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BA LL.B

Code of Civil Procedure – I 301

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UNIT-I

Definitions

a) Decree

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

As per **Section 2(2)**, a decree is the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It can be final or preliminary. From the above definition we can see the following essential elements of a decree -

1. There must be adjudication - Adjudication means Judicial Determination of the matter in dispute. In other words, the court must have applied its mind on the facts of the case to resolve the matter in dispute. For example, dismissing a suite because of default in appearance of the plaintiff is not a decree. But dismissing a suite on merits of the case would be a decree.



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2. There must be a suit - Decree can only be given in relation to a suit. Although CPC does not define what suit means, in **Hansraj vs Dehradun Mussoorie Tramways Co. Ltd. AIR 1933**, the Privy Council defined the term suit as "a civil proceeding instituted by the presentation of a plaint".

3. Rights of the parties - The adjudication must be about any or all of the matters in controversy in the suit. The word right means substantive rights and not merely procedural rights. For example, an order refusing leave to sue in forma pauperis (i.e. an order rejecting the application of a poor plaintiff to waive court costs) is not a decree because it does not determine the right of the party in regards to the matters alleged in the suit.

4. Conclusive Determination - The determination of the right must be conclusive. This means that the court will not entertain any argument to change the decision. I.e. as far as the court is concerned, the matter in issue stands resolved. For example, an order striking out defense of a tenant under a relevant Rent Act, or an order refusing an adjournment is not a decree as they do not determine the right of a party conclusively. On the other hand, out of several properties in issue in a suit, the court may make a conclusive determination about the ownership of a particular property. Such a conclusive determination would be a decree even though it does not dispose off the suit completely.

5. Formal expression - To be a decree, the court must formally express its decision in the manner provided by law. A mere comment of the judge cannot be a decree.

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

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

Kinds of Decree

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

In **Shankar vs Chandrakant SCC 1995**, SC stated that a preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. CPC provides for passing preliminary decrees in several suits such as - suit for possession and mesne profits, administration suit, suits for pre-emption, dissolution of partnership, suits relating to mortgage. In **Narayanan vs Laxmi Narayan AIR 1953**, it was held that the list given in CPC is not exhaustive and a court may pass a preliminary decree in cases not expressly provided for in the code.

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

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

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



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to be decrees under the code. For example, rejection of a plaint and the determination of questions under S. 144 (Restitution) are deemed decrees.

b) Judgment

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

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

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

A judgment must contain the following components:

1. A crisp statement of facts of the case;
2. The points or issues for determination;
3. The decision on such issues and finally;
4. The reasons for such a decision.

c) Order

As per Section 2 (14), the formal expression of any decision of a civil court which is not a Decree is Order. In a suit, a court may take certain decisions on objective considerations and those decisions must contain a discussion of the matters at issue in the suit and the reasons which



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led the court to pass the order. However, if those decisions fall short of a decree, they are orders. Thus, there are several common elements between an order and a decree - both related to matter in controversy, both are decisions given by the court, both are adjudications, both are formal expressions. However, there are substantial differences between them –

Decree - S. 2(2)	Order S. 2(14)
Can only be passed in a suit originated by the presentation of a plaintiff.	Can be passed in a suit originated by the presentation of a plaintiff, application, or petition.
Contains Conclusive Determination of a right	May or may not finally determine a right.
May be final, preliminary, or partly preliminary - partly final.	Cannot be a preliminary order.
In general, there can only be one decree or at the most one preliminary and one final decree in a suit.	There can be any number of orders in a suit.
Every decree is appealable unless an appeal is expressly barred.	Only those orders which are specified as appealable in the code are appealable.
A second appeal may lie against a decree to a High Court on certain grounds.	There is no second appeal for orders.

d) FOREIGN COURT AND FOREIGN JUDGMENT:

With the advent of globalization and with India poised as a major international and global player in the world economy, it is apposite to consider the law concerning enforcement of foreign judgments in India. In law, the enforcement of foreign judgments is the recognition and enforcement rendered in another ("foreign") jurisdiction. Foreign judgments may be recognized based on bilateral or multilateral treaties or understandings, or unilaterally without an express international agreement. The "recognition" of a foreign judgment occurs when the court of one country or jurisdiction accepts a judicial decision made by the courts of another "foreign" country or jurisdiction, and issues a judgment in substantially identical terms without rehearing the substance of the original lawsuit.

Recognition will be generally denied if the judgment is substantively incompatible with basic legal principles in the recognizing country. However, the Code of Civil Procedure, 1908 has defined Foreign Court and Foreign Judgments as:-

Section 2(5) of the CPC, 1908

"Foreign Court" means a Court situate outside India and not established or continued by the authority of the Central Government;

Section 2(6) of the CPC, 1908

"Foreign judgment" means the judgment of a foreign Court;

ENFORCING FOREIGN JUDGMENTS IN INDIA

A foreign judgment can be enforced in India in one of two ways:

1. Judgments from Courts in "reciprocating territories" can be enforced directly by filing before an Indian Court an Execution Decree.



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2. Judgments from "non-reciprocating territories," such as the United States, can be enforced only by filing a law suit in an Indian Court for a Judgment based on the foreign judgment. The foreign judgment is considered evidentiary. - The time limit to file such a law suit in India is within three years of the foreign judgment.

However, "reciprocating territory" is defined in explanation 1 to Section 44A of India's Civil Procedure Code as: "Any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare as a reciprocating territory."

44A. Execution of decrees passed by Courts in reciprocating territory.

(1) Where a certified copy of decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in [India] as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

In case the decree pertains to a country which is not a reciprocating territory then a fresh suit will have to be filed in India on the basis of such a decree or judgment, which may be construed as a cause of action for the said suit. In the fresh suit, the said decree will be treated as another piece of evidence against the defendant. Under Section 44A of the CPC, a decree of any of the Superior Courts of any reciprocating territory is executable as a decree passed by the domestic Court.



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Therefore in case the decree does not pertain to a reciprocating territory or a superior Court of a reciprocating territory, as notified by the Central Government in the Official Gazette, the decree is not directly executable in India.

However in both cases the decree has to pass the test of S. 13 CPC which specifies certain exceptions under which the foreign Judgements becomes inconclusive and is therefore not executable or enforceable in India.

Sections 13 and 14 enact a rule of res judicata in case of foreign judgments. These provisions embody the principle of private international law that a judgment delivered by a foreign court of competent jurisdiction can be enforced by an Indian court and will operate as res judicata between the parties thereto except in the cases mentioned in Section 13. A foreign judgment may operate as res judicata except in the six cases specified in the section 13 and subject to the other conditions mentioned in Sec. 11 of C.P.C.

Sec. 13 of CPC, 1908:- When foreign judgment not conclusive.

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

- (a) Where it has not been pronounced by a Court of competent jurisdiction;
- (b) Where it has not been given on the merits of the case;
- (c) Where it appears on the face of the proceedings to be founded on an incorrect

View of international law or a refusal to recognize the law of [India] in cases in which such law is applicable;

- (d) Where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) Where it has been obtained by fraud;
- (f) Where it sustains a claim founded on a breach of any law in force in [India].



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The awards and decrees of the Indian courts are sacrosanct. However, Section 13 of the Code of Civil Procedure 1908 (CPC) lays down that a foreign judgment shall be conclusive as to any matter directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except in few cases.

E) Mesne profits:

Mesne profits corresponds to the profits which the person in wrongful possession is receiving or might receive with due diligence for the wrongful occupation of property. Mesne profits are defined under Section 2(12) of Code of Civil Procedure.

Section 2 (12) of the Code of Civil Procedure provides that: “Mesne profits” of property means those profits which the person in wrongful possession of such property actually received or might with the ordinary diligence have received therefrom, together with interest on such profits but shall not include profits due to improvement made by the person in wrongful possession.

Therefore, “Mesne profits” are the profits, which the person in unlawful possession actually earned or might have earned with the ordinary diligence. According to Section 2(12) a person becomes entitled to mesne profits only when he has right to obtain possession but another person whose occupation is unauthorized keeps him deprived of that possession. The first and foremost condition for awarding mesne profits is unlawful possession of the occupant of the property. The section further provides that Mesne profits also include interest on such profits. However it explicitly excludes any profit earned due to improvement in the property made by the person in unlawful possession of such property.

In **Phiraya Lal alias Piara Lal v. Jia Rani**, Hon’ble Delhi High Court while defining the term mesne profits observed that, “when damages are claimed in respect of wrongful occupation of immovable property on the basis of the loss caused by the wrongful possession of the trespasser to the person entitled to the possession of the immovable property, these damages are called mesne profits”.



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In **Nataraja Achari v. Balambal Ammal**, taking into consideration the definition of mesne profits provided under Section 2(12) Hon'ble Madras High Court observed that there are three different types of cases in which question of rights of profits arise:

1. Suit for ejectment or recovery of possession of immovable property from a person in possession without title, together with a claim for past or past and future mesne profits.
2. A suit for partition by one or more tenants in common against others with a claim for account of past or past and future profits.
3. Suits for partition by a member of joint Hindu family with a claim for an account from the manager.

The Court observed, "In the first case, the possession of the defendant not being lawful, the plaintiff is entitled to recover mesne profits such profits being really in the nature of damages. In second case the possession and receipt of profits by the defendant not being wrongful the plaintiffs remedy is to have an account of such profits making all jus allowance in the favour of the collecting tenant in common. In the third case the plaintiff must take the joint family property as it exists at the date of the demand for partition and is not entitled to open up past account or claim relief on the ground of past inequality of enjoyment of the profit, except where the manager has been guilty of fraudulent conduct or misappropriation. The plaintiff would however, be in the position of the tenant in common from the date of severance in status and his right would have to be worked out on that basis.

Interest on Mesne profits

The definition of the term 'Mesne profit' provided under section 2(12) of the Code of civil Procedure, 1908 explicitly provides that interest is an integral part of mesne profits. From the expression 'together with interest on such profits' in Section 2(12) it is apparent that 'mesne profit' includes within its fold an interest component. And the rate of interest to be allowed in regard to mesne profits varies depending upon the facts and circumstances of each case. Since the statute does not fix any rate of interest it is left at the discretion of court to determine the rate of interest. Generally, the rate of interest is awarded at 6 % per annum.



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In *N. Dasjee v. Tirupathi Devasthanam*, Hon'ble Supreme Court observed that, "Under Section 2(12) of the Civil Procedure Code which contains the definition of mesne profits, interest is an integral part of mesne profits and has, therefore, to be allowed in the computation of mesne profits itself. That proceeds on the theory that the person in wrongful possession appropriating income from the property himself gets the benefit of the interest on such income".

Improvements in the property by unlawful possessor

Latter part of Section 2(12) expressly provides that mesne profits do not include profits due to improvement made in the property by the person in wrongful possession.

In *The Hindustan Petroleum Corporation Ltd., Chairman and Managing Director v. Khwaja Asadullah Baig and Ors*, while assessing the quantum of mesne profits Hon'ble Andhra Pradesh High Court held that, taking into consideration concept of mesne profits under Section 2(12), the courts have to exclude the profit attributable to the improvements made on the property.

However a person in wrongful possession of the property is not entitled to claim expenses incurred on improvements in such property. In other words, plaintiff is not bound to pay the defendant compensation for improvements as a condition precedent to obtaining possession. The defendant being in the rank of trespasser is not entitled to such compensation.

Assessment of the Mesne profits

One broad principle governing the liability for mesne profits is evident from Section 2(12) of the Code of Civil Procedure, 1908 which defines 'mesne profits' to mean "those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession". But the Section does not provide any fixed rule for the assessment of such profit. The provision simply states that mesne profits include interest on such profits. And profits due to improvement are excluded from the assessment of the quantum of mesne profits.



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In the lights of this broad principle, the determination of quantum mesne profits is left at the discretion of the court. And mesne profits being in the nature of damages even the Court cannot lay down any invariable rule governing award and assessment of mesne profits in every case. The Court may mould award and assessment of mesne profits according to the justice of the case. In other words there is no uniform criterion for the assessment of mesne profits. The quantum of mesne profits depends upon the facts and surrounding circumstances of each case.

Earlier the rental value of the property formed the basis of assessment of mesne profits. The courts used to award mesne profits taking into consideration rental value of the property. This practice of assessing mesne profits on the basis of rent was inappropriate and later on the Courts rightly struck it down.

In Kesardeo Baijnath Vs. Nathmal Kisanalal, it was held, “that determination of mesne profits on the basis of rental value of the property would be in correct test in the context of the definition of menses of profits in section 2[12] Rent could be relevant factor, for considering the quantum of mesne profits but not a decisive of the matter”.

While assessing the quantum of mesne profits, the factors such as location of the property, comparative value of the property, condition of property in question, profits that are actually gained or might have been gained from the reasonable use such property are generally taken into consideration by the courts. Moreover it is settled principle of law that the criteria for the calculation of mesne profits is not what the owner loses by the deprivation of possession but profits should be calculated on the basis of what the person in wrongful possession namely, the defendants had actually received or might with ordinary diligence have received therefrom.

Burden of Proof

It is settled principle of law that in case of mesne profits the burden of proof rests on the claimant i.e. the plaintiff. And mesne profits being in the form of compensation, before claiming mesne profits the plaintiff have to establish before the Hon'ble court that he was lawful owner of the property and he was deprived of it by the unlawful possession of the defendant. The plaintiff



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having proved the aforementioned facts becomes entitled to mesne profits. Further the onus of proving what profits he might have received with the ordinary diligence lies on the claimant.

f) **Affidavit**

An **affidavit** is a written sworn statement of fact voluntarily made by an *affiant* or *deponent* under an oath or affirmation administered by a person authorized to do so by law. Such statement is witnessed as to the authenticity of the affiant's signature by a taker of oaths, such as a notary public or commissioner of oaths. The name is Medieval Latin for *he/she has declared upon oath*. An affidavit is a type of verified statement or showing, or in other words, it contains verification, meaning it is under oath or penalty of perjury and this serves as evidence to its veracity and is required for court proceedings.

To obtain a declaration on a legal document, such as an application for voter registration, that the information provided by the applicant is truthful to the best of the applicant's knowledge. If, after signing such a declaration, the information is found to be deliberately untrue with the intent to deceive, the applicant may face perjury charges.

Affidavits may be written in the first or third person, depending on who drafted the document. If in the first person, the document's component parts are:

- a commencement which identifies the "affiant of truth",-generally stating that everything is true, under penalty of perjury, fine, or imprisonment;
- an attestation clause, usually a jurat, at the end certifying the affiant made oath and the date; and
- Signatures of the author and witness.

If an affidavit is notarized or authenticated, it will also include a caption with a venue and title in reference to judicial proceedings. In some cases, an introductory clause, called a *preamble*, is added attesting that the affiant personally appeared before the authenticating authority.



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g) PLAINT:

ORDER VII of CPC defines Plaintiff.

1. Particulars to be contained in plaintiff

The plaintiff shall contain the following particulars:-

- (a) The name of the Court in which the suit is brought;
- (b) The name, description and place of residence of the plaintiff;
- (c) The name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
- (e) The facts constituting the cause of action and when it arose;
- (f) The facts showing that the Court has jurisdiction;
- (g) The relief which the plaintiff claims;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
- (i) A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

2. In money suits

Where the plaintiff seeks the recovery of money, the plaintiff shall state the precise amount claimed: But where the plaintiff sues for mesne profits, or for an amount which will be found



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due to him on taking unsettled accounts between him and the defendant, [or for movables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate, the plaintiff shall state approximately the amount or value sued for].

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

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

4. When plaintiff sues as representative

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

5. Defendant's interest and liability to be shown

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

6. Grounds of exemption from limitation law

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed :

[Provided that the Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaintiff, if such ground is not inconsistent with the grounds set out in the plaintiff.

7. Relief to be specially-



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

8. Relief founded on separate grounds

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

9. Procedure on admitting plaint- Concise statements-

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

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

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

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



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

10. Return of plaint

(1) [Subject to the provisions of rule 10A, the plaint shall] at any stage of the suit be returned to be: presented to the Court in which the suit should have been instituted.

[Explanation. - For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub-rule.]

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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



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in which the plaint is filed to serve the defendant with the summons for appearance in the suit, unless that Court in which the plaint is filed, for reasons to be recorded, otherwise directs.

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

11. Rejection of plaint

The plaint shall be rejected in the following cases :-

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

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

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

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

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]

12. Procedure on rejecting plaint

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



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

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

h) WRITTEN STATEMENT:

ORDER VIII defines Written statement.

1. Written statement

(1) The defendant shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

(2) Save as otherwise provided in rule 8A, where the defendant relies on any document (whether or not in his possession or power) in support of his defence or claim for set-off or counter. Claim, he shall enter such documents in a list, and shall,-

(a) If a written statement is presented, annex the list to the written statement:

Provided that where the defendant, in his written statement, claims a set-off or makes a counter-claim based on a document in his possession or power, he shall produce it in Court at the time of presentation of the written statement and shall at the same time deliver the document or copy thereof to be filed with the written statement; .

(b) If a written statement is not presented, present the list to the Court at the first hearing of the suit.

(3) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(4) If no such list is so annexed or presented, the defendant shall be allowed such further period for the purpose as the Court may think fit.



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(5) A document which ought to be entered in the list referred to in sub-rule (2), and which is not so entered, shall not, without the leave of the Court, be received in evidence on behalf of the defendant at the hearing of the suit.

(6) Nothing in sub-rule (5) shall apply to documents produced for the cross-examination of plaintiff's witnesses or in answer to any case set up by the plaintiff subsequent to the filing of the plaint, or handed over to a witness merely to refresh his memory.

(7) Where a Court grants leave under sub-rule (5), it shall record its reasons for so doing, and no such leave shall be granted unless good cause is shown to the satisfaction of the Court for the non-entry of the document in the list referred to in sub-rule (2).]

2. New facts must be specially pleaded

The defendant must raise by his pleading all matters which show the suit not be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

3. Denial to be specific

It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

4. Evasive denial

Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. 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. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

5. Specific denial



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[(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission. [(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved..

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.]

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

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

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

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



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Illustrations

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

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

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

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

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

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

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

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

[6A. Counter-claim by defendant

(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for



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delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not : Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

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

6B. Counter-claim to be stated

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

6C. Exclusion of counter-claim

Where a defendant sets up a counterclaims and the plaintiff contends the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counterclaim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

6D. Effect of discontinuance of suit

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

6E. Default of plaintiff to reply to counter-claim

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



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6F. Relief to defendant where counter claim succeeds

Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.

6G. Rules relating to written statement to apply

The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.]

7. Defence or set-off founded upon separate grounds

Where the defendant relies upon several distinct grounds of defence or set-off[or counter-claim] founded separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

8. New ground of defence

Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off [or counter-claim] may be raised by the defendant or plaintiff as the case may be, in his written statement.

[8A. Duty of defendant to produce documents upon which relief is claimed by him

(1) Where a defendant bases his defence upon a document in his possession or power, he shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document or a copy thereof, to be filed with the written statement.

(2) A document which ought to be produced in Court by the defendant under this rule, but is not so produced, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(3) Nothing in this rule shall apply to documents produced,-

(a) For the cross-examination of the plaintiff's witnesses, or

(b) In answer to any case set up by the plaintiff subsequent to the filing of the plaint, or

(c) Handed over to a witness merely to refresh him memory].



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i) **CAVEAT:**

Section 148A of CPC deals with the provisions of Caveat.

.Right to lodge a caveat.

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

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

(3) Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding, the Court, shall serve a notice of the application on the caveator.

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

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the



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application referred to in sub-section (1) has been made before the expiry of the said period.]

Order XL-A

Caveat Rules

1. Every Caveat under Section 148-A shall be signed by the Caveator or his Advocate and shall be in form prescribed.
2. Every Caveat shall be presented by the party in person or by his Advocate to the Court or to the Officer authorised to receive the Caveat. Where the Caveator is represented by an Advocate his Vakalatnama shall accompany the Caveat. When an Advocate instructed by a party to act or appear in a matter has not been able to secure a Vakalatnama in the prescribed form duly signed by the client, he may file a written statement signed by him stating that he has instructions from or on behalf of his client to act or appear in the matter and also undertaking to file within a week a Vakalatnama in the prescribed form duly signed by the party.
3. The Caveat presented under Rule 2 shall be registered in a Caveat Register in Form given below. Before an application for any relief is made to the Court in any proceedings, it shall bear an endorsement from the office of the Court whether a Caveat has or has not been filed.
4. (1) A copy of the Caveat shall be served along With the notice required to be served under Section 148-A (2).

(2) On receipt of the notice of the notice of the Caveat, the applicant or his Advocate shall intimate to the Caveator or his Advocate, the expenses for furnishing the copies and request him to collect the copies on payment of the said expenses. The said expenses should be at the rate of 25 paise per folio of 100 words inclusive of cost of paper.
5. Every application for any relief in a proceeding should be supported by a statement on oath of the applicant stating that no notice under Section 148-A (2) is received by him or if received whether the applicant has furnished the copies of the application together with the copies of the



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papers or documents which have been filed or may be filed in support of the application of the Caveator as required by Section 148-A (4).

6. A notice under-Section 148-A (3) may be served on the Caveator or his Advocate personally or by post Under Certificate of Posting. The notice sent Under Certificate of Posting at the address furnished by the Caveator shall be deemed to be sufficient service on him.

7. Where it appear to the Court that the object of granting ad interim relief on the application would be defeated by delay, it may record reasons for such opinion and grant ad interim relief of the application of the applicant till further orders after giving the Caveator an opportunity of being heard.

IMPORTANT CONCEPTS

a) Res-subjudice (Stay of Suit)

Section 10 of the CPC deals with the concept of 'res subjudice'. The Latin word 'Res' means 'thing' and 'sub judice' means 'under a judge' or 'under determination of a court'. Technically the term 'res subjudice' means stay of suit. In other words, a suit is to be stayed the subject matter of which is already a matter of issue in another suit. Section 10 specifies that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties and that the court in which the previous suit is pending is competent to grant the relief claimed.

Conditions of Res-subjudice: – For the application of section 10 following conditions have to be fulfilled

1. Two or more suits
2. All suits are pending
3. Same Parties
4. Same Subject-matters
5. Same Cause of Action
6. All suits are instituted in Bangladesh

b) Res Judicata



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Section 11 of the CPC deals with the concept of 'res judicata'. The term 'res judicata' is Latin in language and has been borrowed from Roman Law. Ballentine in his Law Dictionary defines it as to connote 'a thing settled by judicial decisions'.

Thus 'res judicata' means a final judicial decision of a court of competent jurisdiction, once pronounced between parties/litigant, cannot be contradicted by any one, as against any other of such parties, in any subsequent litigation between the same parties, respecting the same subject – matter. It is founded on the principle that there should be an end to the litigation as to any issue between the same parties when once that issue has been directly and substantially determined between them by a court of competent jurisdiction.

Conditions of Res–Judicata: – Section of the CPC embodies the doctrine of Res judicata and the conditions for its application are as follows:

1. Two or more suits
2. One suit already been decided
3. Same Parties
4. Same Subject-matters
5. Same Cause of Action

Distinction between Res-Subjudice and Res- Judicata

There are some important distinction between Res-Subjudice and Res- Judicata. There are Following:-

1. In case of **Res-Subjudice**, there must be two suits; one previously instituted where as in case of **Res- Judicata** there must be an end to litigation.
2. In case of **Res-Subjudice**, the matter in issue in both the suits must be substantially the same. On the other hand, the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit either actually or constructively.
3. In case of **Res-Subjudice**, the previously instituted suit must be pending in the same court in which the subsequent suit was brought or in a different court having jurisdiction to grant



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the relief claimed. On the contrary, the former suit must have been a suit between the same parties or between parties under whom they or any of them claim.

4. In case, of **Res-Subjudice**, such parties must be litigating in both the suits under the same title. In case of **Res- Judicata**, such parties must have been under the same title in the former suit.

5. In case of **Res-Subjudice**, both the suits must be between the same parties or their representatives. On the other hand, a final decision of a concrete issue between parties.

Constructive res judicata

The rule of direct res judicate is limited to a matter actually in issue alleged by one party and either denied or admitted by the other party expressly or impliedly. But the rule of constructive res judicata, and provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject – matter.

The clearly is opposed to considerations of public policy on which the doctrine of res judicata is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finally of judgments pronounced by courts would also be materially affected.

Thus, it helps in raising the bar of res judicata by suitably construing the general principles of subduing a cantankerous litigant. That is why this rule is called constructive res judicata, which, in reality, is an observed by Somervell, L. J. : “ I think that ... it would be accurate to say that res judicata is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject – matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.”

Res judication between co – plaintiffs

Just as a matter may be res judicata between co – defendants, so also it may be res judicata between co – plaintiffs, if there is a conflict of interest between plaintiffs and it is necessary to



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resolve the same by a court in order to give relief to a defendant, and the matter is in fact decided, it will open as res judicata between co – plaintiffs in the subsequent suit.

Res judicata between co – defendants

As a matter may be res judicata between a plaintiff and a defendant, similarly, it may be res judicata between co – defendants and co – plaintiffs also. Adjudication will operate as res judicata between co – defendants if the following conditions are satisfied.

- There must be a conflict of interest between co – defendants.
- It must be necessary to decide that conflict in order to give relief to the plaintiff.
- The question between co – defendants must have been finally decided, and
- The co – defendants were necessary or proper parties in the former suit.
- If the conditions are satisfied, the adjudication will operate as res judicata between co–defendants.

Res Judicate and Estoppel:

Estoppel is not the same thing as res judicata. The difference lies in the following points:

- Whereas estoppel is a part of the law of evidence and proceeds upon equitable principle of altered situation, the doctrine of res judicata belongs to procedure and is based on the principle that there must be an end to litigation.
- Estoppel prohibits a party from providing anything which contradicts his previous declarations or acts to the prejudice of a party, who, relying upon them, altered his position; res judicata, on the other hand, prohibits the court from enquiring into a matter already adjudicated.
- Estoppel shuts the mouth of a party whereas res judicata ousts the jurisdiction of the court.

Thus, it appears that res judicata precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying one thing at one time and the opposite at another.



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Lis-Pendens

The literal meaning of the maxim lis pendens is a suit under consideration of any court of law. This principle is based on the maxim 'liti pendente nihil innovetur' (meaning thereby, nothing can be introduced during the pendency of a suit). Section 52 of the Transfer of Property Act 1882 which lays down the principle runs as follows: During the pendency in any Court in Bangladesh of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto, under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation : For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

- 1) The conditions for the application of the doctrine are as follows:
- 2) Pendency of suit or proceeding.
- 3) Competency of Court to decide suit or proceeding.
- 4) Suit or proceeding not to be collusive.
- 5) Some right to immovable property must be directly and specifically involved in that suit or proceeding.
- 6) One of the parties to the suit must have transferred or disposed of the property.
- 7) Such transfer or disposal must affect the rights of the other party.



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c) Restitution.-

Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are property consequential on such variation; reversal, setting aside or modification of the decree of the decree or order.

Explanation: For the purposes of sub-section (1), the expression “court which passed the decree or order” shall be deemed to include,—

(a) Where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the court of first instance;

(b) Where the decree or order has been set aside by a separate suit, the court of first instance which passed such decree or order;

(c) Where the court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

UNIT-II

INITIAL STEPS IN A SUIT

1. Jurisdiction of courts and venue of suits

Jurisdiction means the authority by which a court has to decide matters that are brought before it for adjudication. The limit of this authority is imposed by charter, statute or commission. If no such limit is imposed or defined that the jurisdiction is said to be unlimited.

Limitation of jurisdiction of civil court is basically four kinds:

1. Jurisdiction over the subject matter- to try certain matters by certain court is limited by statute (Ex. Small cause court- suit for money due under promissory note or a suit for price of work done)
2. Place of suing or territorial jurisdiction – A territorial limit of jurisdiction for each court is fixed by Government.
3. Jurisdiction over persons – All person of whatever nationality are subject to the jurisdiction of the country except foreign state.
4. Pecuniary jurisdiction depending on pecuniary value of suit –There is no pecuniary jurisdiction of high court and district court.

Jurisdiction may be further classified:

- Original jurisdiction
- Appellate jurisdiction

Criminal and appellate jurisdiction- Supreme Court, High Courts and District courts have both original and appellate jurisdiction in various matter.



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2. Place of suing (Section 15 to 18)

Every suit shall be instituted in the Court of the lowest grade competent to try it.

Subject to the pecuniary or other limitations prescribed by any law, the following suit shall be institutes in the court with in the local limits of whose jurisdiction the property is situated (Section 16):-

- (a) For the **recovery** of immovable property with or without rent or profits,
- (b) For the **partition** of immovable property,
- (c) For **foreclosure, sale or redemption** in the case of a mortgage of or charge upon immovable property,
- (d) For the **determination of any other right to or interest** in immovable property,
- (e) For **compensation for wrong** to immovable property,
- (f) For the **recovery of movable** property actually under distraint or attachment,

A suit to obtain relief respecting or compensation for wrong to, immovable property be instituted either in the Court within the local limits of whose jurisdiction the property is situate or in the Court within the local limits of for gain or where the either party actually and voluntarily resides or carries on business or personally works.

Suits for immovable property situate within jurisdiction of different Courts (Section 17)

The suit may be instituted in any Court within the local limits of whose jurisdiction the property is situate. Provided that, in respect of the value of the subject matter of the suit, the entire claim is cognizable by such Court.



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Place of institution of suit where local limits of jurisdiction of Courts are uncertain (Section 18)

Any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property.

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

Suits for compensation for wrongs to person or to movable (Section 19)

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

Illustrations

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

Other suits to be instituted where defendants reside or cause of action arises (Section 20)

Every suit shall be instituted in Court within the local limits of whose jurisdiction:

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

The cause of action, wholly or in part, arises.

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



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

Illustrations

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

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

b) INSTITUTION OF SUITS

The institution of the suits is covered under Order IV of CPC.

1. Suit to be commenced by plaintiff

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

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



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2. Register of suits

The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

ORDER V: ISSUE AND SERVICE OF SUMMONS

Issue of Summons

1. Summons

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

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim: Provided further that where a summons has been issued, the Court may direct the defendant to file the written statement of his defence, if any, on the date of his appearance and cause an entry to be made to that effect in the summons.

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

(a) In person, or

(b) By a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) By a pleader accompanied by some person able to answer all such questions.

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



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2. Copy or statement annexed to summons

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

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

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

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

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

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

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

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

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

The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.



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6. Fixing day for appearance of defendant

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

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

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

7. on issue of summons for final disposal, defendant to be directed to produce his witnesses

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

Service of Summons

9. Delivery or transmission of summons for service

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

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



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10. Mode of service

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

11. Service on several defendants

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

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

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

13. Service on agent by whom defendant carries on business

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

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

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

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



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

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

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

16. Person served to sign acknowledgement

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

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

Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person(if any) by whom the house was identified and in whose presence the copy was affixed.



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20. Substituted services

(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house(if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

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

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

21. Service of summons where defendant resides within jurisdiction of another Court.

A summons may be sent by the Court by which it is issued, whether within or without the State, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

22. Duty of Court to which summons is sent

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

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

Where the defendant resides out of India and has no agent in India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and



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sent to him by post, if there is postal communication between such place and the place where the Court is situate :

c) ORDER VI : PLEADINGS GENERALLY

1. Pleading

"Pleading" shall mean plaint or written statement.

2. Pleading to state material facts and not evidence

(1) Every pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved.

(2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

3. Forms of pleading

The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.

4. Particulars to be given where necessary

In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.



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5. Further and better statement, or particulars

A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and

6. Notice

Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred are material.

7. Pleading to be signed

Every pleading shall be signed by the party and his pleader (if any):

Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

8 Address for service of notice

(1) Every pleading, when filed by a party, shall be accompanied by a statement in the prescribed form, signed as provided in rule 14, regarding the address of the party.

(2) Such address may, from time to time, be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition.

(3) The address furnished in the statement made under sub-rule (1) shall be called the "registered address" of the party, and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purpose of execution, and shall hold good,



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subject as aforesaid, for a period of two years after the final determination of the cause or matter.

(4) Service of any process may be affected upon a party at his registered address in all respects as though such party resided thereat.

(5) Where the registered address of a party is discovered by the Court to be incomplete, false or fictitious, the Court may, either on its own motion, or on the application of any party, order -

(a) In the case where such registered address was furnished by a plaintiff, stay of the suit, or

(b) in the case where such registered address was furnished by a defendant, his defence be struck out and he be placed in the same position as if he had not put up any defence.

(6) Where a suit is stayed or a defence is struck out under sub-rule (5), the plaintiff or, as the case may be, the defendant may, after furnishing his true address, apply to the Court for an order to set aside the order of stay or, as the case may be, the order striking out the defence.

(7) The Court, if satisfied that the party was prevented by any sufficient cause from filing the true address at the proper time, shall set aside the order of stay or order striking out the defence, on such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit or defence, as the case may be.

(8) Nothing in this rule shall prevent the Court from directing the service of a process at any other address, if, for any reason, it thinks fit to do so.

9. Verification of pleadings

(1) Save as otherwise provided by any law for the time being in force, every pleading shall be varied at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.



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(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

10. Striking out pleadings

The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading-

- (a) Which may be unnecessary, scandalous, frivolous or vexatious, or
- (b) Which may tend to prejudice, embarrass or delay the fair trial of the suit, or
- (c) Which is otherwise an abuse of the process of the Court?

11. Amendment of pleadings

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just or all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

12. Failure to amend after order

If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

d) ORDER VII : PLAINT

1. Particulars to be contained in plaint

The plaint shall contain the following particulars:-

- (a) The name of the Court in which the suit is brought;
- (b) The name, description and place of residence of the plaintiff;
- (c) The name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
- (e) The facts constituting the cause of action and when it arose;
- (f) The facts showing that the Court has jurisdiction;
- (g) The relief which the plaintiff claims;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
- (i) A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

2. in money suits

Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed:



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But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, or for movables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate, the plaint shall state approximately the amount or value sued for.

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

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

4. When plaintiff sues as representative

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

5. Defendant's interest and liability to be shown

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

6. Grounds of exemption from limitation law

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed :

7. Procedure on admitting plaint- Concise statements-

(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of



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the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

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

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

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

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

10. Return of plaint

(1) [Subject to the provisions of rule 10A, the plaint shall] at any stage of the suit be returned to be: presented to the Court in whom the suit should have been instituted.

[Explanation. - For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub-rule.]

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

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



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

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

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

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

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

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

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

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

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

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

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



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

11. Rejection of plaint

The plaint shall be rejected in the following cases:-

- (a) Where it does not disclose a cause of action;
- (b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) Where the suit appears from the statement in the plaint to be barred by any law :

12. Procedure on rejecting plaint

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

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

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

ORDER VIII : WRITTEN STATEMENT, SET-OFF AND COUNTER-CLAIM

1. Written statement



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1) The defendant shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defense.

(2) Save as otherwise provided in rule 8A, where the defendant relies on any document (whether or not in his possession or power) in support of his defence or claim for set-off or counter. Claim, he shall enter such documents in a list, and shall,-

(a) If a written statement is presented, annex the list to the written statement:

Provided that where the defendant, in his written statement, claims a set-off or makes a counter-claim based on a document in his possession or power, he shall produce it in Court at the time of presentation of the written statement and shall at the same time deliver the document or copy thereof to be filed with the written statement; .

(b) if a written statement is not presented, present the list to the Court at the first hearing of the suit.

(3) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(4) If no such list is so annexed or presented, the defendant shall be allowed such further period for the purpose as the Court may think fit.

(5) A document which ought to be entered in the list referred to in sub-rule (2), and which is not so entered, shall not, without the leave of the Court, be received in evidence on behalf of the defendant at the hearing of the suit.

(6) Nothing in sub-rule (5) shall apply to documents produced for the cross-examination of plaintiff's witnesses or in answer to any case set up by the plaintiff subsequent to the filing of the plaint, or handed over to a witness merely to refresh his memory.



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(7) Where a Court grants leave under sub-rule (5), it shall record its reasons for so doing, and no such leave shall be granted unless good cause is shown to the satisfaction of the Court for the non-entry of the document in the list referred to in sub-rule (2).]

2. New facts must be specially pleaded

The defendant must raise by his pleading all matters which show the suit not be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

3. Denial to be specific

It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

4. Evasive denial

Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. 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. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

5. Specific denial

(1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:



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Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved..

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.

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

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

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

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



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Illustrations

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

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

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

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

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

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

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

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

6A. Counter-claim by defendant



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(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not : Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

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

6B. Counter-claim to be stated

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

6C. Exclusion of counter-claim

Where a defendant sets up a counterclaims and the plaintiff contends the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counterclaim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

6D. Effect of discontinuance of suit



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

6E. Default of plaintiff to reply to counter-claim

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

6F. Relief to defendant where counter claim succeeds

Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.

6G. Rules relating to written statement to apply

The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.]

7. Defence or set-off founded upon separate grounds

Where the defendant relies upon several distinct grounds of defence or set-off [or counter-claim] founded separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

8. New ground of defence

Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off or counter-claim may be raised by the defendant or plaintiff as the case may be, in his written statement.

8A. Duty of defendant to produce documents upon which relief is claimed by him



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(1) Where a defendant bases his defence upon a document in his possession or power, he shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document or a copy thereof, to be filed with the written statement.

(2) A document which ought to be produced in Court by the defendant under this rule, but is not so produced, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(3) Nothing In this rule shall apply to documents produced,-

(a) For the cross-examination of the plaintiff's witnesses, or

(b) In answer to any case set up by the plaintiff subsequent to the filing of the plaint, or

(c) Handed over to a witness merely to refresh him memory.

e) ORDER XI : DISCOVERY AND INSPECTION

1. Discovery by interrogatories

In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer : Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose : Provided also that interrogatories which do not relate to any matters in question in the suit be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

2. Particular interrogatories to be submitted

On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall



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take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

3. Costs of interrogatories

In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatious, or at improper length, the cost occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

4. Form of interrogatories

Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

5. Corporations

Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

6. Objections to interrogatories by answer

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



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7. Setting aside and striking out interrogatories

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

8. Affidavit in answer, filing

Interrogatories shall be answered by affidavit to be filed within ten days or within such other time as the Court may allow.

9. Form of affidavit in answer

An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

10. No exception to be taken

No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

11. Order to answer or answer further

Where any person interrogated omits to answer, or answer insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by viva voce examination as the Court may direct.

12. Application for discovery of documents

Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his



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possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion be thought fit :

Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saying costs.

13. Affidavit of documents

The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

14. Production of documents

It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

15. Inspection of documents referred to in pleadings or affidavits

Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document[or who has entered any document in any list annexed to his pleadings.] or produce such document for the

inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that



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he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

16. Notice to produce

Notice to any party to produce arty documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

17. Time for inspection when notice given

The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

18. Order for inspection

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

Provided that the order shall not be made when and so far as the Court shall be of opinion that, it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his



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affidavit of documents, shall be founded upon an affidavit showing of what inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

21. Non-compliance with order for discovery

(1) Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of document, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect and [an order may be made on such application accordingly, after notice to the parties and after giving them a reasonable opportunity of being heard.]

(2) Where an order is made under sub-rule (1) dismissing any suit, the plaintiff shall be precluded from bringing a fresh suit on the same cause of action.

22. Using answers to interrogatories at trial

Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer : Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

23. Order to apply to minors

This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.



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f) ORDER IX : APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE

1. Parties to appear on day fixed in summons for defendant to appear and answer

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

2. Dismissal of suit where summons not served in consequence of plaintiffs failure to pay costs

Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee of postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed

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

3. Where neither party appears, suit to be dismissed

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

4. Plaintiff may bring fresh suit or Court may restore suit to file

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



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

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

(a) he has failed after using his best endeavors to discover the residence of the defendant, who has not been served, or

(b) Such defendant is avoiding service of process, or

(c) There is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.]

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

6. Procedure when only plaintiff appears

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

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

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



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(c) When summons served but not in due time- if it is proved that the summons was served on the defendant, but not in sufficient time to enable him, to appear and answer on the day fixed in the summons,

the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

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

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

8. Procedure where defendant only appears

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

9. Decree against plaintiff by default bars fresh suit

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



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aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

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

10. Procedure in case of non-attendance of one or more of several plaintiff's

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

11. Procedure in case of non-attendance of one or more of several defendants

Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person

Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively who do not appear.

Setting aside decrees ex parte

13. Setting aside decree ex parte against defendant

In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the



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summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

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

14. No decree to be set aside without notice to opposite party

No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

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g) ORDER XIV : SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

1. Framing of issues

(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) 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.

(3) Each material proposition affirmed by one-party and denied by the other shall form the subject of distinct issue.



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(4) Issues are of two kinds:

- (a) Issues of fact,
- (b) Issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

2. Court to pronounce judgment on all issues

(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

- (a) The jurisdiction of the Court, or
- (b) A bar to the suit created by any law for the time being in force,

And for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.]

3. Materials from which issues may be framed



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The Court may frame the 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 made by the pleaders of such parties;
- (b) Allegations made in the pleadings or in answers to interrogatories delivered in the suit;
- (c) The contents of documents produced by either party.

4. Court may examine witnesses or documents before framing issues

Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

5. Power to amend and strike out, issues

(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

6. Questions of fact or law may by agreement be stated in form of issues

Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,-



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(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that are of them be declared entitled to some right or subject some liability specified in the agreement:

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) One or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment

Where the Court is satisfied, after making such inquiry as it deems proper,-

- (a) That the agreement was duly executed by the parties;
- (b) That they have a substantial interest in the decision of such question as aforesaid, and
- (c) That the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced a decree shall follow.

UNIT-III

INTERIM ORDERS

a) ORDER XXVI : COMMISSIONS



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Commissions to examine witnesses

1. Cases in which Court may issue commission to examine witness

Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it: Provided that a commission for examination on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

Explanation.-The Court may, for the purpose of this rule, accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person, without calling the medical, practitioner as a witness.]

2. Order for commission

An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

3. Where witness resides within Court's jurisdiction

A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

4. Persons for whose examination commission may issue

(1) Any Court may in any suit issue a commission [for the examination on interrogatories or otherwise of-]

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



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

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

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

5. Commission or request to examine witness not within India

Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within [India] is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

6. Court to examine witness pursuant to Commission

Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

7. Return of commission with depositions of witnesses

Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the returned thereto and the evidence taken under it shall [(subject to the provisions of rule 8)] from part of the record of the suit.

8. When depositions may be read in evidence



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Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same 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 the circumstances mentioned in clause (a) and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Commissions for local investigations

9. Commissions to make local investigations

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. Procedure of Commissioner

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.



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(2) Report and depositions to be evidence in suit. Commissioner may be examined in person - The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation. -

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

10A. Commission for scientific investigations

(1) 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 interests 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.

(2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.

10B. Commission for performance of a ministerial act

(1) 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 recorded, it is of opinion that it is necessary or expedient in the interests 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.

(2) The provisions of rule 10 of this Order shall apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.



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10C. Commission for the sale of movable property

(1) 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, it is of opinion that it is necessary or expedient in the interests 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.

(2) The provisions of rule 10 of this Order shall apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.

(3) Every such sale shall be held, as far as may be, in accordance with the procedure prescribed for the sale of movable property in execution of a decree.

Commissions to examine accounts

11. Commission to examine or adjust accounts

In any suit in which an examination or adjustment of the accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

12. Court to give Commissioner necessary instructions

(1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

(2) Proceedings and report to be evidence. Court may direct further inquiry-The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.



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Commissions to make partitions

13. Commission to make partition of immovable property

Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

14. Procedure of Commissioner

(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

General provisions

15. Expenses of commission to be paid into Court

Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.



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16. Powers of Commissioners

Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,-

- (a) Examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in, the matter referred to him;
- (b) Call for and examine documents and other things relevant to the subject of inquiry;
- (c) At any reasonable time enter upon or into any land or building mentioned in the order.

17 Attendance and examination of witnesses before Commissioner

(1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of ⁷[India], and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court :

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits or whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

18. Parties to appear before Commissioner

(1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.



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(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

b) ORDER XL : APPOINTMENT OF RECEIVERS

1. Appointment of receivers

(1) Where it appears to the Court to be just and convenient, the Court may by order-

- (a) Appoint a receiver of any property, whether before or after, decree;
- (b) Remove any person from the possession or custody of the property;
- (c) Commit the same to the possession, custody or management of the receiver; and

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

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

2. Remuneration

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

3. Duties

Every receiver so appointed shall



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- (a) Furnish such security (if any) as the court thinks fit, duly to account for what he shall receive in respect of the property;
- (b) Submit his accounts at such periods and in such form as the Court directs;
- (c) Pay the amount due from him as the Court directs; and
- (d) Be responsible for any loss occasioned to the property by his wilful default or gross negligence.

4. Enforcement of receiver's duties

Where a receiver-

- (a) Fails to submit his accounts at such periods and in such form as the Court directs, or
- (b) Fails to pay the amount due from him as the Court directs, or
- (c) Occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

5. When Collector may be appointed receiver

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

c) ORDER XXXVIII : ARREST BEFORE JUDGEMENT

1. Where defendant may be called upon to furnish security for appearance



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Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, 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 limit soft the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is About to leave [India] under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance. Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiffs claim; and such sum shall be held in deposit by the Court until: the suit is disposed of or until the further order of the Court.

2. Security

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



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(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

3. Procedure on application by surety to be discharged

(1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

4. Procedure where defendant fails to furnish security or find fresh security

Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied :

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

d) ORDER XXXVIII - Attachment before judgment

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

(1) 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,-



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

(b) Is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy, the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) if an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void.]

6. Attachment where cause not shown or security not furnished

(1) 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.

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

7. Mode of making attachment



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Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

8. Adjudication of claim to property attached before judgment

Where any claim is preferred to property attached before judgment, such claim shall be adjudicated upon in the manner hereinbefore provided for the adjudication of claims to property attached in execution of a decree for the payment of money.)

9. Removal of attachment when security furnished or suit dismissed

Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the cost of the attachment, or when the suit is dismissed.

10. Attachment before judgment not to affect rights of strangers, nor bar decree -holder from applying for sale

Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, or bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

11. Property attached before judgment not to be re-attached in execution of decree

Where property is under attachment by virtue of the provisions of this order and a decree is subsequently passed in favor of the plaintiff, it shall not be necessary upon. an application for execution of such decree to apply, for a re-attachment of the property.

11A. Provisions applicable to attachment

(1) The provisions of this Code applicable to an attachment made in execution of a decree shall so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of rule 11.



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(2) An attachment made before judgment in a suit which is dismissed for default shall not become revived merely by reason of the fact that the order for the dismissal, of the suit for default has been set aside and the suit has been restored.

12. Agriculture produces not attachable before judgment

Nothing in this order shall be deemed to authorize the plaintiff to apply for the attachment of any agriculture produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

13. Small Cause Court not to attach immovable property

Nothing in this order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immovable property.

d) ORDER XXXIX : TEMPORARY INJUNCTIONS

1. Cases in which temporary injunction may be granted

Where in any suit it is proved by affidavit or otherwise

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) That the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,

the Court may be order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or dispossession of the property or dispossession of the plaintiff, or otherwise causing



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

2. Injunction to restrain repetition or continuance of breach

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

(2) The Court may be order grant such injunction, on such terms as to the of the durations injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

2A. Consequence of disobedience or breach of injunction

(1) In the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time 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 and shall pay the balance, if any, to the party entitled thereto.]

3. before granting injunction, Court to direct notice to opposite party



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The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be give to the opposite party:

Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant-

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with-

(i) A copy of the affidavit filed in support of the application;

(ii) A copy of the plaint; and

(iii) Copies of documents oil which the applicant relies, and

(b) To file on the day on which such injunction is granted or on the day immediately following, that day, an affidavit stating that the copies aforesaid have been so delivered or sent.

3A. Court to dispose of application for injunction within thirty days

Where an injunction has been granted without giving notice to the opposite party, the Court shall make an Endeavour to finally dispose of the application within thirty days from the date on which the injunction was granted; and where it is unable so to do, it shall record its reasons for such inability.]

4. Order for injunction may be discharged, varied or set aside

Any order for an injunction may be discharged, or varied, or set aside by the Court, on an application thereto by any party dissatisfied with such order: Provided that if in an application for temporary injunction or in any affidavit supporting such application a party his knowingly



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made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is riot necessary so to do in the interests of justice: Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.]

5. Injunction to corporation binding on its officer

An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

e) ORDER XXXIX :NTERLOCUTORY ORDERS

6. Power to order interim sale

The Court may, on the applicator of any party to a suit, order the sale, by an person named in such order, and in such manner and on such terms as it thinks fit, of any movable property being the subject–matter of such suit or attached before judgment in such suit which is subject to speedy and natural decay, or for any other just and sufficient cause it may be desirable to have sold at once.

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

(1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,-

(a) Make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein;



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(b) For all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) For all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, mutatis mutandis, to persons authorized to enter under this: rule.

8. Application for such orders to be after notice

(1) An application by the plaintiff for an order under rule 6 or rule 7 may be made [***] at any time after institution of the suit.

(2) An application by the defendant for a like order may be made [***] at any time after appearance.

(3) Before making an order under rule 6 or rule 7 on an application made for the purpose, the Court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the opposite party.]

9. When party may be put in immediate possession of land the subject-matter of suit

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



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

10. Deposit of money, etc. in Court

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

f) ORDER XXV : SECURITY FOR COSTS

1. When security for costs may be required front plaintiff

(1) At any stage of a suit,, the Court may, either of its own motion or on the application of any defendant, order the plaintiff, for reasons to be recorded, to give within the time fixed by it security for the payment of all costs incurred and likely to be incurred by any defendant.

Provided that such an order shall be made in all cases in which it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of India and that such plaintiff does not possess or that no one of such plaintiffs possesses any sufficient immovable property within India other than the property in suit.

(2) Whoever leaves India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India within the meaning of the proviso to sub-rule (1).

2. Effect of failure to furnish security



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(1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the. Time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

UNIT-IV

SUITS IN PARTICULAR CASES

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

1. Suits by or against Government

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



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2. Persons authorized to act for Government

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

3. Plaints in suits by or against Government.

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

4. Agent for Government to receive process

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

5. Fixing of day for appearance on behalf of Government

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

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

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

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



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(1) In every suit or proceeding to which the Government, or a public officer acting in his official capacity, is a party, it shall be the duty of the Court to make, in the first instance, every endeavour, where it is possible to do so consistently with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage, it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit, to enable attempts to be made to effect such a settlement.

(3) The power conferred under sub-rule (2) is in addition to any other power of the Court to adjourn proceedings.]

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

The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of [the Government] who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

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

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

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

8. Procedure in suits against public officer

(1) Where the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint,



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shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

(2) Where no application under sub-rule (1) is made by the [Government pleader] on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties: Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

B) ORDER XXXIII : SUITS BY INDIGENT PERSONS

1. Suits may be instituted by indigent person-

Subject to the following provisions, any suit may be instituted by an indigent person.

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

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

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

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

1A. Inquiry into the means of an indigent person-



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Every inquiry into the question whether or not a person is an indigent person shall be made, in the first instance, by the chief ministerial officer of the Court, unless the Court otherwise directs, and the Court may adopt the report of such officer as its own finding or may itself make an inquiry into the question.]

2. Contents of application-

Every application for permission to sue as an [indigent person] shall contain the particulars required in regard to plaints in suits: a schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

3. Presentation of application-

Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person:

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

4. Examination of applicants-

(1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

(2) If presented by agent, Court may order applicant to be examined by commission - Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant



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be examined by a commission in the manner in which the examination of an absent witness may be taken.

5. Rejection of application-

The Court shall reject an application for permission to sue as [an indigent person]-

(a) Where it is not framed and presented in the manner prescribed by rules 2 and 3, or

(b) Where the applicant is not an [indigent person], or

(c) Where he has, within two months next before the presentation of the application disposed of any property fraudulently or in order to be able to apply for permission to sue as [an indigent person]:

[Provided that no application shall be rejected if, even after the value of the property disposed of by the applicant is taken into account, the applicant would be entitled to sue as an indigent person,] or

(d) Where his allegations do not show a cause of action, or

(e) Where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter, [or]

[(f) Where the allegations made by the applicant in the application show that the suit would be barred by any law for the time being in force, or

(g) Where any other person has entered into an agreement with him to finance the litigation].

6. Notice of day for receiving evidence of applicant's indigency-



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Where the Court sees no reason to the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten day's clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the application may adduce in proof of his indecency, and for hearing any evidence which may be adduced in disproof thereof.

7. Procedure at hearing-

(1) On the day so fixed or as soon thereafter as may be convenient the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make [a full record of their evidence].

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as an indigent person.

8. Procedure if application admitted-

Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee [or fees payable for service of process] in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

9. Withdrawal of permission to sue as an indigent person-

The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order that the permission granted to the plaintiff to sue as an indigent person be withdrawn-

(a) if he is guilty of vexatious or improper conduct in the course of the suit;



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(b) If it appears that his means are such that he ought not to continue to sue as [an indigent person]; or

(c) If he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained. An interest in such subject-matter.

9A. Court to assign a pleader to an unrepresented indigent person-

(1) Where a person, who is permitted to sue as an indigent person, is not represented by a pleader, the Court may, if the circumstances of the case so require, assign a pleader to him.

(2) The High Court may, with the previous approval of the State Government, make rules providing for-

(a) The mode of selecting pleaders to be assigned under sub-rule (1);

(b) The facilities to be provided to such pleaders by the Court;

(c) Any other matter which is required to be or may be provided by the rules for giving effect to the provisions of sub-rule (1).

10. Costs where indigent person succeeds-

Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as an [indigent person]; such amount shall be recoverable by the [State Government] from any party ordered by the decree to pay the same and shall be a first charge on the subject-matter of the suit.

11. Procedure where Indigent person fails-

Where the plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed,-



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(a) Because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service [or to present copies of the plaint or concise statement], or

(b) Because the plaintiff does not appear when the suit is called on for hearing,

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

12. State Government may apply for payment of court-fees-

The State Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10, rule 11 or rule 11.

13. State Government to be deemed a party-

All matters arising between the State Government and any party to the suit under rule 10, rule 11, rule 11 A or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

14. Recovery of amount of court-fees-

Where an order is made under rule 10, rule 11 or rule 11A, the court shall forthwith cause a copy of the decree or order to be forwarded to the Collector who may, without prejudice to any other mode of recovery, recover the amount of court-fees specified therein from the person or property liable for the payment as if it were an arrear of land revenue.]

An order refusing to allow the applicant to sue as an indigent person shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right.

16. Costs-

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

17. Defence by an indigent person-

Any defendant, who desire to plead a set-off or counter-claim, may be allowed to set up such claim as an indigent person, and the rules contained in this Order shall so far as may be, apply to him as if he were a plaintiff and his written statement were a plaint.

18. Power of Government to provide for free legal services to indigent person-

(1) Subject to the provisions of this Order, the Central or State Government may make such supplementary provisions as it thinks fit for providing free legal services to those who have been permitted to sue as indigent persons.

(2) The High Court may, with the previous approval of the State Government, make rules for carrying out the supplementary provisions made by the Central or State Government for providing free legal services to indigent persons referred to in sub-rule (1), and such rules may include the nature and extent of such legal services, the conditions under which they may be made available, the matters in respect of which, and the agencies through which, such services may be rendered.]

C) ORDER XXXV : INTERPLEADER

1. Plaint in interpleader-suit-

In every suit of interpleader the plaintiff shall, in addition to the other statements necessary for plaints, state-

(a) That the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs;

(b) The claims made by the defendants severally; and



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(c) That there is no collusion between the plaintiff and any of the defendants.

2. Payment of thing claimed into Court-

Where the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.

3. Procedure where defendant is suing plaintiff-

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

4. Procedure at first hearing-

(1) At the first hearing the Court may-

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct-



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(a) That an issue or issues between the parties be framed and tried, and

(b) That any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner.

5. Agents and tenants may not institute interpleader suits-

Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Illustrations

(a) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader-suit against A and C.

(b) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader-suit against A and C.

6. Charge for plaintiff's costs-

Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way.

e) ORDER XXXVII : SUMMARY PROCEDURE

1. Court and classes of suits to which the Order is to apply



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(1) This Order shall apply to the following Courts, namely :-

(a) High Courts, City Civil Courts and Courts of Small Causes: and

(b) Other Courts:

Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:-

(a) Suits upon bills of exchange, hundies and Promissory notes:

(b) Suits in which the plaintiff seeks only to recover a debt or liquidated demand in money 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 in the nature of a debt other than a penalty; or

(iii) On a guarantee, Where the claim against the principal is in respect of a debt or liquidated demand only.]

2. Institution of summary suits

(1) A suit, to which this Order applies, may if the plaintiff proceeds to desires hereunder, be instituted by presenting a plaint which shall contain,-



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(a) a specific averment to the effect that the suit is filed under this Order;

(b) that no relief, which does not fall within the ambit of this rule; has been claimed in the plaint; and

(c) the following inscription, immediately below the number of the suit in the title of the suit, namely :-

"(Under Order XXXVII of the Code of Civil Procedure, 1908)."

(2) The summons of the suit shall be in Form No. 4 in Appendix B or in such other Form as may, from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.]

3. Procedure for the appearance of defendant

(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexure thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself,



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either by. notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) if the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgement in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgement, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall 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 up by the defendant is frivolous vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgement,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the



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Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) 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.]

4. Power to set aside decree

After decree the Court may, under special circumstances set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

5. Power to order bill, etc., to be deposited with officer of Court

In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

6 Recovery of cost of noting non-acceptance of dishonored bill or note

The holder of every dishonored bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonor, as he has under this Order for the recovery of the amount of such bill or note.

7. Procedure in suits

Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

e) **Public nuisances.-**

Section-91



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Public nuisance derives support from section 91 of CPC that lays down the procedure for initiation of a civil suit for the offense of public nuisance. Being purely procedural, the section gives the flexibility of seeking parallel remedies in criminal jurisdiction or damages under law of torts. The marginal note of section 91 reads: public nuisance and other wrongful acts affecting the public. Inclusion of 'other wrongful acts affecting public' besides public nuisance widens the scope of the section to incorporate various situations which although do not fall under the accepted straitjacket definitions of nuisance, yet are a cause of discomfort and inconvenience to the public. For instance, courts have read slaughtering of cattle on a public street or encroachment upon a public street by construction of buildings as legitimate cause of action for a claim for public nuisance by the virtue of it being a wrongful act against public.

Section 91 of CPC states that

(1) In the case of a public nuisance the Advocate General or two or more persons having obtained the consent in writing of the Advocate General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

As per the General Clauses Act 1897, the definition of nuisance for the purpose of section 91, CPC has to be borrowed from section 268 IPC. The definition of nuisance excludes from its ambit the instances of legalized nuisance. Legalized nuisance are cases when the nuisance cause is statutorily approved and in the interest of greater good and social welfare. For instance, the running of railway engines and trains or establishment of the yard, despite being a legitimate cause of nuisance, is not punishable under IPC or a valid ground for invoking Section 91.

Though much hasn't been said about the inclusion of clause 1 in section 91, it is believed that inclusion of the Advocate General as the initiator of the suit for public nuisance was to act as a safety check arrangement to the expansive and broad definition of nuisance and the subjectivity of 'wrongful acts against the public'. Later, by the 1976 amendment, the provision of two or more persons filing a suit for public nuisance with the consent of the advocate general was added



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to section 91. Such active involvement of the Advocate General in public nuisance suits was to ensure that suits are not initiated with malicious intentions, with the sole purpose of creating impediments for the party alleged with causing nuisance. This rule however does not extend to representative cases when a member of the community whose rights are being restricted by the act of public nuisance files the claim. In such suits, the leave of the court is not necessary. Even in cases when certain rights are provided to the entire community, but immediate damage by the nuisance occurs to an individual, leave of court is not mandatory.

Clause 2 of Section 91 permits the existence of a parallel suit for the same cause of action in criminal jurisdiction through a PIL or as a civil suit for private claims. It also allows an individual aggravated by the nuisance to file for damages his individual suit. This is primarily so because section 91 in its entirety does not create any rights or deprive anyone of their existing rights. It merely states the procedural guidelines for instituting a civil suit when the cause of action is public nuisance. Consequently, it does not control representative suits under order I, rule 8 or modify the right of a person to sue apart from the provision of this section. This means that if a group initiates a suit for declaration of a particular right, it does not fall under the category of suit for public nuisance and hence mandates the prior approval of the advocate general. However, the existence of such right is a necessary prerequisite. For instance, a suit against a religious procession is maintainable under Section 91 only if the infringement of some right and even if the consequent damage caused is not proved. Similarly, member of the public can maintain a suit for removal of obstruction of a public highway, if his right of passage through it is obstructed, without proof of special damage.

3. Remedies In Cases Of Public Nuisance

As mentioned above, section 91, clause 2 permits the concomitant existence of individual as well as suits under other laws for relief for public nuisance. Since public nuisance is an offence both in civil and criminal jurisprudence, the reliefs range from punitive to pecuniary (generally in case of private claims). In public nuisance cases, the most common relief is the injunction order for continuing the act causing nuisance or an order for removal of the cause by the magistrate. Therefore, the remedies for public nuisance are:



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1. Criminal Prosecution under such section of chapter XIV of the Indian Penal Code as may be applicable to the case.

Sections 269 to section 291 enlist provisions for punitive remedies with imprisonment, fine or both. For attracting provisions of chapter XIV, it is not necessary that the annoyance should injuriously affect every single member of the public within the range of operation, it is sufficient that nuisance disturbs the people living in the vicinity.

2. Removal of nuisance or stopping the nuisance-causing activity by the orders of the magistrate under section 143 and 133, CrPC.

Section 133 of CrPC allows the magistrate to order removal of the nuisance causing agent or activity from the locality provided that he is satisfied that the nuisance affects or injures number of people enough to attribute 'public nature' to the right being violated, the dispute is not of private nature, between two members or groups of public or the dispute is a case of emergency or imminent danger to public interest as in cases of pollution by industries.

3. Action under this section by the Advocate General, or two or more persons with the leave of the Court where a declaration or injunction or some other appropriate relief is desired to put an end to a public nuisance.

This is when the remedy is sought under section 91 of the CPC where a suit is filed either by the advocate general himself or by two or more people in representative capacity with the prior consent of the advocate general or the leave of the court. The reliefs available to the parties in such cases are temporary or intermittent injunction if the injury complained of is either irreparable or continuous. Even if no substantial damage is caused by the act, injunction can be granted if the nature of nuisance-causing act is such that it can obstruct public rights in future. Declaration of can also be sought as a remedy.

4. Action by a private individual, where he has sustained some extraordinary damage by it.



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As mentioned in part I(A), the distinction between private and public nuisance collapses in cases where an individual is caused damage by the act of nuisance which prima facie violates a public right. In such a case, invoking clause 2 of section 91, an individual can file a claim for damages or injunctions for violation for some right without prior consent of the Advocate General or the leave of the Court if there is sufficient proof of violation of his some of his or her existing rights. As per the amended provision, no such sanction is required and independent locus is conferred on every person aggrieved by public nuisance or wrongful act to file a suit for declaration or injunction. For instance, if the petitioner's land that is used by everyone in the village(public right) as a passage is dug for making a channel by the authorities, a sufficient cause of action for initiating a suit under clause 2 of article 91 is created. Apart from this section no individual can maintain an action against another for a relief against public nuisance except on proof of special damage.

Besides civil suits and criminal cases, another way of realizing these remedies is through the instrument of public interest litigations or PILs. In the last two and a half decades, PILs have emerged as a striking balance of citizen-consciousness and judicial activism to work for the welfare of all. The next section of this paper aims to trace the history of PILs in India and their use to check public nuisance detrimental to the environment.

Text books / Compulsory Readings (Latest editions only):

1. Code of Civil Procedure, 1908 (Relevant Provisions)
2. C.K. Takwani, Code of Civil Procedure
3. Mulla – Code of Civil Procedure
4. Sarkar's Code of Civil Procedure



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