whenever an appeal is preferred, the appellate court is entitled, after hearing the appellant or his advocate, to reject the appeal summarily if *prima facie* there is no substance in it.[118]

The discretion, however, must be exercised judiciously and not arbitrarily. Such power should be used very sparingly and only in exceptional cases. When an appeal raises triable issues, it should not be summarily dismissed.[119]

Where the appellate court which dismisses an appeal summarily is other than a High Court, it must record reasons for doing so.[120] However, in matters involving construction of documents, even a High Court should record reasons.[121]

The same principle applies to Letters Patent Appeals arising out of First Appeals since in such appeal (LPA), all questions of fact and law are open to challenge.[122]

[116] R. 6(1), (2).

[117] R. 6(2); see also *Pratibha Singh* v. *Shanti Devi*, (2003) 2 SCC 330: AIR 2003 SC 643.

[118] R. 11(1).

[119] *Mahadev Tukaram* v. *Sugandha*, (1973) 3 SCC 746: AIR 1972 SC 1932; *Umakant Vishnu* v. *Pramilabai*, (1973) 1 SCC 152: AIR 1973 SC 218; *Vinod Trading Co.* v. *Union of India*, (1982) 2 SCC 40; *Kiranmal* v. *Dnyanoba Bajirao*, (1983) 4 SCC 223: AIR 1983 SC 461.

[120] R. 11(4); see also *Govinda Kadtuji* v. *State of Maharashtra*, (1970) 1 SCC 469: AIR 1970 SC 1033.

[121] *Shanker* v. *Gangabai*, (1976) 4 SCC 112 at p. 115: AIR 1976 SC 2506 at p. 2509.

[122] *Gaudiya Mission* v. *Shobha Bose*, AIR 2008 SC 1012.

Again, when the first appellate court affirms the findings of the trial court, it is its duty to record reasons in brief for doing so. It is all the more necessary in a case where such court is a final court of finding of fact and where the judgment of the trial court is based on appreciation of oral and documentary evidence which is seriously challenged by the contesting party.[123]

But once an appeal is admitted, the court cannot dismiss it on technical grounds or without hearing the appellant.[124] Similarly, an appeal cannot be admitted partly. It can be admitted or dismissed wholly.[125] If the appellant or his pleader does not appear when the appeal is called on for hearing, the court may dismiss it for default.[126] The word *may* shows that the court has discretion in the matter and is not bound to dismiss the appeal for default of appearance. The court may adjourn the hearing of the appeal to a future date or even admit it. Where an appeal is dismissed for default, it may be restored if it is proved that the appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing.[127]

### 35. ABATEMENT OF APPEAL

The provisions relating to abatement of suits apply to appeals also.[128]

### 36. ADMISSION OF APPEAL: RULES 12, 14

If the appeal is not summarily dismissed, the appellate court shall fix a day for hearing of the appeal, and the notice of such date of hearing shall be served upon the respondent with a copy of the memorandum of appeal.[129]

### 37. DOCTRINE OF MERGER

Where an appeal is provided against a decree passed by the trial court and such appeal is preferred, it is the decree of the appellate court which is operative in law, which can be enforced.

The doctrine of merger is based on the principle that there cannot be, at one and the same time, more than one operative decree governing the same subject-matter. Hence, as soon as an appeal is decided by an appellate court, the decree of the trial court ceases to have existence in the eyes of the law and is superseded by a decree by an appellate

[123] *Kerala Transport Co.* v. *Shah Manilal Mulchand*, 1991 Supp (2) SCC 461 at p. 462.

[124] *Dipo* v. *Wassan Singh*, (1983) 3 SCC 376: AIR 1983 SC 846; *Jhanda Singh* v. *Gram Sabha of Village Umri*, (1971) 3 SCC 980.

[125] *Ramji Bhagala* v. *Krishnarao*, (1982) 1 SCC 433: AIR 1982 SC 1223.

[126] R. 11(2). See also *Thakur Sukhpal Singh* v. *Thakur Kalyan Singh*, AIR 1963 SC 146: (1963) 2 SCR 733; *Shantilal* v. *Bai Basi*, AIR 1976 Guj 1: (1975) 16 Guj LR 1.

[127] R. 19.

[128] Or. 22 R. 11. For detailed discussion, *see supra*, Pt. II, Chap. 13.

[129] Rr. 12, 14.

court. In other words, the decree passed by the trial court merges with the decree of the appellate court.[130]

## 38. PROCEDURE AT HEARING: RULES 16-21

### (a) Right to begin: Rule 16

The appellant has a right to begin.[131] After hearing the appellant in support of the appeal, if the court finds no substance in the appeal, it may dismiss the appeal at once without calling upon the respondent to reply. But if the appellate court does not dismiss the appeal at once, it will hear the respondent against the appeal and the appellant shall then be entitled to reply.[132]

### (b) Dismissal for default and restoration: Rules 17-19

If the appellant does not appear when the appeal is called on for hearing, the court may dismiss the appeal in default.[133] The court, however, cannot dismiss it on merits.[134] The appeal, however, cannot be dismissed although the notice has not been served upon the respondent, if the respondent appears when the appeal is called on for hearing.[135]

Where the appeal has been dismissed for default or for non-payment of process fees, the appellant may apply to the appellate court for the restoration of the appeal. On sufficient cause being shown, the appellate court shall restore the appeal on such terms as to costs or otherwise as it thinks fit.[136] The court may require the counsel to go on for hearing after restoration and may refuse to restore the matter for further adjournment.[137] Appearance of a party or his advocate and

[130] *Jowad Hussain* v. *Gendan Singh*, AIR 1926 PC 63: (1925-26) 53 IA 197; *Lachmeshwar Prasad* v. *Keshwar Lal*, AIR 1941 FC 5: 1940 FCR 84; *CIT* v. *Amritlal Bhogilal and Co.*, AIR 1958 SC 868: 1959 SCR 713; *Collector of Customs* v. *East India Commercial Co. Ltd.*, AIR 1963 SC 1124: (1963) 2 SCR 563; *State of Madras* v. *Madurai Mills Co. Ltd.*, AIR 1967 SC 681: (1967) 1 SCR 732; *Gojer Bros. (P) Ltd.* v. *Ratan Lal Singh*, (1974) 2 SCC 453: AIR 1974 SC 1380; *Dilip* v. *Mohd. Azizul Haq*, (2000) 3 SCC 607: AIR 2000 SC 1976.

[131] R. 16(1).

[132] R. 16(2).

[133] R. 17(1). See also *New Brahma Kshatriya Coop. Housing Society* v. *Govindlal*, AIR 1975 Guj 173: (1974) 15 Guj LR 689; *Ajit Kumar* v. *Chiranjibi Lal*, (2002) 3 SCC 609; *Shiv Kumar* v. *Darshan Kumar*, (2009) 2 SCC 116.

[134] Expln. to R. 17(1). See also *Shantilal* v. *Bai Basi*, AIR 1976 Guj 1: (1975) 16 Guj LR 1; *Abdur Rahman* v. *Athifa Begum*, (1996) 6 SCC 62; *Secy., Dept. of Horticulture* v. *Raghu Raj*, (2009) 1 Guj LH 457 (SC).

[135] Proviso to R. 18.

[136] R. 19. See also *Rafiq* v. *Munshilal*, (1981) 2 SCC 788: AIR 1981 SC 1400; *Goswami Krishna* v. *Dhan Prakash*, (1981) 4 SCC 574; *Savithri Amma Seethamma* v. *Aratha Karthy*, (1983) 1 SCC 401: AIR 1983 SC 318; *Lachi Tewari* v. *Director of Land Records*, 1984 Supp SCC 431: AIR 1984 SC 41; *Mangilal* v. *State of M.P.*, (1994) 4 SCC 564.

[137] *New Brahma Kshatriya Coop. Housing Society* v. *Govindlal Narbherem Thakore*, AIR 1975 Guj 173: (1974) 15 Guj LR 689 at p. 696; *Madhumilan Syntex Ltd.* v. *Union of India*,

prayer for recalling of an order of dismissal for default may be a good ground for restoring a matter but it cannot be said to be a good ground for restoration of the matter for hearing in future. In other words, "a matter may be restored for hearing and not for adjournment".[138]

**(c) Ex parte hearing and rehearing: Rules 17 & 21**

Where the appellant appears and the respondent does not appear when the appeal is called on for hearing, the appeal shall be heard *ex parte*.[139] If the judgment is pronounced against the respondent, he may apply to the appellate court for rehearing of the appeal. If he satisfies the court that the notice of appeal was not duly served upon him or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit.[140]

However, ordinarily, no *ex parte* decree should be passed by a court except on reliable evidence.[141]

**(d) Addition of respondent: Rule 20**

Where it appears to the appellate court at the hearing of the appeal that any person who was a party to the suit in the trial court but who has not been made a party to the appeal is interested in the result of the appeal, the court may adjourn the hearing of the appeal and direct that such person be joined as a respondent.[142] Such addition of a respondent cannot be ordered after the expiry of the period of limitation for appeal, unless the reasons are recorded for doing so.[143] The Court can also make an order as to costs.[144]

The object of Rule 20 is to protect parties to the suit who have not been made respondents in the appeal from being prejudiced by modifications being made behind their back in the decree under appeal.[145] Over and above Rule 20, the appellate court has inherent power to

(2007) 11 SCC 297: AIR 2007 SC 1481.

[138] *Madhumilan Syntex Ltd.* v. *Union of India*, (2007) 11 SCC 297 at pp. 305-06: AIR 2007 SC 1481 (*per* Thakker, J.)

[139] R. 17(2).

[140] R. 21; see also *Sourindra Mohan* v. *State of W.B.*, (1982) 2 SCC 360: AIR 1982 SC 1193; *Savithri Amma Seethamma* v. *Aratha Karthy*, (1983) 1 SCC 401: AIR 1983 SC 318.

[141] *Sudha Devi* v. *M.P. Narayanan*, (1988) 3 SCC 366: AIR 1988 SC 1381.

[142] R. 20(1); see also *SBI* v. *Ramkrishna Pandurang*, 1990 Supp SCC 801: AIR 1990 SC 1981; *Shew Bux* v. *Bengal Breweries Ltd.*, AIR 1961 SC 137: (1961) 1 SCR 680.

[143] R. 20(2). See also *Ch. Surat Singh* v. *Manohar Lal*, (1971) 3 SCC 889: AIR 1971 SC 240.

[144] R. 20(2).

[145] *Subramaniam* v. *Veerabhadram*, (1908) 31 Mad 442 at p. 444.

add a party respondent or to transpose a party from one category to another.[146]

## 39. CROSS-OBJECTIONS: RULE 22

### (a) General

Order 41 Rule 22 is a special provision permitting the respondent who has not filed an appeal against the decree to object to the said decree by filing cross-objections in the appeal filed by the opposite party.[147] Filing of cross-objections by the respondent, however, is optional and voluntary. The provision is permissive and enabling and not peremptory or obligatory.[148] Where the suit is partly decided in favour of the plaintiff and partly in favour of the defendant and the aggrieved party (either the plaintiff or the defendant) files an appeal, the opposite party may adopt any of the following courses:

(*i*) He may prefer an appeal from that part of the decree which is against him. Thus, there may be two appeals against the same decree; one by the plaintiff and the other by the defendant. They are known as "cross-appeals". Both these appeals will be disposed of together.

(*ii*) He may not file an appeal against the part of the decree passed against him but may take objection against that part. Such objections are called "cross-objections".

(*iii*) Without filing a cross-appeal or cross-objection, he may support the decree (*a*) on the grounds decided in his favour by the trial court; or (*b*) even on the grounds decided against him.[149]

[146] *Saila Bala Dassi* v. *Nirmala Sundari Dassi*, AIR 1958 SC 394 at p. 398: 1958 SCR 1287.

[147] R. 22(1) of Order 41 reads thus:

"Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader notice of the date fixed for hearing the appeal, or within such further time as the appellate court may see fit to allow."

[148] *Ravinder Kumar* v. *State of Assam*, (1999) 7 SCC 435: AIR 1999 SC 3571.

[149] *Ramanbhai Ashabhai* v. *Dabhi Ajitkumar Fulsinji*, AIR 1965 SC 669 at p. 676: (1965) 1 SCR 712; *Indian Cable Co.* v. *Workmen*, (1974) 3 SCC 11 at pp. 17-18: AIR 1972 SC 2195 at pp. 2198-99; *Choudhary Sahu* v. *State of Bihar*, (1982) 1 SCC 232 at p. 235: AIR 1982 SC 98 at p. 99; *CST* v. *Vijai International Udyog*, (1984) 4 SCC 543: AIR 1985 SC 109; *Krishan Gopal* v. *Haji Mohd. Muslim*, AIR 1969 Del 126; *Bihar Supply Syndicate* v. *Asiatic Navigation*, (1993) 2 SCC 639 at pp. 650-51; *Union of India* v. *Kolluni Ramaiah*, (1994) 1 SCC 367 at p. 370: AIR 1994 SC 1149 at p. 1151; *Banarsi* v. *Ram Phal*, (2003) 9 SCC 606: AIR 2003 SC 1989; *S. Nazeer Ahmed* v. *State Bank of Mysore*, (2007) 11 SCC 75: AIR 2007 SC 989; *see also infra*, "Modification of decree: Rule 33".

**(b) Nature**

The expression "cross-objection" expresses the intention of the legislature that it can be directed by the respondent against the appellant. One cannot treat an objection by a respondent in which the appellant has no interest as a cross-objection. *The appeal is by the appellant against a respondent, the cross-objection must be an objection by a respondent against the appellant.*[150] (emphasis supplied)

A cross-objection is like cross-appeal. It has thus all the trappings of an appeal. The mere distinction between the two lies in the fact that whereas cross-objections form part of the same record, cross-appeals are two distinct and independent proceedings.[151]

**(c) Who may file cross-objections?**

Cross-objections can be filed by the respondent (1) if he could have filed an appeal against any part of the decree;[152] or (2) if he is aggrieved by a finding in the judgment, even though the decree is in his favour because of some other finding.[153]

Cross-appeals and cross-objections provide two different remedies for the same purpose since the cross-objections can be filed on the points on which that party could have preferred a cross-appeal.[154] The right to file cross-objections is substantive in nature and not merely procedural.[155]

**(d) Against whom cross-objections may be filed**

Ordinarily, cross-objections may be filed only against the appellant. In exceptional cases, however, one respondent may file cross-objections against the other respondents[156]; for instance, when the appeal by some of the parties cannot effectively be disposed of without opening

[150] *Vadlamudi Venkateswarlu* v. *Ravipati Ramamma*, AIR 1950 Mad 379: ILR 1950 Mad 874 (FB); *Panna Lal* v. *State of Bombay*, AIR 1963 SC 1516: (1964) 1 SCR 980; *Mahant Dhangir* v. *Madan Mohan*, 1987 Supp SCC 528: AIR 1988 SC 54.

[151] *N. Jayaram Reddy* v. *Revenue Divisional Officer*, (1979) 3 SCC 578: AIR 1979 SC 1393: *Superintending Engineer* v. *B. Subba Reddy*, (1999) 4 SCC 423: AIR 1999 SC 1747.

[152] R. 22(1); see also *N. Jayaram Reddy* v. *Revenue Divisional Officer*, (1979) 3 SCC 578: AIR 1979 SC 1393.

[153] Expln. to R. 22(1).

[154] *N. Jayaram Reddy* v. *Revenue Divisional Officer*, (1979) 3 SCC 578: AIR 1979 SC 1393. [It may, however, be stated that no appeal lies against a mere "finding" if such finding does not amount to "decree". For detailed discussion, *see supra*, "No appeal against finding". But cross-objections can be filed even against a "finding" which may not amount to decree; *see* Expln. to R. 22(1)].

[155] *Panna Lal* v. *State of Bombay*, AIR 1963 SC 1516 at p. 1520: (1964) 1 SCR 980.

[156] *Ibid*, see also *Mahant Dhangir* v. *Madan Mohan*, 1987 Supp SCC 528: AIR 1988 SC 54.

the matter as between the respondents *inter se*; or in a case where the objections are common as against the appellant and co-respondent.[157]

Thus, where the relief sought against the appellant in cross-objections is intermixed with the relief granted to the other respondents in such a way that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and other respondents, cross-objections by one respondent against the other respondents may be allowed.[158]

The principle that no decision can be made against a person who is not a party to the proceedings applies to cross-objections also. Hence, cross-objections cannot be allowed against a person who is not a party to the appeal.

**(e) When cross-objections may be filed?**

The provisions of Order 41 Rule 22 contemplates right to file cross-objections only when an appeal is filed and also when such appeal is admitted by the appellate court and notice is issued on the respondent.[159]

A stage of filing cross-objections arises only when an appeal is admitted and the court directs notice to be issued to the respondent. No cross-objections, hence, can be filed if no appeal is filed by the appellant or an appeal is filed but has not been admitted. Mere posting of preliminary hearing of an appeal is not enough. Similarly, prior to service of notice of hearing of appeal by the court, no cross-objections would lie. That, however, does not make cross-objections suffer from legal infirmity.[160]

**(f) Ambit and scope**

Where the respondent has filed cross-objections, even if the original appeal is withdrawn or dismissed for default, they will be heard and decided on merits.[158] Where an appeal is withdrawn or dismissed for default and the cross-objections are decided on merits, restoration of appeal and rehearing will not automatically warrant rehearing of cross-objections.[161]

[157] *Panna Lal, supra; Mahant Dhangir, supra,* at p. 533 (SCC): at p. 57 (AIR).

[158] R. 22(4); see also *Hari Shankar* v. *Sham Manohar,* (2005) 3 SCC 761: 2005 AIR SCW 1712.

[159] *Balwant Singh* v. *State of M.P.,* 1986 MP LJ 571: 1986 Jab LJ 686.

[160] *Manthena Ramanamma* v. *Tehsildar,* AIR 1976 AP 81; *Ram Kripal* v. *Radhey Shyam,* AIR 1970 Raj 234: 1970 Cri LJ 1558; (2003) 4 JLJR 502: (2004) 3 JLR 246 (Jhar).

[161] *Nanoo Gopinathan* v. *Neelacantan Balakrishnan,* AIR 1990 Ker 197.

But where the appeal is dismissed as time-barred[162], or has abated[163], or is held to be not maintainable[164], the cross-objections cannot be heard on merits as they are contingent and dependent upon the hearing of the appeal.[165]

**(g) Cross-appeal whether may be treated as cross-objections**

An appeal filed beyond the period of limitation may be treated as cross-objections under Order 41 Rule 22. A cross-appeal may be treated as cross-objection only if such appeal is filed after the other appeal and not if it is filed before that appeal.[166]

**(h) Form**

Cross-objections shall be in the form of a memorandum of appeal and they should be served on the party affected thereby or his pleader.[167] A respondent can file cross-objections as an indigent person.[168]

**(i) Limitation**

Cross-objections can be filed within one month from the date of service on the respondent or his pleader of the notice of the date fixed for hearing of the appeal.[169] The appellate court may, at its discretion, extend the period within which cross-objections can be filed.[170] The discretion, however, must be exercised judicially and on sufficient cause for delay being shown and is open to review by the superior court.

**(j) Cross-objection against finding: Explanation to Rule 22(1)**

Explanation to sub-rule (1) of Rule 22 of Order 41, as added by the Amendment Act, 1976 permits respondent to file cross-objection not only against *decree* but also against *finding* not amounting to *decree*. The

[162] *Charity Commr.* v. *Padmavati*, AIR 1956 Bom 86; *A.L.A. Alagappa Chettiar* v. *Chockalinagam Chetty*, AIR 1919 Mad 784 (FB); *Ram Chand* v. *Ramku*, AIR 1977 HP 82.

[163] *Abdullamiya Hamdumiya* v. *Mohamedmiya Gulamhusein*, AIR 1949 Bom 276; *Lt. Col. P.H. Choudhary* v. *Altaf Ahmed*, AIR 1963 AP 382.

[164] *Kashiram Sonu* v. *Ranglal Motilalshet*, AIR 1941 Bom 242; *Ram Chand* v. *Ramku, supra*; *Chanchalgauri* v. *Narendrakumar*, AIR 1986 Guj 55; *Municipal Corpn. of Delhi* v. *International Security & Intelligence Agency Ltd.*, (2004) 3 SCC 250: AIR 2003 SC 1515: 2003 AIR SCW 870.

[165] *N. Jayaram Reddy* v. *Revenue Divisional Officer*, (1979) 3 SCC 578: AIR 1979 SC 1393.

[166] *Nripjit Kaur* v. *Sardar Satinder Singh*, AIR 1955 Punj 190; *Bhagai Ram* v. *Raghbar Dial*, AIR 1925 Lah 57; *Mihan Singh* v. *Tilak Ram*, AIR 1934 Lah 273; *Lablu Ram* v. *Ram Pratap*, AIR 1944 Lah 76; (1969) 1 Mys LJ 507; *S.M. Singh* v. *Punjabi University, Patiala*, AIR 1975 Punj 318.

[167] R. 22(2).

[168] R. 22(5).

[169] R. 22(1).

[170] *Vishwa Nath* v. *Maharaji*, AIR 1977 All 459.

position, however, as regards filing of appeal has remained as it was before the amendment.[171]

After the amendment in Rule 22 now, a party to a suit who has succeeded and whose favour, a decree is passed by the court cannot file an appeal against any "finding" recorded against him, but if the other side prefers an appeal against the decree, he may file cross-objection against the "finding" of the lower court notwithstanding that the ultimate decision or decree may be partly or wholly in his favour.

**(k) Procedure at hearing**

The appeal and the cross-objections should be heard together and they should be disposed of by a common judgment incorporating the decisions on both; the appeal as well as the cross-objections.[172]

**(l) Omission to file cross-objections**

A party in whose favour a decree has been passed has a substantive and valuable right which should not be lightly interfered with. As an ordinary rule, therefore, in the absence of a cross-appeal or cross-objection by a respondent, the appellate court has no power to disturb the decree of the lower court so far as it is in favour of the appellant. This is, however, subject to the provisions of Order 41 Rule 33 of the Code.[173]

**(m) Disposal of appeal and cross-objections**

The court should decide and dispose of appeal and cross-objections together by one judgment and such decision should be incorporated in one decree. This approach seeks to avoid contradictory and inconsistent decisions on the same questions in one and the same suit.[174]

**(n) Principles**

The following principles govern cross-objections:[175]

(1) An appeal is a substantive right. It is a creation of the statute. The right to appeal does not exist unless it is specifically conferred.

(2) A cross-objection is like an appeal. It has all the trappings of an appeal. It is filed in the form of a memorandum and the

[171] Notes on Clauses.

[172] R. 22(5). See also *Krishan Gopal* v. *Haji Mohd. Muslim*, AIR 1969 Del 126.

[173] *Choudhary Sahu* v. *State of Bihar*, (1982) 1 SCC 232 at p. 235: AIR 1982 SC 98 at p. 99; *Nirmala Bala* v. *Balai Chand*, AIR 1965 SC 1874: (1965) 3 SCR 550; *Mahant Dhangir* v. *Madan Mohan*, 1987 Supp SCC 528: AIR 1988 SC 54; *Panna Lal* v. *State of Bombay*, AIR 1963 SC 1516; *Banarsi* v. *Ram Phal*, (2003) 9 SCC 606: AIR 2003 SC 1989; *State of Gujarat* v. *Dharmistaben Narendrasinh Rana*, (2001) 3 Guj LR 2056.

[174] *Krishan Gopal* v. *Haji Mohd. Muslim*, AIR 1969 Del 126; *State of Kerala* v. *K.K. Padmavathi*, (1984) 1 TAC 119; *State* v. *Salu*, AIR 1963 Raj 93.

[175] *Superintending Engineer* v. *B. Subba Reddy*, (1999) 4 SCC 423: AIR 1999 SC 1747.

provisions of Rule 1 of Order 41 of the Code, so far as these relate to the form and contents of the memorandum of an appeal, apply to a cross-objection as well.

(3) Court fee is payable on a cross-objection like that on the memorandum of an appeal. Provisions relating to appeals by indigent persons also apply to cross-objections.

(4) Even where an appeal is withdrawn or is dismissed for default, a cross-objection may nevertheless be heard and determined.

(5) A respondent even though he has not appealed may support the decree on any other ground but if he wants to modify it, he has to file a cross-objection to the decree which objection he could have taken earlier by filing an appeal. The time for filing an objection which is in the nature of an appeal is extended by one month after service of notice on him of the day fixed for hearing the appeal. This time can also be extended by the Court like in an appeal.

(6) A cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give *quietus* to the whole litigation by his accepting the judgment and decree or order even if it was partly against his interest. When, however, the other party challenges the same by filing an appeal, the statute gives the respondent a second chance to file an appeal by way of a cross-objection if he still feels aggrieved by the judgment and decree or order.[176]

## 40. POWERS OF APPELLATE COURT: SECTION 107, RULES 23-29 & 33

Sections 96-108 and Rules 23 to 33 of Order 41 enumerate the powers of an appellate court while hearing first appeals. They may be summarised thus:

### (a) Power to decide a case finally: Section 107(1)(a), Rule 24

Section 107(1)(*a*) and Rule 24 of Order 41 enable the appellate court to dispose of a case finally. Where the evidence on record is sufficient to enable the appellate court to pronounce judgment, it may finally determine the case notwithstanding that the judgment of the trial court has proceeded wholly upon some ground other than that on which the appellate court proceeds. The general rule is that a case should, as far as possible, be disposed of on the evidence on record and should not be remanded for fresh evidence, except in rare cases[177] by drawing

[176] *Ibid*, at pp. 433-34 (SCC): at pp. 1753-54 (AIR) (*per* Wadhwa, J.).

[177] *Sunder Singh* v. *Narain Singh*, 1969 SCD 900; *Rajeshwar Rao* v. *Collector, Hyderabad*, (1969) 2 SCWR 344; *Annamalai* v. *Narayanswami Pillai*, AIR 1972 Mad 316 at pp. 318-19; *D. Kaur* v. *Kanti Khare*, (1981) 4 SCC 152: AIR 1982 SC 789; *Nedunuri Kameswaramma*

the final curtain on the litigation between the parties.[178] Fragmentary decisions are most inconvenient and tend to delay the administration of justice.[179] "If life like a dome of many-coloured glass stains the white radiance of eternity, so do the doings and conflicts of mortal beings till death tramples them down."[180]

**(b) Power to remand: Section 107(1)(b), Rules 23 & 23-A**

*(i) Meaning*

Remand means to send back.

*(ii) Nature*

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

Rule 23-A as inserted by the Amendment Act, 1976 enables the appellate court to remand a case where the lower court has decided it on merits but the appellate court considers such remand in the interest of justice.

*(iii) Scope*

By passing an order of remand, an appellate court directs the lower court to reopen and retry the case. On remand, the trial court will readmit the suit under its original number in the register of civil suits and will proceed to determine it as per the directions issued by the appellate court.[181]

v. *Sampati Subba Rao*, AIR 1963 SC 884: (1963) 2 SCR 208; *Patel Sureshbhai* v. *Patel Satabhai*, (1983) 3 SCC 294: AIR 1983 SC 648; *Kausalya Devi* v. *Land Acquisition Officer*, (1984) 2 SCC 324: AIR 1984 SC 892; *Bhairab Chandra* v. *Ranadhir Chandra*, (1988) 1 SCC 383: AIR 1988 SC 396.

[178] *Sant Narain* v. *Rama Krishna Mission*, (1974) 2 SCC 730 at p. 737: AIR 1974 SC 2241 at p. 2246; *Bechan Pandey* v. *Dulhin Janki Devi*, (1976) 2 SCC 286 at p. 290: AIR 1976 SC 866 at p. 869; *Chinnamarkathian* v. *Ayyavoo*, (1982) 1 SCC 159 at p. 170: AIR 1982 SC 137 at p. 143; *Kausalya Devi Bogra* v. *Land Acquisition Officer*, (1984) 2 SCC 324 at p. 334: AIR 1984 SC 892 at p. 897; *K. Gopalan* v. *K. Balakrishnan*, (2005) 12 SCC 351.

[179] *Nanhelal* v. *Umrao Singh*, AIR 1931 PC 33: (1930-31) 58 IA 50: 130 IC 686.

[180] *Per* Khanna, J. in *Bechan Pandey* v. *Dulhin Janki Devi*, *supra*, at p. 299 (SCC): at p. 869 (AIR). *See also*, observations of Chief Justice Crewe quoted by His Lordship.

[181] R. 23.

*(iv) Conditions*

The appellate court has power to remand a case either under Rule 23 or under Rule 23-A. A remand cannot be ordered lightly.[182] It can be ordered only if the following conditions are satisfied:[183]

(1) *The suit must have been disposed of by the trial court on a preliminary point.*—Before the court can exercise the power of remand under Rule 23, it is necessary to show that the lower court has disposed of the suit on a preliminary point.

A point can be said to be a *preliminary point*, if it is such that the decision thereon in a particular way is sufficient to dispose of the whole suit, without the necessity for a decision on the other points in the case.[184] Such preliminary point may be one of fact or of law, but the decision thereon must have avoided the necessity for a full hearing of the suit.

Thus, where the lower court dismisses the suit as being not maintainable, or barred by limitation; or res judicata; or as disclosing no cause of action; it does so on a preliminary point of law. On the other hand, where the lower court dismisses the suit on the ground that the plaintiff is estopped from proving his case; or that it was motivated; or that the plea raised at the hearing was different from that raised in the plaint, it does so on a preliminary point of fact.

(2) *The decree under appeal must have been reversed.*—No remand can be ordered by the appellate court under this rule unless the decision of the lower court on the preliminary point is reversed in appeal.[185]

Where such is not the case, the appellate court cannot order remand simply because the judgment of the lower court is not satisfactory; or that the lower court has misconceived or misread the evidence; or has ignored the important evidence; or has acted contrary to law; or that the materials on which the conclusion is reached are *scanty*; and the appellate court must decide the appeal in accordance with law.[186]

(3) *Other grounds.*—Rule 23-A of Order 41, as inserted by the Amendment Act of 1976, empowers the appellate court to remand a

[182] *K. Krishna Reddy* v. *Collector, Land Acquisition*, (1988) 4 SCC 163: AIR 1988 SC 2123; *Bhairab Chandra Nandan* v. *Ranadhir Chandra Dutta*, (1988) 1 SCC 383: AIR 1988 SC 396; *Peria Nachi Muthu* v. *Raju Thevar*, (1985) 2 SCC 290: AIR 1985 SC 821; *Sunder Singh* v. *Narain Singh*, 1969 SCD 900; *Rajeshwar Rao* v. *Collector, Hyderabad*, (1969) 2 SCWR 344; *Kausalya Devi* v. *Land Acquisition Officer*, (1984) 2 SCC 324: AIR 1984 SC 892; *Thatchara Bros.* v. *M.K. Marymol*, (1999) 1 SCC 298.

[183] *Mohd. Akbar Khan* v. *Motai*, AIR 1948 PC 36; *State* v. *Sanubhai*, (1970) 11 Guj LR 613; *Kalipada Dinda* v. *Kartick Chandra Hait*, AIR 1977 Cal 3.

[184] *Malayath Veetil Raman* v. *C. Krishnan Nambudripad*, AIR 1922 Mad 505 at p. 508 (FB); *Chaudhary Chandrika Prasad* v. *Mithu Rai*, AIR 1927 Pat 296; *Bai Bai* v. *Mahadu Maruti*, AIR 1960 Bom 543 at p. 547; *D.P. Singh* v. *State of U.P.*, AIR 1973 All 174 at pp. 181-82.

[185] *Purapabutchi Rama* v. *Purapa Vimalakumari*, AIR 1969 AP 216 at p. 220.

[186] *Sunder Singh* v. *Narain Singh*, *supra*; *Rajeshwar Rao* v. *Collector, Hyderabad*, *supra*.

case even when the lower court has disposed of the case otherwise than on a preliminary point and the remand is considered necessary by the appellate court in the interests of justice.

The primary object of Rule 23-A is to widen the powers of the appellate court to remand a case in the interests of justice.[187] Even before the insertion of new Rule 23-A, it was held that an order of remand can be passed, if it is necessary to do so in the interests of justice.[188] But it was also held that the power of remand must be regulated by the provisions of Rules 23 and 25 of Order 41 and that inherent powers under Section 151 of the Code cannot be exercised by the appellate court to order remand.[189] The power of remand was, thus, strictly a limited power and yet in practice, many cases arose wherein remand was necessitated for some reasons other than those mentioned in Rules 23 and 25. The Law Commission[190], therefore, recommended an amendment of the rule empowering the appellate court to remand a case whenever it thinks it is necessary in the interests of justice. The said recommendation has been accepted and Rule 23-A has accordingly been added.

(*v*) *Effect*

An order of remand reverses the decision of the lower court and reopens the case for retrial by the lower court except in regard to the matters decided by the appellate court.

An order of remand is appealable.[191] If the party aggrieved by an order of remand does not appeal therefrom, he cannot subsequently question its correctness under the inherent powers of the court under Section 151 of the Code.[192]

[187] Statement of Objects and Reasons. See also *Ramesh Kumar* v. *Kesho Ram*, 1992 Supp (2) SCC 623: AIR 1992 SC 700; *Patel Sureshbhai* v. *Patel Satabhai*, (1983) 3 SCC 294: AIR 1983 SC 648; *Ashwinkumar K. Patel* v. *Upendra J. Patel*, (1999) 3 SCC 161: AIR 1999 SC 1125; *Ram Autar* v. *Director of Consolidation*, 1991 Supp (1) SCC 552: AIR 1991 SC 480; *Raghbendra Bose* v. *Sunil Krishna*, (2005) 12 SCC 309; *Shanti Devi* v. *Daropti Devi*, (2006) 13 SCC 775.

[188] *State of T.N.* v. *S. Kumaraswami*, (1977) 4 SCC 602(III): AIR 1977 SC 2026; *Dwarka Nath* v. *Ram Rati Devi*, (1980) 1 SCC 17: AIR 1980 SC 192.

[189] *Mahendra Manilal* v. *Sushila Mahendra*, AIR 1965 SC 364 at p. 399: (1964) 7 SCR 267; *Nain Singh* v. *Koonwarjee*, (1970) 1 SCC 732 at pp. 734-35: AIR 1970 SC 997 at p. 998.

[190] Law Commission's Fourteenth Report, Vol. I at p. 405; Law Commission's Twenty-seventh Report at p. 241; Law Commission's Fifty-fourth Report at pp. 299-300.

[191] Or. 43 R. 1(*u*).

[192] S. 105(2). See also *Mahendra Manilal Nanavati* v. *Sushila Mahendra Nanavati, supra*; *Nain Singh* v. *Koonwarjee*, (1970) 1 SCC 732 at pp. 734-35: AIR 1970 SC 997 at p. 998; *Sita Ram* v. *Sukhnandi Dayal*, (1971) 3 SCC 488 at p. 494: AIR 1972 SC 1612 at p. 1617; *Jasraj Inder Singh* v. *Hemraj Multanchand*, (1977) 2 SCC 155 at p. 164: AIR 1977 SC 1011 at pp. 1017-18; *State of Maharashtra* v. *Harishchandra*, (1986) 3 SCC 349.

Similarly, the court to which the case is remanded is also bound by it and cannot go behind the order of remand.[193] While remanding the case, the appellate court shall fix a date for the appearance of the parties before the lower court so as to receive its directions regarding the suit or proceeding pending in the lower court.[194] It thus nullifies the order passed by the trial court.[195] It must, however be noted that when an appellate court remands a case setting aside findings of the lower court, only those findings can be said to have been set aside and not all the findings recorded by the trial court.[196]

*(vi) Duty of trial court*

Once an order of remand is made by a superior court, an inferior court has to decide the matter as per the direction of the superior court. In *CWT* v. *Aluminium Corpn. Ltd.*[197], the High Court of Calcutta expressed "doubts" about the "competence" of the Supreme Court to remand the case. When the matter reached the Supreme Court again, the Apex Court observed that the High Court clearly exceeded its jurisdiction in examining the "competence" of the Apex Court to remand the case. It declared, "It would have done well to remind itself that it was bound by the orders of this Court and could not entertain or express any argument or views challenging their correctness. *The judicial tradition and propriety required that court not to sit on judgment over the decision and orders of this Court*," [198] (emphasis supplied)

*(vii) Conclusions*

The appellate court should not exercise the power of remand very lightly. As far as possible it should dispose of the appeal finally unless remand is imperative.[199] The correctness of an order of remand if not questioned at the time when it was made by filing an appeal, never-

[193] *Nain Singh* v. *Koonwarjee, supra; Bhopal Sugar Industries Ltd.* v. *ITO*, AIR 1961 SC 182 at p. 185: (1961) 1 SCR 474; *Tobacco Manufacturers (India) Ltd.* v. *CST*, AIR 1961 SC 402 at p. 405: (1961) 2 SCR 106; *CWT* v. *Aluminium Corpn. Ltd.*, (1973) 3 SCC 643: (1972) 1 SCR 486; *Jasraj Inder Singh* v. *Hemraj Multanchand*, (1977) 2 SCC 155 at p. 164: AIR 1977 SC 1011 at pp. 1017-18; *Kausalya Devi* v. *Land Acquisition Officer*, (1984) 2 SCC 324 at pp. 333-34: AIR 1984 SC 892 at pp. 896-97; *Narinder Singh* v. *Surjit Singh*, (1984) 2 SCC 402: AIR 1984 SC 1359; *Cassell & Co. Ltd.* v. *Broome*, 1972 AC 1027: (1972) 2 WLR 645 (HL): (1972) 1 All ER 801.

[194] R. 26-A.

[195] *Kausalya Devi Bogra* v. *Land Acquisition Officer*, (1984) 2 SCC 324: AIR 1984 SC 892; *Mangal Prasad* v. *Narvadeshwar Mishra*, (2005) 3 SCC 422: AIR 2005 SC 1964.

[196] *Mohan Lal* v. *Anandibai*, (1971) 1 SCC 813: AIR 1971 SC 2177.

[197] (1973) 3 SCC 643: (1972) 1 SCR 484.

[198] *Ibid*, at p. 646 (SCC) (*per* Hegde, J.).

[199] *K. Krishna Reddy* v. *Collector, Land Acquisition*, (1988) 4 SCC 163: AIR 1988 SC 2123; *Surendra Narain* v. *Prashidh Narain*, 1988 Supp SCC 171; *Bechan Pandey* v. *Dulhin Janki Devi*, (1976) 2 SCC 286: AIR 1976 SC 866; *Patel Sureshbhai* v. *Patel Satabhai*, (1983) 3 SCC 294: AIR 1983 SC 648; *Ashwinkumar K. Patel* v. *Upendra J. Patel*, (1999) 3 SCC 161: AIR

theless can be challenged later on in an appeal arising out of the final judgment and decree.[200]

*(viii) Appeal*

An order passed under Rule 23 or 23-A of Order 41 is appealable.[201]

**(c) Power to frame issues and refer them for trial: Section 107(1)(c), Rules 25 and 26**

*(i) Scope*

Where the lower court has omitted *(i)* to frame any issue; or *(ii)* to try any issue; or *(iii)* to determine any question of fact, which is essential to the right decision of the suit upon merits, the appellate court may frame issues and refer them for trial to the lower court and shall direct that court to take the additional evidence required. The lower court shall try such issues and shall return the evidence and the findings within the time fixed by the appellate court.[202]

*(ii) Effect*

Such evidence and findings shall form part of the record in the suit, and either party may file in the appellate court a memorandum of objections to any such finding of the lower court within a time fixed by the appellate court.[203] The appellate court should, thereafter, hear the whole appeal and the hearing should not be confined to the points on which the findings were called for.[204]

*(iii) Rules 23, 23-A and 25: Distinction*

The points of distinction between Rules 23, 23-A and Rule 25 are as under:

(1) While after remand under Rules 23 or 23-A, the *whole case* goes back for decision to the lower court (except on the point on which the appellate court has reversed the finding of the lower court), under Rule 25 the case is retained in the file of the appellate court and only *issues* are remitted to the lower court for trial and findings thereon.

1999 SC 1125; *Gangadharan* v. *Janardhana Mallan*, (1996) 9 SCC 53: AIR 1996 SC 2127; *J. Lingaiah* v. *G. Hanumanthappa*, (2001) 10 SCC 751.

[200] *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; *Margaret* v. *Indo Commercial Bank Ltd.*, (1979) 2 SCC 396: AIR 1979 SC 102.

[201] Or. 43 R. 1(4); *see also infra*, Chap. 4.

[202] S. 107(1)(c), Or. 41 R. 25. See also *Mahendra Manilal Nanavati* v. *Sushila Mahendra Nanavati*, *supra*; *Pasupuleti Venkateswarlu* v. *Motor & General Traders*, (1975) 1 SCC 770: AIR 1975 SC 1409.

[203] R. 26.

[204] *Gogula Gurumurthy* v. *Kurimeti Ayyappa*, (1975) 4 SCC 458: AIR 1974 SC 1702 at p. 1703; *Soundararaj* v. *Devasahayam*, 1984 Supp SCC 235: AIR 1984 SC 133.

(2) An order of remand under Rules 23, 23-A is a *final order* which cannot be reconsidered by the court which passed it except on review, while an order under Rule 25 is an *interlocutory order* which is open to be reconsidered by the court which has passed it.

(3) Whereas an order under Rules 23, 23-A is appealable, an order under Rule 25 is not appealable.

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

(*i*) *General*

As a general rule, the appellate court shall decide an appeal on the evidence led by the parties before the trial court and should not admit additional evidence for the purpose of disposal of an appeal.[205] Sub-rule (1) of Rule 27 also reads thus, "The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court."

Section 107(1)(*d*), however, is an exception to the general rule, and empowers an appellate court to take additional evidence or require such evidence to be taken subject to the conditions laid down in Rule 27 of Order 41.[206]

(*ii*) *Meaning*

The term "additional evidence" does not mean evidence over and above the evidence led by the party in the lower court. Such a view would be introducing an additional condition not contemplated by the Code. There should be no distinction between a party who has led some evidence and a party who has not led evidence at all. All that is required is that the conditions laid down in the Code for leading of additional evidence must be fulfilled.[207]

(*iii*) *Object*

The basic principle of admission of additional evidence is that the person seeking the admission of additional evidence should be able to establish that with the best efforts such additional evidence could not have been adduced at the first instance. Secondly, the party affected by the admission of additional evidence should have an opportunity

[205] *Municipal Corpn. of Greater Bombay* v. *Lala Pancham*, AIR 1965 SC 1008 at p. 1012: (1965) 1 SCR 542; *Soonda Ram* v. *Rameshwarlal*, (1975) 3 SCC 698 at p. 699: AIR 1975 SC 479 at p. 480; *K. Venkataramiah* v. *A. Seetharama Reddy*, AIR 1963 SC 1526 at p. 1528: (1964) 2 SCR 35.

[206] *K. Venkataramiah* v. *A. Seetharama Reddy* (*ibid.*).

[207] *Jaipur Development Authority* v. *Kailashwati Devi*, (1997) 7 SCC 297: AIR 1997 SC 3243.

to rebut such additional evidence. Thirdly, the additional evidence must be relevant for the determination of the issue.[208]

(*iv*) *Nature and scope*

When a party is unable to produce the evidence in the trial court under the circumstances mentioned in the Code, he should be allowed to produce the same in an appellate court. The power is discretionary and should be exercised on sound judicial principles and in the interests of justice.[209]

(*v*) *Circumstances*

Rule 27 enumerates the circumstances in which the appellate court may admit additional evidence, whether oral or documentary, in appeal. They are as under:[210]

(1) Where the lower court has improperly refused to admit evidence which ought to have been admitted; or

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

(3) Where the appellate court itself requires such evidence either (*a*) to enable it to pronounce judgment; or (*b*) for any other substantial cause.

In *Shivajirao Nilangekar Patil* v. *Dr. Mahesh Madhav Gosavi*[211], the Supreme Court stated, "The basic principle of admission of additional evidence is that the person seeking the admission of additional evidence should be able to establish that with the best efforts such additional evidence could not have been adduced at the first instance. Secondly, the party affected by the admission of additional evidence should have an opportunity to rebut such additional evidence. Thirdly, that additional evidence was relevant for the determination of the issue.

(*A*) *Improper refusal to admit evidence.*—Where the lower court has refused to admit evidence which was tendered and which ought to have been admitted, the appellate court may admit such evidence at the appellate stage.[212] The expression *ought to have been* admitted means

[208] *Shivajirao Nilangekar* v. *Dr. Mahesh Madhav*, (1987) 1 SCC 227 at p. 243: AIR 1987 SC 294 at p. 304; *N. Kamalam* v. *Ayyasamy*, (2001) 7 SCC 503.

[209] *Jaipur Development Authority* v. *Kailashwati Devi*, (1997) 7 SCC 297: AIR 1997 SC 3243: *Arjan Singh* v. *Kartar Singh*, AIR 1951 SC 193: 1951 SCR 258; *Natha Singh* v. *Financial Commr.*, (1976) 3 SCC 28: AIR 1976 SC 1053; *Mahavir Singh* v. *Naresh Chandra*, (2001) 1 SCC 309: AIR 2001 SC 134.

[210] R. 27(1)(*a*), (*aa*) & (*b*).

[211] (1987) 1 SCC 227 at p. 243: AIR 1987 SC 294 at p. 304.

[212] *Official Liquidator* v. *Raghava Desikachar*, (1974) 2 SCC 741 at pp. 746-47: AIR 1974 SC 2069 at pp. 2073-74; *Shivajirao Nilangekar* v. *Dr. Mahesh Madhav*, (1987) 1 SCC 227: AIR 1987 SC 294.

*should be admitted in the exercise of sound discretion.*[213] The appellate court, therefore, before admitting additional evidence must be satisfied that the trial court was unjustified in refusing to admit such evidence.

Thus, where the lower court has refused to take certain evidence on the ground of its late production, such rejection cannot be said to be unjustified and the appellate court should not interfere with the discretion of the lower court and admit such evidence.[214]

(*B*) *Discovery of new evidence.*—Clause (*aa*) of sub-rule (1) of Rule 27, inserted by the Amendment Act of 1976, empowers the appellate court to receive additional evidence at the appellate stage if the party seeking to produce additional evidence satisfies the court that, in spite of the exercise of due diligence, such evidence was not within his knowledge or could not be produced by him when the decree was passed against him.[215]

One of the basic principles for admission of additional evidence is that the person seeking admission of additional evidence should establish that in spite of due diligence such evidence could not be produced at the first instance.[216] The provision, however, is not confined to cases where the parties have adduced some evidence in the lower court. Even if he has not adduced any evidence before the trial court, additional evidence can be permitted by the appellate court if the conditions laid down in clause (*aa*) of Rule 27(1) of Order 41 are satisfied.[217]

(*C*) *Requirement by appellate court.*—The appellate court may itself require additional evidence for either of the two purposes: (*a*) to enable it to pronounce judgment; or (*b*) for any other substantial cause.[218]

[213] *Sumitra* v. *Maharaju*, AIR 1963 HP 21 at p. 23; *Arjan Singh* v. *Kartar Singh*, AIR 1951 SC 193 at p. 195: 1951 SCR 258; *Natha Singh* v. *Financial Commr.*, (1976) 3 SCC 28 at p. 31: AIR 1976 SC 1053 at pp. 1056-57.

[214] *Pramod Kumari* v. *Om Prakash*, (1980) 1 SCC 412 at p. 416: AIR 1980 SC 446 at p. 448; *Roop Chand* v. *Gopi Chand*, (1989) 2 SCC 383; *Shiv Chander* v. *Amar Bose*, (1990) 1 SCC 234: AIR 1990 SC 325.

[215] *Shivajirao Nilangekar Patil* v. *Dr. Mahesh Madhav Gosavi*, (1987) 1 SCC 227: AIR 1987 SC 294; *Shiv Chander Kapoor* v. *Amar Bose*, (1990) 1 SCC 234: AIR 1990 SC 325; *Pramod Kumari Bhatia* v. *Om Prakash Bhatia*, (1980) 1 SCC 412: AIR 1980 SC 446; *State of A.P.* v. *Kalva Suryanarayana*, (1992) 2 SCC 732: AIR 1992 SC 797; *Hindustan Brown Boveri Ltd.* v. *Workmen*, (1968) 1 LLJ 571: (1968) 16 FLR 325 (SC); *Yudhistir* v. *Ashok Kumar*, (1987) 1 SCC 204: AIR 1987 SC 558; *Haryana State Industrial Development Corpn.* v. *Cork Mfg. Co.*, (2007) 8 SCC 120.

[216] *Shivajirao Nilangekar Patil* v. *Dr. Mahesh Madhav Gosavi*, *supra*, at p. 243 (SCC): at p. 304 (AIR).

[217] *Jaipur Development Authority* v. *Kailashwati Devi*, (1997) 7 SCC 297: AIR 1997 SC 3243.

[218] *Arjan Singh* v. *Kartar Singh*, AIR 1951 SC 193: 1951 SCR 258; *Kamala Ranjan* v. *Baijnath Bajoria*, AIR 1951 SC 1: 1950 SCR 840; *Yudhistir* v. *Ashok Kumar*, (1987) 1 SCC 204: AIR 1987 SC 558; *Sarada* v. *Manikkoth Kombra*, (1996) 8 SCC 345; *City Improvement Trust Board* v. *H. Narayanaiah*, (1976) 4 SCC 9: AIR 1976 SC 2403; *Natha Singh* v. *Financial Commr.*, (1976) 3 SCC 28: AIR 1976 SC 1053; *Billa Jagan Mohan* v. *Billa Sanjeeva*, (1994) 4

The requirement must be of the appellate court. "The legitimate occasion for the application of the present rule is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made outside the court of such evidence and the application is made to import it."[219] Thus, subsequent events can be considered by the court.[220] But a matter cannot be remanded for allowing a party to adduce additional evidence when such evidence was available and yet not produced in the lower court.[221]

The true test, therefore, is whether the appellate court is able to pronounce judgment on the material before it without taking into consideration the additional evidence sought to be adduced.[222]

Similarly, the appellate court may admit additional evidence "for any sufficient cause". An application of additional evidence must be disposed of before pronouncing judgment.[223] The expression *any substantial cause* should be liberally construed so as to advance substantial justice between the parties.[224] Thus, the additional evidence may be required to enable the court to pronounce judgment; or for any other substantial cause, but, in either case, it must be the court which requires it.[225] A mere difficulty in coming to a decision is not sufficient for admission of evidence under Rule 27.

The words "for any other substantial cause" must be read with the word "requires" which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule will apply.[226] The defect may be pointed out by a party, or that a party may move the court to supply the defect, but the requirement must be the requirement of the court upon its appreciation of the evidence as it stands.[227]

The provisions of Rule 27 are not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts

SCC 659; *Mahavir Singh* v. *Naresh Chandra*, (2001) 1 SCC 309: AIR 2001 SC 134; *State of Gujarat* v. *Mahendrakumar*, (2006) 9 SCC 772: AIR 2006 SC 1864.

[219] *Kessowji Issur* v. *Great Indian Peninsula Railway Co.*, ILR (1907) 31 Bom 381 (PC): (1906-07) 34 IA 115 (PC); *Arjan Singh* v. *Kartar Singh*, *supra*.

[220] *Gulabbai* v. *Nalin Narsi Vohra*, (1991) 3 SCC 483: AIR 1991 SC 1760.

[221] *Koyappathodi M. Ayisha* v. *State of Kerala*, (1991) 4 SCC 8 at p. 11: AIR 1991 SC 2027.

[222] *Arjan Singh* v. *Kartar Singh*, *supra*; *Natha Singh* v. *Financial Commr.*, *supra*.

[223] *Premier Automobiles Ltd.* v. *Kabirunissa*, 1991 Supp (2) SCC 282: AIR 1991 SC 91; *State of Rajasthan* v. *T.N. Sahani*, (2001) 10 SCC 619; *Sanjiv Goel* v. *Avtar S. Sandhu*, (2006) 9 SCC 748.

[224] *K. Venkataramiah* v. *A. Seetharama Reddy*, *supra*, at p. 1530 (AIR); *State of U.P.* v. *Manbodhan Lal*, AIR 1957 SC 912 at p. 915: 1958 SCR 533.

[225] *Ibid*, see also *Arjan Singh* v. *Kartar Singh*, AIR 1951 SC 193: 1951 SCR 258.

[226] *Mahavir Singh* v. *Naresh Chandra*, (2001) 1 SCC 309: AIR 2001 SC 134; *Billa Jagan Mohan* v. *Billa Sanjeeva*, (1994) 4 SCC 659; *Sunder Lal & Sons* v. *Bharat Handicrafts (P) Ltd.*, AIR 1968 SC 406: (1968) 1 SCR 608.

[227] *K. Venkataramiah* v. *A. Seetharama Reddy*, *supra*.

of his case and to fill in gaps.[228] The expression "to enable it (appellate court) to pronounce judgment" means when the appellate court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands. The ability to pronounce judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of the court delivering it.[229]

The provisions of Rule 27 have not been engrafted in the Code so as to patch up weak points by the party in the case and to fill up the omission in the court of appeal. It does not authorise any lacunae or gaps in evidence by a party to be filled up. The authority and jurisdiction as conferred on the appellate court to allow fresh evidence is restricted.[230] *It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way.*[231]

(emphasis supplied)

*(vi) Recording of reasons*

Whenever the appellate court admits additional evidence, it should record reasons for doing it.[232] The underlying object of this provision is to keep a clear record of what weighed with the appellate court in allowing the additional evidence to be produced.[233] As observed by their Lordships of the Privy Council, "It is a salutary provision, which operates as a check against a too easy reception of evidence at a late stage of the litigation, and the statement of the reasons may inspire confidence and disarm objection."[234]

Again, where a further appeal lies from the decision of the appellate court, recording of reasons is necessary so as to enable the higher court to decide whether the discretion under the rule has been judicially exercised by the court below.[235] The omission to record reasons,

[228] *State of U.P.* v. *Manbodhan Lal, supra; Maganlal* v. *Mulchand,* 1969 UJSC 654; *Sunder Lal & Sons* v. *Bharat Handicrafts (P) Ltd.,* AIR 1968 SC 406 at p. 409: (1968) 1 SCR 608.

[229] *Mahavir Singh* v. *Naresh Chandra,* (2001) 1 SCC 309: AIR 2001 SC 134; *Syed Abdul Khader* v. *Rami Reddy,* (1979) 2 SCC 601: AIR 1979 SC 553; *Municipal Corpn. of Greater Bombay* v. *Lala Pancham,* AIR 1965 SC 1008: (1965) 1 SCR 542.

[230] *N. Kamalam* v. *Ayyasamy,* (2001) 7 SCC 503.

[231] *Municipal Corpn. of Greater Bombay* v. *Lala Pancham, supra,* at p. 1012 (AIR); *Syed Abdul Khader* v. *Rami Reddy,* (1979) 2 SCC 601: AIR 1979 SC 553; *N. Kamalam* v. *Ayyasamy,* (2001) 7 SCC 503.

[232] R. 27(2). See also *K. Venkataramiah* v. *A. Seetharama Reddy, supra,* at p. 1529 (AIR); *City Improvement Trust Board* v. *H. Narayanaiah,* (1976) 4 SCC 9 at p. 20: AIR 1976 SC 2403 at p. 2414.

[233] *K. Venkataramiah* v. *A. Seetharama Reddy, supra,* at p. 1527 (AIR).

[234] *Gunga Gobind Mundul* v. *Collector of the Twenty-four Pergunnahs,* (1867) 11 MIA 345 at p. 368 (PC); see also *Hurpurshad* v. *Sheo Dyal,* (1875-76) 3 IA 259; *Manmohan Das* v. *Ramdei,* AIR 1931 PC 175.

[235] *K. Venkataramiah* v. *A. Seetharama Reddy, supra.*

therefore, must be treated as a serious defect.[236] The provision, however, is directory and not mandatory, and failure to record reasons does not make the evidence inadmissible if the reception of such evidence is otherwise justified under the rule.[237]

*(vii) Mode of taking additional evidence*

Rules 28 and 29 lay down the mode of taking additional evidence when the appellate court admits additional evidence in appeal. The appellate court may take the evidence itself or direct the lower court from whose decree the appeal is preferred or any other subordinate court to take it.[238] Where the appellate court directs the lower court to record evidence, it should retain the appeal on its file and dispose it of on receipt of the additional evidence.[239]

### (e) Power to modify decree: Rule 33[240]

*(i) General*

Rule 33 of Order 41 empowers an appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between one respondent and another respondent. It empowers an appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal, but also to give such other relief to any of the respondents as the case may require.[241]

[236] *Mahant Dhangir* v. *Madan Mohan*, 1987 Supp SCC 528 at pp. 534-35: AIR 1988 SC 54 at p. 58; *Chaya* v. *Bapusaheb*, (1994) 2 SCC 41; *K. Muthuswami* v. *N. Palaniappa*, (1998) 7 SCC 327: AIR 1998 SC 3118; see also *Tummalla Atchaiah* v. *Venka Narasingarao*, (1979) 1 SCC 166: AIR 1978 SC 725.

[237] *Ibid*, see also *Venkataramaiah* v. *Seetharama Reddy*, *supra*.

[238] R. 28.

[239] R. 29, see also *A.P. State Wakf Board* v. *All-India Shia Conference (Branch)*, (2000) 3 SCC 528: AIR 2000 SC 1751.

[240] R. 33 of Or. 41 reads as under:

"33. *Power of Court of Appeal.*—The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees."

[241] *Rameshwar Prasad* v. *Shambehari Lal*, AIR 1963 SC 1901: (1964) 3 SCR 549; *Panna Lal* v. *State of Bombay*, AIR 1963 SC 1516: (1964) 1 SCR 980; *Nirmala Bala* v. *Balai Chand*, AIR 1965 SC 1874: (1965) 3 SCR 550; *Giani Ram* v. *Ramjilal*, (1969) 1 SCC 813: AIR 1969 SC 1144; *Ramchand* v. *Janki Ballabhji Maharaj*, (1969) 2 SCC 313: AIR 1970 SC 532; *Ramgaya Prasad* v. *Murli Prasad*, (1973) 2 SCC 9: AIR 1972 SC 1181; *Koksingh* v. *Deokabai*, (1976) 1 SCC 383: AIR 1976 SC 634; *Choudhary Sahu* v. *State of Bihar*, (1982) 1 SCC 232 at pp. 235-37: AIR 1982 SC 98 at pp. 99-100; *Bihar Supply Syndicate* v. *Asiatic Navigation*, (1993)

*(ii) Illustrations*

(*i*) *A* claims a sum of money as due to him from *X* or *Y*, and in a suit against both obtains a decree against *X*. *X* appeals and *A* and *Y* are respondents. The appellate court decides in favour of *X*. It has power to pass a decree against *Y*.

(*ii*) *A* claims a sum of money as due to him from *X* or *Y*. The suit is decreed partly against *X* and partly against *Y*. *X* appeals but *Y* does not. The appellate court can discharge *X* making *Y* liable for the whole amount.

*(iii) Object*

The underlying object of Rule 33 is to enable the appellate court to do full and complete justice between the parties. It is true that the power of the appellate court is discretionary. But it is a proper exercise of judicial discretion to determine all questions in order to render full justice to the parties. The court should not refuse to exercise the discretion on mere technicalities.[242] No hard and fast rule can be laid down as to the circumstances in which the power of Rule 33 may or may not be exercised and each case must depend on its own facts.[243]

*(iv) Rules 22 and 33: Distinction*

Generally, cross-objections under Rule 22 of Order 41 can be directed only against the appellant and only in exceptional cases can they be filed by one respondent against the other respondent. The provisions of Rule 33 dealing with the power of the appellate court to grant relief to parties to a suit who have not appealed or filed cross objections, on the other hand, enable the court to make any order as the case may require to meet the ends of justice not only between the appellant and respondent but also between a respondent and co-respondent.[244]

In *Panna Lal* v. *State of Bombay*[245], after reviewing several decisions, the Supreme Court stated, "(T)he legislature wanted to give effect to the views held by the different High Courts that in exceptional cases as mentioned above an objection can be preferred by a respondent against a co-respondent is indicated by the substitution of the word

2 SCC 639 at pp. 650-51; *Shankar Popat. Hiraman Umaji*, (2003) 4 SCC 100: AIR 2003 SC 1682.

[242] *Mahant Dhangir* v. *Madan Mohan*, 1987 Supp SCC 528 at pp. 534-35: AIR 1988 SC 54 at p. 58; *Chaya* v. *Bapusaheb*, (1994) 2 SCC 41; *K. Muthuswami* v. *N. Palaniappa*, (1998) 7 SCC 327: AIR 1998 SC 3118.

[243] *Ibid*, see also *Tummalla Atchaiah* v. *Venka Narasingarao*, (1979) 1 SCC 166: AIR 1978 SC 725.

[244] *Panna Lal* v. *State of Bombay*, AIR 1963 SC 1516: (1964) 1 SCR 980; *Mahant Dhangir* v. *Madan Mohan*, 1987 Supp SCC 528: AIR 1988 SC 54; *Bihar Supply Syndicate* v. *Asiatic Navigation*, (1993) 2 SCC 639: AIR 1993 SC 2054; *Narayanarav* v. *Sudarshan*, 1995 Supp (4) SCC 463; *S. Nazeer Ahmed* v. *State Bank of Mysore*, (2007) 11 SCC 75: AIR 2007 SC 989.

[245] AIR 1963 SC 1516: (1964) 1 SCR 980.

'appellant' in the third paragraph by the words 'the party who may be affected by such objection'."

If the cross-objection filed under Rule 22 of Order 41, CPC was not maintainable against the co-respondent, the court could consider it under Rule 33 of Order 41, CPC. Rule 22 and Rule 33 are not mutually exclusive. They are closely related with each other. If an objection cannot be urged under Rule 22 against a co-respondent, Rule 33 could take over and come to the rescue of the objector. The appellate court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower court. The appellate court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or objection. The sweep of the power under Rule 33 is wide enough to determine any question, not only between an appellant and respondent, but also between a respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice.[246]

(*v*) *Conditions*

The language of Rule 33 is very wide. The following requirements, however, must be satisfied before it can be invoked:

(1) The parties before the lower court must also be there before the appellate court; and

(2) The question raised must have properly arisen out of the judgment of the lower court.

If these conditions are fulfilled, the appellate court can consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal.[247]

(*vi*) *Ambit and scope*

The sweep of power under Rule 33 is wide enough to determine any question not only between the appellant and the respondent but also between the respondent and co-respondents. The appellate court can

[246] *Mahant Dhangir* v. *Madan Mohan*, 1987 Supp SCC 528: AIR 1988 SC 54; see also *Bihar Supply Syndicate* v. *Asiatic Navigation, supra*, at p. 651 (SCC); *Chaya* v. *Bapusaheb, supra*; *Chunilal* v. *H.K. Adhyaru*, AIR 1956 SC 655: (1956) 26 Comp Cas 168; *Kanaya Ram* v. *Rajender Kumar*, (1985) 1 SCC 436: AIR 1985 SC 371; *Shadi Singh* v. *Rakha*, (1992) 3 SCC 55: AIR 1994 SC 800; *Syed Asadullah* v. *ADJ, Allahabad*, (1981) 3 SCC 483: AIR 1981 SC 1724; *Laxmi & Co.* v. *Dr. Anant R. Deshpande*, (1973) 1 SCC 37: AIR 1973 SC 171; *Mithilesh Kumari* v. *Prem Behari*, (1989) 2 SCC 95: AIR 1989 SC 1247.

[247] *Mahant Dhangir* v. *Madan Mohan*, 1987 Supp SCC 528 at pp. 534-35: AIR 1988 SC 54 at p. 57; *K. Muthuswami* v. *N. Palaniappa*, (1998) 7 SCC 327: AIR 1998 SC 3118.

pass any decree or order which ought to have been passed in the facts and circumstances of the case. The words "as the case may require" used in Rule 33 enable the appellate court to pass any order or decree to meet the ends of justice.[248] The only constraint on the power of the court is that the parties before the lower court should also be there before the appellate court.

*(vii) Limitations*

Though Rule 33 is expressed in very wide terms, it has to be applied with care and caution and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the court to adjust the rights of the parties.[249] The rule does not confer unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the trial court.[250] Nor the appellate court will interfere with finding of fact.[251] Again, the discretionary power cannot be exercised to nullify the effect of the abatement of appeal.[252]

As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or objection, it must be exercised with care and caution. The Rule does not confer an unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the court appealed from. While exercising powers under this Rule the court should not lose sight of other provisions of the Code itself nor the provisions of other laws, viz. the law of limitation or the law of court fees, etc.[253]

Moreover, such power cannot be exercised without issuing notice and affording an opportunity to the party likely to be affected.[254] The expression "which ought to have been passed" means "which ought in law to have been passed".[255] *Such a power is to be exercised in exceptional*

[248] *Rameshwar Prasad* v. *Shambehari Lal, supra; Mahant Dhangir* v. *Madan Mohan, supra.*

[249] *Ibid,* see also *Nirmala Bala* v. *Balai Chand, supra,* at p. 1884 (AIR); *Choudhary Sahu* v. *State of Bihar, supra,* at p. 235 (SCC): at p. 99 (AIR).

[250] *Nirmala Bala Ghose* v. *Balai Chand Ghose, supra; State of Punjab* v. *Bakshish Singh,* (1998) 8 SCC 222: AIR 1999 SC 2626.

[251] *Sarju Pershad* v. *Jwaleshwari Pratap,* AIR 1951 SC 120: 1950 SCR 781; *Mohd. Salamatullah* v. *Govt. of A.P.,* (1977) 3 SCC 590: AIR 1977 SC 1481.

[252] *Rameshwar Prasad* v. *Shambehari Lal, supra,* at p. 1877 (AIR); *Harihar Prasad* v. *Balmiki Prasad,* (1975) 1 SCC 212: AIR 1975 SC 733.

[253] *Choudhary Sahu* v. *State of Bihar,* (1982) 1 SCC 232 at p. 235: AIR 1982 SC 98 at p. 99; *State of Punjab* v. *Bakshish Singh, supra.*

[254] *Trimbak Narayan* v. *Babulal Motaji,* (1973) 2 SCC 154: AIR 1973 SC 1363.

[255] *Giani Ram* v. *Ramjilal,* (1969) 1 SCC 813: AIR 1969 SC 1144 at p. 1147; *Nirmala Bala Ghose* v. *Balai Chand Ghose, supra,* at p. 1877 (AIR); *Shankar Popat* v. *Hiraman Umaji,* (2003)

*cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties.*[256] (emphasis supplied)

*(viii) Conclusions*

It is submitted that the following observations of Shah, J. (as he then was) in *Nirmala Bala Ghose* v. *Balai Chand Ghose*[257], lay down correct law on the point and, therefore, are worth quoting:

> "The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41 Rule 33 may properly be invoked. *The rule however does not confer an unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the Court appealed from.*"[258] (emphasis supplied)

**(f) Other powers: Section 107(2)**

Section 107(2) of the Code enacts that over and above the aforesaid powers, an appellate court has the same powers as an original court. This provision is based on the general principle that an appeal is a continuation of a suit and therefore, an appellate court can do, while the appeal is pending, what the original court could have done while the suit is pending.[259]

Thus, an appellate court is empowered to reappreciate the evidence, to add, transpose or substitute the parties, to permit the withdrawal of proceedings, to return a plaint or memorandum of appeal for presentation to the proper court, to allow amendments in pleadings, to take notice of subsequent events, to take into consideration a change

4 SCC 100: AIR 2003 SC 1682.

[256] *Rameshwar Prasad* v. *Shambehari Lal Jagannath*, AIR 1963 SC 1901: (1964) 3 SCR 549; see also *Harihar Prasad Singh* v. *Balmiki Prasad Singh*, (1975) 1 SCC 212: AIR 1975 SC 733.

[257] AIR 1965 SC 1874: (1965) 3 SCR 550.

[258] *Ibid*, at p. 1874 (AIR); see also *Bihar Supply Syndicate* v. *Asiatic Navigation*, (1993) 2 SCC 639.

[259] *R.S. Lala Praduman* v. *Virendra Goyal*, (1969) 1 SCC 714 at p. 717: AIR 1969 SC 1349 at p. 1351; *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165 at p. 1178: (1968) 3 SCR 163; *Ramankutty Guptan* v. *Avara*, (1994) 2 SCC 642 at p. 645: AIR 1994 SC 1699. For detailed discussion, *see supra*, "Suit and appeal"

in law and to apply the existing or changed law, to order restitution, to enlarge time for doing certain acts, etc.[260]

## 41. DUTIES OF APPELLATE COURT

It should not, however, be forgotten that the powers of an appellate court are not absolute or uncontrolled. The Code also imposes certain duties on appellate courts and the court has to decide appeals keeping in mind these duties. These duties are as follows:

### (a) Duty to decide appeal finally

It is the duty of the appellate court to decide an appeal in accordance with law after considering the evidence as a whole. The judgment of the appellate court must clearly show that it has applied its judicial mind to the evidence as a whole.[261]

### (b) Duty not to interfere with decree for technical errors

Section 99 of the Code enacts that a decree which is otherwise correct on merits and is within the jurisdiction of the court should not be upset merely for technical and immaterial defects. The underlying object of Section 99 is "to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuitry of litigation".[262]

As observed by the Supreme Court,[263] "When a case has been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it has resulted in failure of justice."

### (c) Duty to reappreciate evidence

As seen above, an appeal is a continuation of a suit. Inasmuch as an appeal is a rehearing of the matter, the appellate court can reappreciate the entire evidence, oral as well as documentary, and can arrive at its own conclusion. At the same time, however, the appellate court

[260] *Ibid*, See also *Qudrat Ullah* v. *Municipal Board, Bareilly*, (1974) 1 SCC 202 at p. 217: AIR 1974 SC 396 at p. 404; *Narhari Shivram* v. *Pannalal Umediram*, (1976) 3 SCC 203 at p. 209: AIR 1977 SC 164 at p. 169; *Bai Dosabai* v. *Mathurdas Govinddas*, (1980) 3 SCC 545 at pp. 552-53: AIR 1980 SC 1334 at pp. 1339-40; *M.M. Quasim* v. *Manohar Lal*, (1981) 3 SCC 36: AIR 1981 SC 1113; S. 144. *See also infra*, Pt. V, Chap. 2; S. 148. *See also infra*, Pt. V, Chap. 4; *Ramesh Kumar* v. *Kesho Ram*, 1992 Supp (2) SCC 623: AIR 1992 SC 700. For detailed discussion and case law, *see*, Authors *Code of Civil Procedure* (Lawyers' Edn.) Vol. II at pp. 456-66.

[261] *State of T.N.* v. *S. Kumaraswami*, (1977) 4 SCC 602(III): AIR 1977 SC 2026. For detailed discussion *see supra*, "Power to decide a case finally".

[262] *Mohd. Husain* v. *Babu Kishva Nandan*, AIR 1937 PC 233 at p. 234: (1936-37) 64 IA 250; *Kiran Singh* v. *Chaman Paswan*, AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117; *Virendra Singh* v. *Vimal Kumar*, (1977) 1 SCC 718 at p. 722: AIR 1976 SC 2169 at p. 2172; *Kempamma* v. *Kalamma*, AIR 1992 Kant 282; *Kalipada Das* v. *Bimal Krishna*, (1983) 1 SCC 14: AIR 1983 SC 876.

[263] *Kiran Singh* v. *Chaman Paswan, supra*; *Virendra Singh* v. *Vimal Kumar, supra*.

will bear in mind a finding recorded by the trial court on oral evidence. It should not forget that the trial court had the advantage and opportunity of watching the demeanour of witnesses and, hence, the trial court's conclusions should not normally be disturbed. No doubt, the appellate court has the same powers as the original court, but they have to be exercised with proper care, caution and circumspection. When a finding of fact has been arrived at by the trial court by mainly appreciating oral evidence, it should not be lightly disturbed unless the approach of the trial court in appraisal of evidence is materially erroneous, contrary to well-established principles or perverse.[264]

In *T.D. Gopalan* v. *Hindu Religious & Charitable Endowments*[265], the Supreme Court observed, "We apprehend that the uniform practice in the matter of appreciation of evidence has been that if the trial court has given cogent and detailed reasons for not accepting the testimony of a witness, the appellate court in all fairness to it ought to deal with those reasons before proceeding to form a contrary opinion about accepting the testimony which has been rejected by the trial court."

Three requisites should normally be present before an appellate court reverses a finding of fact recorded by the trial court:[266]

(*i*) it applied its mind to reasons given by the trial court;
(*ii*) it had no advantage of seeing and hearing the witnesses; and
(*iii*) it records cogent and convincing reasons for disagreement with the trial court.

In *Sarju Pershad* v. *Jwaleshwari Pratap*[267], dealing with such a situation, the Supreme Court observed, "The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial judge. The rule is–and it is nothing more than a rule of practice—that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice or there is a

[264] S. 107(2); see also *R.S. Lala Praduman* v. *Virendra Goyal*, (1969) 1 SCC 714: AIR 1969 SC 1349; *Madhusudan Das* v. *Narayanibai*, (1983) 1 SCC 35: AIR 1983 SC 114; *Jagdish Singh* v. *Madhuri Devi*; *Arundhati* v. *Iranna*, (2008) 3 SCC 181.

[265] (1972) 2 SCC 329: AIR 1972 SC 1716 at p. 1719.

[266] *Madhusudan Das* v. *Narayanibai*, (1983) 1 SCC 35 at pp. 39-40: AIR 1983 SC 114; see also *Jagdish Singh* v. *Madhuri Devi*, *supra*.

[267] AIR 1951 SC 120: 1950 SCR 781.

sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial judge on a question of fact.[268] *The duty of the appellate court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial court arrived at or whether there is an element of improbability arising from proved circumstances which, in the opinion of the court, outweighs such finding.*"[269] (emphasis supplied)

In the case of *Madhusudan Das* v. *Narayanibai*[270], the Supreme Court once again observed, "At this stage, it would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies... . The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact."[271]

In *Radha Prasad* v. *Gajadhar Singh*[272], after considering a number of English as well as Indian decisions, the Supreme Court laid down the following principle, which, it is respectfully submitted, lays down the correct law on the point regarding the powers of the first appellate court in appreciation of evidence and inference with finding of fact recorded by the trial court:

> "The position in law, in our opinion, is that when an appeal lies on facts, it is the right and the duty of the appeal court to consider what its decision on the question of facts should be, but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing

[268] *Ibid*, at p. 121 (AIR).
[269] *Ibid*, at p. 123 (AIR).
[270] (1983) 1 SCC 35: AIR 1983 SC 114.
[271] *Ibid*, at pp. 39-40 (SCC): at pp. 116-17 (AIR).
[272] AIR 1960 SC 115: (1960) 1 SCR 663.

the witnesses and that it should not lightly reject the trial judge's conclusion that the evidence of a particular witness should be believed or should not be believed, particularly when such conclusion is based on the observation of the demeanour of the witness in court. But, this does not mean that merely because an appeal court has not heard or seen the witness it will in no case reverse the findings of a trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the appeal court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the trial judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the trial Judge is wrong, the appeal court should have no hesitation in reversing the findings of the trial judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in court but a question of inference of one fact from proved primary facts the court of appeal is in as good a position as the trial judge and is free to reverse the findings if it thinks that the inference made by the trial judge is not justified."[273]

**(d) Duty to record reasons**

Again, though an appellate court has power to dismiss an appeal summarily, such power should be exercised sparingly and in exceptional cases and, that too, after recording reasons. If such appellate court is other than a High Court, requirement of recording of reasons is mandatory. But in case of a High Court also, it is appropriate if it passes a speaking order when dismissing an appeal *in limine*.

Rule 31, however, enjoins an appellate court to record reasons in support of its judgment. The judgment must be self-contained with reasons in support of the findings arrived at by the court. It must discuss the evidence in the light of points for determination and come to its own conclusion.

In *State of Punjab* v. *Jagdev Singh*[274], the High Court allowed the petition of the detenu and set aside an order of detention passed against him. The reasons in support of the judgment were, however, not recorded. When the matter was taken further the Supreme Court observed that when the appellate court is other than the Supreme Court,

[273] *Radha Prasad* v. *Gajadhar Singh*, AIR 1960 SC 115 at p. 118: (1960) 1 SCR 663; see also *Mohd. Salamatullah* v. *Govt. of A.P.*, (1977) 3 SCC 590: AIR 1977 SC 1481; *S.V.R. Mudaliar* v. *Rajabu F. Buhari*, (1995) 4 SCC 15: AIR 1995 SC 1607; *Gajanan Krishnaji* v. *Dattaji Raghobaji*, (1995) 5 SCC 347: AIR 1995 SC 2284.

[274] (1984) 1 SCC 596: AIR 1984 SC 444.

it is desirable that a final order which an appellate court intends to pass should not be announced until a reasoned judgment is ready for pronouncement. The Supreme Court did not approve the practice of announcing a final order without a reasoned judgment and recorded reasons for not approving such practice in the following words:

> "We would like to take this opportunity to point out that serious difficulties arise on account of the practice increasingly adopted by the High Courts, of pronouncing the final order without a reasoned judgment. It is desirable that the final order which the High Court intends to pass should not be announced until a reasoned judgment is ready for pronouncement. Suppose for example, that a final order without a reasoned judgment is announced by the High Court that a house shall be demolished, or that the custody of a child shall be handed over to one parent as against the other, or that a person accused of a serious charge is acquitted, or that a statute is unconstitutional or, as in the instant case, that a detenu be released from detention. *If the object of passing such orders is to ensure speedy compliance with them, that object is more often defeated by the aggrieved party filing a special leave petition in this court in a predicament because, without the benefit of the reasoning of the High Court, it is difficult for this court to allow the bare order to be implemented.* The result inevitably is that the operation of the order passed by the High Court has to be stayed pending delivery of the reasoned judgment."[275] (emphasis supplied)

It is, no doubt, true that normally even the Supreme Court also should follow this practice. However, in exceptional cases, the Supreme Court may depart from this course and pronounce an operative part of the order without a reasoned judgment. But, it cannot be forgotten that the Supreme Court is the *final* court and no further appeal lies against the said order. The reasons, in these circumstances, may not be said to be essential. The Supreme Court rightly observed in this context:

> "It may be thought that as such orders are passed by this court, therefore, there is no reason why the High Courts should not do the same. *We would like to point out respectfully that the orders passed by this court are final and no appeal lies against them. The Supreme Court is the final court in the hierarchy of our courts.* Besides, orders without a reasoned judgment are passed by this court very rarely, under exceptional circumstances. Orders passed by the High Court are subject to the appellate jurisdiction of this court under Article 136 of the Constitution and other provisions of the statutes concerned. *We thought it necessary to make these observations in*

[275] *Ibid*, at p. 611 (SCC): at p. 452 (AIR) (para 30) (*per* Chandrachud, C.J.).

*order that a practice which is not very desirable and which achieves no useful purpose may not grow out of its present infancy."*[276]

(emphasis supplied)

In *State of Punjab* v. *Surinder Kumar*[277] also, the Supreme Court reiterated the principle laid down in *Jagdev Singh Talwandi* and made the following observations which, it is submitted, lay down correct law on the point: "On the question of the requirement to assign reasons for an order, a distinction has to be kept in mind between a court whose judgment is not subject to further appeal and other courts. One of the main reasons for disclosing and discussing the grounds in support of a judgment is to enable a higher court to examine the same in case of a challenge. *It is, of course, desirable to assign reasons for every order or judgment, but the requirement is not imperative in the case of this court."*[278]

(emphasis supplied)

Very recently, in *Jagdish Singh* v. *Madhuri Devi*,[279] the Family Court granted divorce to the husband on the ground of cruelty. The High Court, without considering the relevant evidence and without recording reasons, reversed the finding recorded by the trial court as to cruelty by wife and dismissed the petition filed by the husband by a "cryptic" order. The aggrieved husband approached the Supreme Court.

Allowing the appeal, setting aside the judgment of the High Court and remanding the matter for fresh disposal on merits, the Supreme Court held that the High Court had "virtually" reached a conclusion without recording reasons in support of such conclusion.

The Court stated:

"When the court of original jurisdiction has considered oral evidence and recorded findings after seeing the demeanour of witnesses and having applied its mind, the appellate court is enjoined to keep that fact in mind. It has to deal with the reasons recorded and conclusions arrived at by the trial court. Thereafter, it is certainly open to the appellate court to come to its own conclusion if it finds that the reasons which weighed with the trial court or conclusions arrived at were not in consonance with law."[280]

[276] *State of Punjab* v. *Jagdev Singh*, (1984) 1 SCC 596: AIR 1984 SC 444 para 31.
[277] (1992) 1 SCC 489: AIR 1992 SC 1593: (1992) 19 ATC 345.
[278] *Ibid*, at pp. 491-92 (SCC): at p. 1594 (AIR).
[279] (2008) 10 SCC 497: AIR 2008 SC 2296.
[280] *Ibid*, at p. 506 (*per* Thakker, J.).

**(e) Other duties**

An appellate court should not dismiss an appeal *in limine* raising triable issues.[281] An appeal can be admitted or dismissed as a whole. It cannot be admitted partly.[282] Once the appeal is admitted, it cannot be dismissed on technical grounds.[283] An appellate court cannot grant stay against the execution of a decree if an appeal is time-barred.[284] Normally, it should not grant stay against a money decree.[285] When other matters involving a common question or identical points are pending, a summary dismissal of an appeal is not justified.[286] Similarly, when two cognate appeals are filed against the same judgment, both the appeals should be taken up for hearing and decided together.[287] Where an appeal on a similar question or point of law is pending in a superior court, a subordinate court should not proceed to decide the point, but should wait till the question is decided by the higher court.[288]

In first appeal, all questions (questions of fact as also of law) are open. The judgment of the first appellate court must, therefore, be supported on findings on all issues raised in the appeal. If the appellate court agrees with the conclusions of the trial court, it need not restate evidence discussed by the first court and "general agreement" with such findings would be sufficient. But such agreement should not be a device or camouflage for shirking the duty cast on the appellate court.[289]

Where an appeal is heard by a Bench of two or more judges, it must be decided in accordance with their opinion or of the majority of such judges. Where there is no majority concurring in a judgment varying

[281] *Mahadev Tukaram* v. *Sugandha*, (1973) 3 SCC 746: AIR 1972 SC 1932; *Umakant Vishnu* v. *Pramilabai*, (1973) 1 SCC 152; *Vinod Trading Co.* v. *Union of India*, (1982) 2 SCC 40; *Kirammal* v. *Dnyanoba Bajirao*, (1983) 4 SCC 223.

[282] *Ramji Bhagala* v. *Krishnarao*, (1982) 1 SCC 433: AIR 1982 SC 1223.

[283] *Dipo* v. *Wassan Singh*, (1983) 3 SCC 376: AIR 1983 SC 846; *Jhanda Singh* v. *Gram Sabha of Village Umri*, (1971) 3 SCC 980.

[284] For detailed discussion, *see supra*, "Stay of proceedings and of execution".

[285] R. 1(3); see also *Mehta Teja Singh and Co.* v. *Grindlays Bank Ltd.*, (1982) 3 SCC 199; *Union Bank of India* v. *Jagan Nath Radhey Shyam and Co.*, AIR 1979 Del 36; *Dijabar* v. *Sulabha*, AIR 1986 Ori 38; *Malwa Strips (P) Ltd.* v. *Jyoti Ltd.*, (2009) 2 SCC 426.

[286] *Vinod Trading Co.* v. *Union of India*, (1982) 2 SCC 40; *State of Gujarat* v. *Prabhat Solvent Extraction Industries (P) Ltd.*, (1982) 1 SCC 624; *Bir Bajrang Kumar* v. *State of Bihar*, AIR 1987 SC 1345.

[287] *CST* v. *Vijai International Udyog*, (1984) 4 SCC 543: AIR 1985 SC 109.

[288] *D.K. Trivedi & Sons* v. *State of Gujarat*, 1986 Supp SCC 20: AIR 1986 SC 1323.

[289] *Santosh Hazari* v. *Purushottam Tiwari*, (2001) 3 SCC 179; *Madhukar* v. *Sangram*, (2001) 4 SCC 756; *Sk. Mehboob Mader* v. *Syed Ashfaque Hussain*, 1988 Supp SCC 558; *Ratneshwari Nandan* v. *Bhagwati Saran*, AIR 1950 FC 142: 1949 FCR 667; *Govind Prasad* v. *Hari Dutt*, (1977) 9 SCC 736: AIR 1977 SC 1005.

or reversing the decree, the decree shall be confirmed.[290] Where two or other even number of judges composing the Bench differ on a point of law, they must state the point and the appeal shall then be heard by one or more of other judges and decided according to the opinion of the majority.[291] The object of enacting this provision is that on a question of fact when there is a difference of opinion, the view expressed by the trial court in the absence of a majority opinion should be confirmed.[292]

Where the sanctioned strength of judges is there but only two judges are available who differ from each other and refer the matter to the third judge, the appeal should wait till the arrival of the third judge. It cannot be contended that in such an eventuality the order impugned in the appeal should be confirmed.[293]

An appellate court has to accept a statement of fact as to what transpired at hearing or recorded in the judgment of the court below as true, final and conclusive. If a litigant feels aggrieved by such fact or statement, proper course for him is not to make a complaint before the appellate court but to approach the same court, to call the attention of the same judge who recorded it and to have it deleted or corrected.[294]

## 42. JUDGMENT: SECTION 98, RULES 30-34

After hearing the parties or their pleaders, the appellate court shall pronounce the judgment in open court, either at once or on some future date after giving notice to the parties or their pleaders. It is not necessary for the court to read out the whole judgment and it can read out only the final order but a copy of the whole judgment should be made available for the perusal of the parties or their pleaders after the judgment is pronounced.[295]

The judgment of the appellate court shall be in writing and shall state (*i*) the points for determination; (*ii*) the decision thereon; (*iii*) the reasons for the decision; and (*iv*) where the appeal is allowed and the decree of the lower court is reversed or varied, the relief to which the appellant is entitled. It shall be signed and dated by the judge or judges concurring therein.[296]

[290] S. 98; see also *Tej Kaur* v. *Kirpal Singh*, (1995) 5 SCC 119: AIR 1995 SC 1681.

[291] *Ibid.*

[292] *Ibid.*

[293] *Sikkim Subba Associates* v. *State of Sikkim*, (2001) 5 SCC 629: AIR 2001 SC 2062.

[294] *State of Maharashtra* v. *Ramdas Shrinivas*, (1982) 2 SCC 463: AIR 1982 SC 1298. For detailed discussion and case law, *see*, Author's *Code of Civil Procedure* (Lawyers's Edn.) Vol. II at p. 476; V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt. V, Chap. 2.

[295] R. 30.

[296] Rr. 31 & 32; see also *Gunnamani Anasuya* v. *Parvatini Amarendra*, (2007) 10 SCC 296: AIR 2007 SC 2380; *Shiv Kumar* v. *Santosh Kumari*, (2007) 8 SCC 600.

Any judge dissenting from the judgment of the court shall state in writing the decision or order which he thinks should be passed on the appeal and state his reasons for the same.[297]

As stated above, the appellate court is required to record reasons for its decision, but where the appellate court agrees with the view of the trial court on the evidence, it need not restate the effect of evidence and restate the reasons given by the trial court. Expression of general agreement with the reasons given by the trial court would ordinarily suffice.[298]

### 43. DECREE: RULES 35-37

The decree of an appellate court shall contain (*i*) the date and the day on which the judgment was pronounced; (*ii*) number of the appeal, names and description of the parties and a clear specification of the relief granted or other adjudication made; (*iii*) the costs of the appeal and of the suit and by whom they are to be paid; and (*iv*) the date and signature of the judge or judges who passed it. A dissenting judge need not sign the decree.[299]

Certified copies of the judgment and decree shall be sent to the lower court and shall be furnished to the parties at their expense on an application being made to the appellate court.[300]

### 44. LETTERS PATENT APPEAL

The Code of Civil Procedure makes no provision for an appeal within the High Court. Therefore, the question whether an appeal would lie against an order passed by a Single Judge to a Division Bench of the same court would depend upon the provisions of the Letters Patent of the High Court concerned. Under the relevant clause of the Letters Patent of the Chartered High Courts, from a "judgment" of a Single judge of the High Court, an appeal lies to the Division Bench of that High Court provided that such an appeal is not barred by any statute (e.g. Section 100-A of the Code) and provided that the other conditions are satisfied. Such an appeal can be filed within 30 days from the date of the order passed by the Single Judge.[301] The procedure laid down in Order 41 applies to Letters Patent Appeals also.[302]

[297] R. 34.

[298] *Girijanandini Devi* v. *Bijendra Narain*, AIR 1967 SC 1124 at p. 1129: (1967) 1 SCR 93; *State of Karnataka* v. *Hemareddy*, (1981) 2 SCC 185 at pp. 188-89: AIR 1981 SC 1417 at p. 1420. For duty to record reasons by Quasi-judicial Authorities, *see*, Author's *Lectures on Administrative Law* (2008) Lecture VI.

[299] R. 35.

[300] Rr. 37 & 36.

[301] Art. 117, Limitation Act, 1963.

[302] *Budge Budge Municipality* v. *Mongru Mia*, AIR 1953 Cal 433; *Shah Babulal* v. *Jayaben D. Kania*, (1981) 4 SCC 8: AIR 1981 SC 1786; *Umaji Keshao* v. *Radhikabai*, 1986 Supp SCC

It may, however, be stated that Section 100-A, as amended by the Code of Civil Procedure (Amendment) Act, 2002 states that notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, no further appeal[303] shall lie from a judgment and decree by a Single Judge in a first appeal.

In this connection, it may be noted that Justice Malimath Committee had examined the issue of further appeal against a judgment of a Single judge exercising first appellate jurisdiction, i.e. under Section 96 of the Code and also exercising jurisdiction under Article 226 or 227 of the Constitution and recommended to suitably amend Section 100-A of the Code abolishing intra-court appeal in those cases.[304]

The recommendations were accepted and by the Code of Civil Procedure (Amendment) Act, 1999[305], Section 100-A was amended abolishing Letters Patent Appeal against the decision of a Single Judge in a first appeal as also in a petition under Article 226/227 of the Constitution of India. The Amendment Act of 1999 received assent of the President on 30 December 1999 but was not brought into force. Meanwhile by the Amendment Act of 2002,[306] Section 100-A was further amended and a Letters Patent Appeal was barred against a decision by a Single judge in a First Appeal only. The amendment has been brought into force from 1 July 2002.[307]

## 45. APPEAL TO SUPREME COURT

Sections 109 and 112 provide for appeals to the Supreme Court in certain circumstances. Order 45 prescribes procedure for such appeals.[308] These provisions, however, have to be read along with the relevant provisions of the Constitution of India.[309]

401: AIR 1986 SC 1272; *Devaraju Pillai* v. *Sellayya Pillai*, (1987) 1 SCC 61: AIR 1987 SC 1160.

[303] Letters Patent Appeal.

[304] Notes on Clauses—Clause 10.

[305] Act 46 of 1999.

[306] Act 22 of 2002.

[307] For detailed discussion, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, Section 96.

[308] For detailed discussion, *see infra*, Chap. 5.

[309] Arts. 132-36.

PART III

# 3 Second Appeals

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## 1. GENERAL

SECTIONS 100 to 103, 107-108 and Order 42 deal with second appeals. As already stated,[1] a right of appeal is not a natural or inherent right attaching to litigation and it does not exist unless expressly conferred by a statute. Section 100 of the Code allows filing of second appeals in the High Court, if the High Court is satisfied that "the case involves a substantial question of law" but not on any other ground.[2]

## 2. SECTION 100

Section 100 of the Code provides filing of second appeal in the High Court. It reads as under:

"(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal

[1] *See supra*, "First appeals", Chap. 2.

[2] S. 101.

shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

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

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

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

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

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."[3]

### 3. NATURE AND SCOPE

Section 100 of the Code as amended by the Amendment Act of 1976 declares that an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court if the High Court is satisfied that the case involves a substantial question of law. Such appeal lies also against an appellate decree passed *ex parte*. The appellant has to precisely state in the memorandum of appeal the substantial question of law involved in the appeal. Where the High Court is satisfied that a substantial question of law is involved in the case, it shall formulate such question. The High Court can hear the appeal on the question so formulated. It, however, permits the respondent (opposite party) to argue at the hearing of the appeal that the question formulated by the court as a substantial question of law does not involve such question. But the High Court has power to hear the

[3] Sub-section (1) of S. 100 before the Amendment Act of 1976 read as under:

"Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court, on any of the following grounds, namely:

(*a*) the decision being contrary to law or to some usage having the force of law;

(*b*) the decision having failed to determine some material issue of law or usage having the force of law;

(*c*) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question. The High Court, however, is required to record reasons for such satisfaction.

The amendment made in Section 100 has drastically changed and considerably curtailed the scope of a second appeal. Under the old section, a second appeal was maintainable on any of the three grounds set out in clauses (*a*), (*b*) or (*c*)[3], which were liberally interpreted by High Courts, resulting in a plethora of conflicting judgments.

The Law Commission rightly observed, "It appears that the wide language of Section 100 and the somewhat liberal interpretation placed judicially on it have practically resulted in giving a goodbye to the basic principle that on questions of fact decisions of courts of first instance would be final subject to one appeal."

After the amendment in Section 100, the following consequences ensued:

(*i*) The High Court must be satisfied that the case involves a substantial question of law;[4]

(*ii*) The memorandum of appeal must precisely state such question;[5]

(*iii*) The High Court at the time of admitting the appeal should formulate such question;[6]

(*iv*) The appeal shall be heard only on that question;[7]

(*v*) At the hearing of the appeal, the respondent can argue that the case does not involve such question;[8]

(*vi*) The High Court is, however, empowered to hear the second appeal on any other substantial question of law, not formulated by it, if it is satisfied that the appeal involves such question. The High Court, however, has to record reasons for doing so.[9]

### 4. OBJECT

Before the Amendment Act, 1976, the scope of second appeals was very wide. It has been rightly observed, "In dealing with second appeals, the courts had devised and successfully adopted several concepts, such as, a mixed question of fact and law, a legal inference to be drawn from the facts proved, and even the point that the case has not been properly approached by the courts below. This had created confusion in the minds of the public as to the legitimate scope of the

[4] S. 100(1).
[5] S. 100(3).
[6] S. 100(4).
[7] S. 100(5); Or. 42 R. 2.
[8] S. 100(5).
[9] Proviso to S. 100(5); Or. 42 R. 2.

second appeal under Section 100 and had burdened the High Courts with an unnecessary large number of second appeals."[10]

The Shah Committee which dealt with the arrears of cases in High Courts observed:

> "It is necessary to provide for a stricter and better scrutiny of second appeals and they should be made subject to special leave, instead of giving an absolute right of appeal limiting it to a question of law."

The Law Commission[11] in its Fifty-fourth Report reviewed the position and recommended that the right of second appeal should be confined to cases where (*i*) a question of law was involved; and (*ii*) the question of law so involved was substantial.

The phraseology used in the amended section (substantial question of law) indicates legislative intent for the change. There is no doubt that it has been done deliberately and intentionally with the avowed object of ensuring that the second appeal may not become a "third trial on facts" or "one more dice in the gamble".[12]

Considering the above recommendations, Section 100 has been drastically amended. By this amendment, the scope and ambit of the jurisdiction of the High Court to interfere with the decision of the inferior courts is very much narrowed down. The right of appeal is confined to cases where a question of law is involved and such question of law is a substantial one. Now the High Court can interfere with the decisions of inferior courts only when it is satisfied that a point involves a substantial question of law.[13] With this, a large number of cases decided under the old Section 100 have become more or less academic.

## 5. SECOND APPEAL AND FIRST APPEAL[14]

## 6. SECOND APPEAL AND REVISION

Though a second appeal as well as a revision both lie in the High Court, there is a difference between the two. A second appeal lies to the High Court on the ground of a substantial question of law, while a revision lies on a jurisdictional error. Revisional powers of the High Court can be invoked only in those cases wherein no appeal lies. A second appeal can be filed against a decree passed by a first appellate court. While exercising revisional jurisdiction, the High Court cannot

[10] Statement of Objects and Reasons.

[11] Law Commission's Fifty-fourth Report at p. 187.

[12] *Koli Jiva Gaga* v. *Koli Ravji Chuga*, (1996) 3 Guj CD 1; *Gurdev Kaur* v. *Kaki*, (2007) 1 SCC 546: AIR 2006 SC 1975.

[13] *Harcharan Singh* v. *Shivrani*, (1981) 2 SCC 535 at p. 551: AIR 1981 SC 1284 at p. 1294.

[14] *See supra*, Chap. 2; *infra*, Chap. 9.

interfere with an order passed by a subordinate court, if it is within the jurisdiction of such court, even if it is legally wrong. But the High Court can interfere with the decree passed by the first appellate court if it is contrary to law. A High Court cannot decide a question of fact in revision, but it can decide an issue of fact in a second appeal certain cases. Finally, the High Court may refuse to interfere in revision if it is satisfied that substantial justice has been done. In second appeal, however, the High Court has no discretionary power and it cannot decline to grant relief on equitable grounds.[15]

## 7. SUBSTANTIAL QUESTION OF LAW

### (a) Meaning

The Legislature has not defined the term "substantial question of law", though the expression has been used in the Constitution[16] as well as in other statutes.[17] The phrase, however, cannot be confined to a straitjacket and no rule of universal application can be formulated as to when it can be said that a substantial question of law has arisen.

### (b) Nature and scope

A High Court can entertain a second appeal provided that it is satisfied that the case "involves" a substantial question of law.[18] The term "involves" suggests that such a question must arise in the case and it is necessary to decide it.[19] The mere fact that the question is raised by the appellant in the appeal is not enough and the High Court is not justified in entertaining the appeal. The term 'involves' implies a considerable element of necessity.[20]

### (c) Test

Though the expression *substantial question of law* has not been defined in the Code, in *Chunilal V. Mehta and sons* v. *Century Spg. & Mfg. Co. Ltd.*[21], the Supreme Court observed:

[15] For detailed discussion, *see infra*, "Revision"; *see also*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, Ss. 100, 115.

[16] Art. 133, Constitution of India.

[17] S. 260-A, Income Tax Act, 1961; S. 30, Workmen's Compensation Act, 1923; S. 55, Monopolies and Restrictive Trade Practices Act, 1969.

[18] S. 100(1).

[19] *SBI* v. *S.N. Goyal*, (2008) 8 SCC 92: AIR 2008 SC 2594; *Rajah Tasadduq Rasul* v. *Manik Chand*, (1902-1903) 30 IA 35 (PC); *Karunalaya* v. *Valangupalli Roman Catholic Mission*, AIR 1943 Mad 67: (1942) 2 Mad LJ 350; *Kunwar Jagdish Kumar* v. *L. Harikishen Das*, AIR 1942 Oudh 362; *Ganesh Prasad* v. *Makhna*, AIR 1948 All 375.

[20] *Ibid*, see also *Pankaj Bhargava* v. *Mohinder Nath*, (1991) 1 SCC 556: AIR 1991 SC 1233; *Santosh Hazari* v. *Purushottam Tiwari*, (2001) 3 SCC 179: AIR 2001 SC 965; *Gurdev Kaur* v. *Kaki*, (2007) 1 SCC 546: AIR 2006 SC 1975.

[21] AIR 1962 SC 1314: 1962 Supp (3) SCR 549.

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and, if so, whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well-settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law."[22]

It can thus be said that when a question is fairly arguable, or where there is room for a different opinion, or where an alternative view is equally possible, or where the point is not finally settled, or not free from doubt, it can be said that the question would be a "substantial question of law".[23]

### (d) Substantial question of law and question of law of general importance

At the same time, however, it should be remembered that, for the purpose of invoking the jurisdiction of the High Court under Section 100 of the Code, the substantial question of law need not be of *general importance*. The Law Commission in its Fifty-fourth Report[24] made it clear by observing:

"It should be noted that *we are not limiting the scope of second appeal to questions of law of general importance*. If the law has been clearly laid down by the High Court, and the decision of the subordinate court is in clear violation of the law as pronounced by the High Court, the power of the High Court to correct it should be left intact. This situation would not be covered if the limitation of general importance is inserted." (emphasis supplied)

[22] *Ibid*, at p. 1318 (AIR): at pp. 557-58 (SCR). See also *State of J&K* v. *Thakur Ganga Singh*, AIR 1960 SC 356 at pp. 359-60: (1960) 2 SCR 346; *State of Kerala* v. *R.E. D'Souza*, (1971) 1 SCC 533: AIR 1971 SC 832; *Mahindra & Mahindra Ltd.* v. *Union of India*, (1979) 2 SCC 529 at pp. 550-51: AIR 1979 SC 798 at pp. 811-12; *State of Assam* v. *Basanta Kumar*, (1973) 1 SCC 461 at p. 469: AIR 1973 SC 1252 at p. 1257; *Pankaj Bhargava* v. *Mohinder Nath*, (1991) 1 SCC 556: AIR 1991 SC 1233; *Vithaldas* v. *Ramchandra*, 1995 Supp (3) SCC 374; *Surain Singh* v. *Mehenga*, (1996) 2 SCC 624.

[23] For analytical discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

[24] Law Commission's Fifty-fourth Report at p. 90.

ıntial question of law means a substantial ques-
n the parties in the case involved.[25] A question
ıs between the parties if the decision turns one
ıe particular view of law. If it does not affect the
said to be substantial as between the parties.[26]
substantial question of law would depend upon
ces of each case.[27]

v. *Kishorilal Goenka*[28], the Full Bench of the High
er referring to the Fifty-fourth Report of the Law
umber of decisions, observed:

; the expression substantial question of law, the
be said only to have sought to eliminate frivo-
fragile second appeals and exhorted the High
the strictest vigil against entry of appeals on
out ingenious grounds. It does not by its own
admission of appeal in cases where there has
sconduct in the assessment or admission of evi-
icates that facts found upon such misconduct of
and misapplication of the procedure with regard
necessarily be a question of law touching the le-
ce on proved facts... .[29] If the law is settled but is
set of facts despite the finding warranting its ap-
ot perceivable how the legislature could conceive
High Court from setting right the erroneous ap-
re the finding of fact is on no evidence it is then to
sumptions, or on surmises, and conjectures. How
n shall be allowed to go unremedied where it leads

sad v. *Commr. of Pratapgarh*, AIR 1927 PC 110: (1926-27) 54 IA 126;
am T. Ditta, AIR 1928 PC 172: (1927-28) 55 IA 235; *Bharawan Estate* v.
IR 1953 SC 521 at p. 523: 1954 SCR 506; *Buckingham & Carnatic Co. Ltd.*
953 SC 47 at p. 49: 1953 SCR 219: 1952 Lab AC 490; *Secy. to Govt. Home*
Rao, AIR 1978 Mad 42 at p. 45; *Ratanlal* v. *Kishorilal Goenka*, AIR 1993
l LT 162 (FB).

shan v. *Satgur Prasad*, AIR 1953 All 129.

v. *Mohinder Nath*, (1991) 1 SCC 556: AIR 1991 SC 1233.

4: (1993) 1 Cal LT 162 (FB).

IR) (para 61).

l v. *Kishorilal Goenka*, AIR 1993 Cal 144: (1993) 1 Cal LT 162
h Chandra v. *Santosh Kumar*, (1997) 5 SCC 438: AIR 1997 SC 2517;
vitribai Sopan, (1999) 3 SCC 722: AIR 1999 SC 2213; *Santosh Hazari*
i, (2001) 3 SCC 179: AIR 2001 SC 965; *Rajeshwari* v. *Puran Indoria*,
indaraju v. *Mariamman*, (2005) 2 SCC 500: AIR 2005 SC 1008; *Hero*
ammal, (2006) 5 SCC 545: AIR 2006 SC 2234; *Gurdev Kaur* v. *Kaki*,
2006 SC 1975.

to the denial of justice? *This will bring the judicial system to discredit before the people.*"[31] (emphasis supplied)

**(e) Formulation of question**

Formulation of a substantial question of law is the *sine qua non* and a condition precedent for the exercise of power by the High Court.[32]

**(f) Duty of appellant**

The Code requires the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal, which he proposes to urge before the High Court.[33]

**(g) Duty of court**

If the High Court is satisfied that a substantial question of law is involved in the case, it should formulate such a question.[34]

The Code thus enjoins upon the High Court to formulate a substantial question of law. This duty is irrespective of the duty cast on the appellant. It is, no doubt, open to the High Court to consider the question stated or formulated by the appellant (or by his advocate) in the memorandum of appeal and if the High Court is satisfied that the appeal involves such a question and it is a substantial question of law, it should formulate the question. Often the court admits an appeal by virtually formulating a substantial question (questions) of law by taking it (them) *verbatim* from the memorandum of appeal filed by the appellant. Nevertheless the words "shall formulate that question" leave no room for doubt that ultimately it is the duty of the High Court to formulate a substantial question of law.[35]

**(h) Hearing of appeal**

The Code states expressly that the appeal shall be heard on the question (substantial question of law) formulated by the High Court.[36] It thus interdicts the appellant from urging any other ground in appeal without the leave of the court. The scope of hearing of second appeal is thus circumscribed by the question formulated by the court. Not only

[31] *Ibid*, at pp. 160-61 (AIR) (para 69).

[32] S. 100(4); For detailed discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

[33] S. 100(3); For detailed discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

[34] S. 100(4); For detailed discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

[35] For detailed discussion and case law, *see*, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

[36] S. 100(5); For detailed discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

that but it allows the respondent to argue that the question formulated by the High Court is not involved in the case.[37]

Generally, at the time of preliminary hearing of appeal, the respondent, who had succeeded for the first appellate court is not present in the High Court, and the second appeal is heard *ex parte*. But even if he is present, admission of appeal is essentially between the appellant and the court and the respondent (or his counsel) has no *"right"* of audience. Moreover, at that stage, the court does not critically or analytically examine the case *closely*. If *prima facie*, it is satisfied that the appeal *involves* a substantial question of law, it may admit such appeal. It is at the time of final hearing that the respondent may be able to convince the court that no such question of law is involved in the case which can be said or termed "substantial". The legislature, therefore, advisedly conferred a right on the respondent to raise such contention at the time of hearing of appeal.[38]

**(i) Saving power of High Court**

Proviso to sub-section (5) of Section 100, however, preserves powers of the High Court taking a second appeal for the final hearing to hear and decide the appeal upon any substantial question of law not framed or formulated at the time of admission of the appeal. The proviso is thus a repository of judicial discretion. It, no doubt, requires the High Court to exercise the power by recording reasons.[39]

**(j) Substantial question of law involved: Illustrative cases**

Whether or not, in a particular matter, a substantial question of law is involved depends upon the facts and circumstances of each case. Moreover, the expression *"involves"* implies a considerable degree of necessity. It does not mean that in certain contingencies such a question might possibly arise.[40] Similarly, the mere fact that such a question is raised in the second appeal is also not sufficient. It must definitely and clearly arise in the case.[41] Finally, if a question of law has already been settled by the highest court, that question, however important

[37] For detailed discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) S. 100.

[38] For detailed discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

[39] Proviso to S. 100 (5); *see also*, Or. 42 R. 2. For detailed discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

[40] *Banke Lal* v. *Jagat Narain*, ILR (1901) 23 All 94 at p. 98; *Hafiz Mohammad* v. *Sham Lal*, AIR 1944 All 273 at pp. 275-76 (FB); *Emperor* v. *Saver Manuel Dantes*, AIR 1941 Bom 245 (FB); *Hansraj Singh* v. *R.*, AIR 1949 All 632 at p. 634.

[41] *Ibid*, see also *A.B. Lagu* v. *State of Madhya Bharat*, AIR 1950 MB 81 at p. 82; *Durga Chowdhrani* v. *Jewahir Singh*, (1891) 18 Cal 23 at p. 30 (PC); *Kuar Nirbhai Das* v. *Rani Kuar*, ILR (1894) 16 All 274 at pp. 275-76 (PC); *Karuppanan* v. *Srinivasan*, ILR (1902) 25 Mad 215 at pp. 219-20 (PC).

and difficult it may have been regarded in the past and however large may be its effect on any of the parties, would not be regarded as a substantial question of law.[42]

The following questions may be said to be substantial questions of law:[43]

(*i*) A question of law on which there is conflict of judicial opinion;
(*ii*) Recording of a finding without any evidence on record;
(*iii*) Inference from or legal effect of proved or admitted facts;
(*iv*) Disregard or non-consideration of relevant or admissible evidence;
(*v*) Taking into consideration irrelevant or inadmissible evidence;
(*vi*) Misconstruction of evidence or documents;
(*vii*) Interpretation or construction of material documents;
(*viii*) A question of admissibility of evidence;
(*ix*) Placing onus of proof on a wrong party;
(*x*) Disposal of appeal before disposing an application for additional evidence under Order 41 Rule 27, etc.

**(k) Substantial question of law not involved: Illustrative cases**

The following questions were held not to be substantial questions of law:[44]

(*i*) Concurrent findings of fact recorded by courts of below;
(*ii*) Finding of fact recorded by the first appellate court;
(*iii*) Where two views are possible;
(*iv*) Where new case is sought to be made out in second appeal;
(*v*) Where new plea is raised which is either based on fact, or on mixed question of fact and law, or on mere question of law (and not on substantial question of law);
(*vi*) Where the question raised is too general or omnibus in nature;
(*vii*) Where inference as to finding of fact has been drawn on the basis of evidence and material on record;
(*viii*) Where the question is finally concluded by the Supreme Court, Privy Council or Federal Court;
(*ix*) Where a finding of fact has been attacked on the ground that it is erroneous (as against perverse);

[42] *Pankaj Bhargava* v. *Mohinder Nath*, (1991) 1 SCC 556: AIR 1991 SC 1233.

[43] For detailed discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) S. 100.

[44] For detailed discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II, S. 100.

(x) Where the High Court feels that the reasoning of the first appellate court is not proper, etc.

Like first appeal,[45] where second appeal involves construction of material documents and if more than one view is possible, even if the High Court dismisses the appeal summarily, it should record reasons for doing so.[46]

## 8. NO SECOND APPEAL IN CERTAIN CASES: SECTIONS 101-102

No second appeal is maintainable except on the grounds specified in the Code.[47] Likewise, no second appeal lies in any suit where the subject-matter of the original suit for recovery of money does not exceed twenty five thousand rupees.[48]

## 9. NO LETTERS PATENT APPEAL: SECTION 100-A

Section 100-A as inserted by the Amendment Act of 1976 enacts that no further appeal[49] shall lie against the decision of a Single Judge in a second appeal. In the Statement of Objects and Reasons, it has been stated, "Under the Letters Patent, an appeal lies in certain cases, against the decision of a Single Judge in a second appeal. Such appeal, in effect, amounts to a third appeal. For the purpose of minimising delay in the finality of adjudications, it is not desirable to allow more than two appeals. In the circumstances, new S. 100-A is being inserted to provide that there should be no further appeal against the decision of a Single Judge in a second appeal."[50]

This provision is prospective and not retrospective and would not affect vested right of Letters Patent Appeal against the judgment pronounced before 1 February 1977.[51]

## 10. LIMITATION

A second appeal lies to a High Court within a period of ninety days from the date of the decree appealed against.[52]

## 11. FORM OF APPEAL[53]

Since the second appeal is maintainable only when it involves a substantial question of law, a memorandum of second appeal must precisely state such question. However, unlike the memorandum of first

[45] *See supra*, Chap. 2.
[46] *Shankar* v. *Gangabai*, (1976) 4 SCC 112 at p. 115: AIR 1976 SC 2506.
[47] S. 101.
[48] S. 102, as amended by the Amendment Act of 2002.
[49] Letters Patent Appeal.
[50] Gazette of India, Extra., Pt. II, S. 2, dated 08-04-1974 at p. 308.
[51] *Fr. Abraham Mathews* v. *Illani Pillai*, AIR 1981 Ker 129 (FB).
[52] Art. 116, Limitation Act, 1963.
[53] For Model Second Appeal, *see infra*, Appendix "E".

appeal, it need not set out the grounds of objec
pealed from.[54] If the High Court is satisfied tha
such question, it will formulate that question an
peal will be confined to that question only and t
urge any other ground in appeal except with the lea
even if the High Court fails to formulate a substanti
at the time of admitting the appeal, the appeal can
on that ground and the court can formulate such a qu
stage also.[55]

No doubt, such a situation is regrettable. But failure
the court cannot prejudicially or adversely affect the pa
not, however, mean that the appellant has no duty at a
vigilant to bring to the notice of the court the above er
corrected. In a given case if the conduct of the party i
lacks *bona fides*, his appeal may be dismissed also, but
principle of law, a party cannot be penalised for the m
court. The proviso to sub-section (5) of Section 100 is indi
legislative intention in this regard. It confers enabling pov
court to cure the defect and to ensure that no injustice is
appellant.

In *Sonubai Yeshwant* v. *Bala Govinda*[56], Masodkar, J. rightl
"The restrictive scheme of Section 100 couched in manda
firstly, casts a duty on the court not to admit the appeals w
involve substantial questions of law for such an appeal is n
for; and secondly, it requires the admission order to speak
spell out such substantial question and, thirdly, on that qu
notice has to be issued to the respondents, who are enable
that such a question is neither a substantial question of law,
in a given appeal but further at that stage with the leave of th
appellant is further enabled to rely on any other substantia
of law which can form the part of the debate at the final hear
While working out this compact scheme, however, occasio
present one may arise wherein though the court admitted the
failed to spell out the substantial questions of law as enjoine
section (4). Doubtless such a situation is regrettable. Nonethe
omission is the omission of the court and not of the party. Th
ple that applies to the omissions, errors or mistakes on the pa
court should always be available in such an eventuality prov
course of justice is not prejudiced or affected to opponent's di
tage. Once the litigant has diligently followed the procedural

[54] Or. 41 R. 1. *See also supra*, Chap. 2; *infra*, Appendix 'D'.
[55] *Sonubai Yeshwant Jadhav* v. *Bala Govinda Yadav*, *infra*.
[56] AIR 1983 Bom 156: (1983) 1 Bom CR 632.

cannot be punished for the omission of the court. To act *ex debito justitiae* is the basic rule in matters of administration of justice and, particularly, when it arises out of the procedural laws. Failure on the part of the court, therefore, though serious does not affect the process of appeal which is set for final hearing, nor can the appeal be dismissed for that reason. There are ample complementary and supplementary inherent powers with which the court is clothed to cure such defects and that is expressly recognised by the provisions of Section 151 of the Code of Civil Procedure. Drawing upon that power in a given case, the court would be entitled to cure such a defect of court's failure to comply with the mandatory requirements of sub-section (4) of Section 100 even by formulating such a question at the later stage."[57]

## 12. POWER OF HIGH COURT TO DECIDE ISSUE OF FACT: SECTION 103

Though no second appeal lies on a question of fact, when such appeal is already before the High Court, and the evidence on record is sufficient, it may decide any issue of fact necessary for the disposal of the appeal, if such issue (*a*) has not been determined either by the trial court or by the appellate court or by both; or (*b*) has been wrongly determined by such court or courts by reason of its/their decisions on a substantial question of law.[58] This provision enables a High Court to decide even an issue of fact in certain circumstances.

## 13. PROCEDURE AT HEARING

The provisions relating to first appeals[59] shall apply to second appeals also.[60]

## 14. PENDING APPEALS

As seen above, the right of appeal is a substantive right and is not merely a matter of procedure. Moreover, institution of a suit carries with it a right of appeal which is a vested right and such right is governed by the law prevailing at the date of filing of the suit or proceeding and it cannot be abrogated or curtailed by a subsequent legislation.[61]

[57] *Sonubai Yeshwant* v. *Bala Govinda*, AIR 1983 Bom 156 at p. 162.

[58] S. 103. See also *Kiran Singh* v. *Chaman Paswan*, AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117; *Gurbaksh Singh* v. *Nikka Singh*, AIR 1963 SC 1917 at p. 1919: 1963 Supp (1) SCR 55; *Afsar Sheikh* v. *Soleman Bibi*, (1976) 2 SCC 142: AIR 1976 SC 163; *N.G. Dastane* v. *S. Dastane*, (1975) 2 SCC 326 at p. 334: AIR 1975 SC 1534 at p. 1539; *Balai Chandra* v. *Shewdhari Jadav*, (1978) 2 SCC 559 at p. 566: AIR 1978 SC 1062 at p. 1067; *Jadu Gopal* v. *Pannalal Bhowmick*, (1978) 3 SCC 215 at p. 235: AIR 1978 SC 1329 at pp. 1340-41; *Bhagwan Sharma* v. *Bani Ghosh*, 1993 Supp (3) SCC 497: AIR 1993 SC 398.

[59] Or. 41; *see supra*, Chap. 1.

[60] Or. 42 R. 1.

[61] *Colonial Sugar Refining Co. Ltd.* v. *Irving*, 1905 AC 369 (PC).

On the above analogy, the right of second appeal which accrued in favour of the appellant on the date of filing of the suit cannot be restricted or narrowed down by the Amendment Act of 1976 by which Section 100 was amended.

However, with a view to remove doubts, Section 97 of the Amendment Act, 1976 relating to "Repeal and Saving" clarifies that the provisions of the new Section 100 will not affect any second appeal admitted before the date the Amendment Act came into force.[62]

## 15. GENERAL PRINCIPLES

From the aforesaid discussion, the following general principles can be deduced regarding second appeals:

(*i*) A second appeal lies in the High Court;

(*ii*) Such an appeal is maintainable only on a substantial question of law alone;

(*iii*) An appeal lies also against an ex parte decree;

(*iv*) No second appeal lies except on grounds mentioned in S. 100, i.e. except on a substantial question of law. Thus, no appeal can be filed on a question of fact, question of law, or mixed question of fact and law;

(*v*) No second appeal lies in a money decree, where the amount does not exceed twenty five thousand rupees;

(*vi*) The memorandum of appeal must state substantial question of law;

(*vii*) The High Court should formulate a substantial question of law while admitting an appeal;

(*viii*) The appeal will be heard only on such question;

(*ix*) The High Court, however, has power to hear the appeal on other substantial question of law not formulated by it at the admission stage by recording reasons;

(*x*) At the hearing the respondent can argue that such question does not involve the appeal;

(*xi*) A substantial question of law does not mean a question of general importance but a question arising between the parties to the appeal;

(*xii*) In certain circumstances, a High Court can also decide an issue of fact;

(*xiii*) Procedure at the hearing will be the same as that of the first appeal;

(*xiv*) No letters patent appeal lies against the decision in the second appeal;

[62] *Kamla Devi* v. *Kushal Kanwar*, (2006) 13 SCC 295: AIR 2007 SC 663; *Vidya Vati* v. *Hans Raj*, AIR 1993 Del 187.

(*xv*) The provisions of the Amendment Act of 1976 do not apply to second appeals already admitted prior to the amendment and pending for hearing.