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CIVIL PROCEDURE CODE

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By
V.R.Sangale
(Asst. Prof.)
B.A, LL.M. SET (Law)

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Module 01

Preliminary, Institution of Suits, Bar to Jurisdiction, Maintainability:

Introduction:

The Civil Procedure Code was passed in 1908 and came into force from 1st January 1909. The Civil Procedure Code neither creates nor takes away any right. It is intended to regulate the procedures followed by the civil court.Law is divided into two parts,1. Procedural law 2,sunstantive law. The 'Code of Civil Procedure' is a procedure law, i.e., an adjective law. The Code neither creates nor takes away any right. It only helps in proving or implementing the 'Substantive Law'. The Code contains 158 Sections and 51 Orders. The object of the Code is to consolidate (all the laws relating to the procedure to be adopted by the Civil Courts) and amend the law relating to the procedure of Courts of Civil Procedure. The

procedural laws are always retrospective in operation unless there are good reasons to the contrary. The reason is that no one can have a vested right in forms of procedure. The Code of Civil Procedure is not retrospective in operation.- The Code is not exhaustive.

History of the Code

Before 1859, there was no uniform civil procedure applicable for the entire country. Sir Charles Wood was responsible, then President of the Board for the affairs of India instructed the Second Law Commission to prepare a simple code for applicability in all Indian courts. Although it was not applicable in Presidency Supreme Courts and Presidency Small Cause Courts. This code had several issues and was amended and reacted in 1877. Another amendment was made in 1892. There existed a conflict of judicial opinion and interpretation of certain procedures of the Code.

In 1908, with the assent of the Governor-General, The Code of Civil Procedure of 1908 was implemented. The Civil Procedure Code has been amended several times to meet the needs and requirements which are dynamic and changing from time to time. Between 1909 to 1976, the Code has been amended for more than 30 times.

Two important amendments were made in 1951 and 1956. Despite there being some defects in it, the Code was enforced satisfactorily. The Law Commission submitted several reports with the requirement of what changes should be made while keeping in mind the following necessities –

1. The procedure must not be complex and must allow a fair deal to economically weaker sections of the society.
2. A litigant must get a fair trial in accordance with the accepted principles of natural justice.

In 2002, several considerable changes were made to the CPC of which some of the changes are listed below –

1. Number of adjournments to be restricted
2. Provision for outside of court settlement to be introduced
3. Provision for recording evidence by Court commissioner has been made
4. A provision is made for the filing of an appeal in the court where the decree has been passed.

DEFINITIONS

Section-2(2) "**Decree**" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either Preliminary or final.
It shall be deemed to include the rejection of a plaint and the determination of any question within Section-144,
but shall not include:-
a) any adjudication from which an appeal lies as an appeal from an order, or
b) any order for dismissal for default.

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

Decree [Section-2 (2)] and Order [Section-2 (14)]
Essential Elements of a decree:
The decision of a Court can be termed as a "decree" upon the satisfaction of the following elements:-
I. There must be an adjudication
II. Such adjudication must have been given in a suit
III. It must have determined the rights of the parties with regard to all or any of the matter in controversy in the suit.
IV. Such determination must be of a conclusive nature and
V. There must be formal expression of such adjudication.

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

b) **In a Suit:** Suit means a Civil proceeding instituted by the presentation of a Plaint. Thus, every suit is instituted by the presentation of Plaint. Where there is no Civil suit, there is no decree; e.g., Rejection of an application for leave to sue in forma pauper is is not a decree, because there cannot be a plaint in such case until the application is granted.
Exception: But where in an enactment specific provisions have been made to treat the applications as suits, then they are statutory suits and the decision given thereunder are, therefore, decrees;
e.g.,
proceeding under the Indian Succession Act, the Hindu Marriage Act, the Land Acquisition Act, the Arbitration Act, etc.

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

"Rights of the parties" under section 2(2).
The rights of the parties inter se (between the parties) relating to status, limitation, jurisdictions, frame of suit. accounts, etc.

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

d) Conclusive Determination:
The determination must be final and conclusive as regards the Court, which passes it.
An interlocutory order which does not finally decide the rights of the parties is not a decree; e.g., An order refusing an adjournment, or of striking out defence of a tenant under the relevant Rent Act, or an order passed by the appellate Court under Order 41, rule 23 to decide some issues and remitting other issues to the trial Court for determination are not decrees because they do not decide the rights of the parties conclusively.

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

Classes/ Types of Decrees

Decree
Preliminary Decree Final Decree Partly Preliminary & Partly Final Decree
I. Preliminary Decree:
Where an adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit, but does not completely dispose of the suit, it is a ***Preliminary Decree.***
A preliminary decree is only a stage in working out the rights of the parties, which are to be finally adjudicated by a final decree.

II. Final Decree :
A decree may be final in two ways-
a. When no appeal is filled against the decree within the prescribed period or the matter has been decided by the decree of the highest Court;
b. When the decree so far as regards the Court passing it, completely dispose of the suit.
"A final decree is one which completely disposes of the suit and finally settles all the questions in controversy between the patties and nothing further remains to be decided thereafter.
Under the special circumstances, more than one final decrees can be passed in the same suit, e.g.
Where two or more causes of actions are joined together, there can be more than one final decree.

III.Partly Preliminary and Partly Final Decree: For example, in a suit for possession of immoveable property with mesnes profits, the Court-
a) decrees possession of the property, and
b) directs an enquiry into the mesne profits.

The former part of the decree is finally while the later part is only preliminary because the Final Decree for mesne profits can be drawn only after enquiry and ascertainment of the due amount. In such a case, even though the decree is only one, it is Partly Preliminary and Partly Final.

Order: Section -2 (14)
An order means the formal expression of any decision of a Civil Court which is not a decree. The adjudication of a court of law may be either Decree or Order; and cannot be both.
Difference Between Decree and Order
Decree Order Basic of Distinction
1. Origin A decree can only be passed in a suit which commenced by presentation of plaint.
An order may originate from a suit, by presentation of a plaint or may arise from a proceeding commenced by a petition or an application.
2(3) "Decree-Holder"
means any person in whose favour a decree has been passed or an order capable of execution has been made.

2(5) "Foreign Court"
means a Court situate outside India and not established or continued by the authority of the Central Government;

2(6) "Foreign Judgment"
means the judgment of a foreign Court;

2(8) "Judge"
Means the presiding officer of a Civil Court;
2(9) "Judgment"
means the statement given by the Judge on the grounds of a decree or order.
2(10) "Judgment-Debtor"
means any person against whom a decree has been passed or an order capable of execution has been made.

2(11) "Legal Representative"
means a person who in law represents the estate of a deceased person, and includes any person who intermediates with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

2(12) "Mesne Profits"
of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession; The owner of property or any other person who is entitled to have possession of property has a right to the possession of his property and when such person is deprived of such a right by any other person, person, then he is entitled not only to receive back possession of that property but also to damages for wrongful possession from that person.
"Mesne Profits" of property means those profits which the person in wrongful possession of such property actually received therefrom, together with interest on such profits,

But shall not include
profits due to improvements made by the person in wrongful possession.
The mesne profits are compensation, which is penal in nature.

A decree for mesne profits is to compensate the person who has been kept out of possession even though he was entitled to possession thereof.

The person against whom Mesne profits can be claimed

1. The mesne profits can be claimed with regard to immoveable property only. Generally, person in wrongful possession and enjoyment of immoveable property is liable for mesne profits.
2. A decree for mesne profit can be passed against
   a)a tresspasser or a person against whom a decree for possession is passed, or
   b)against a mortgagee in possession of property even after a decree for redemption is passed or
   c)against a tenant holding over at will after a notice to quit has been served him.

To ascertain and provide mesne profits it is not what the plaintiff has lost by being out of possession but what the defendant gained or might reasonably and with ordinary prudence have gained by such wrongful

possession. Since interest is an integral part of mesne profits, it has to be allowed in the computation of mesne profits itself.

2(14) "order"
means the formal expression of any decision of a Civil Court which is not a decree;
2(16) "prescribed"
means prescribed by rules;
2(18) "rules"
means rules and forms contained .in the First Schedule or made under section 122 or section 125.
SUITS OF CIVIL NATURE

Meaning: Jurisdiction means power of a Court to hear and decide a case. Jurisdiction of a Court means the power or the extent of the authority of a Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it. The Jurisdiction of a Court means the extent of the authority of a Court to administer justice prescribed with reference to the subject matter, pecuniary value or local limits.

Lack of and illegal exercise of jurisdiction:
"A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed." A decree passed in the inherent lack of jurisdiction, is a nullity, and that nullity can be set up in any collateral proceedings. But in case, the Court has jurisdiction but it is irregularly exercised, the error can e remedied with the help of procedures prescribed by law for setting that error right i.e. in appeal or revision and when there is no such remedy or not availed of, the decision is final. Where the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.

Decision as to jurisdiction:
Whenever the jurisdiction of the Court is challenged, the Court has inherent jurisdiction to decide the said question. The allegations made in plaint decide the forum and e jurisdiction does not depend upon the defence taken by the defendants in the Written Statement.

Kinds of jurisdiction:
Jurisdiction of a Court may be classified into the following four categories-
i. Territorial jurisdiction or Local jurisdiction:
Each Court has vested power to exercise jurisdiction within its own territorial or local limits beyond which it cannot go.
ii. Pecuniary jurisdiction:
The term 'Pecuniary jurisdiction' connotes the value of the subject matter of the suit. The High Courts and District Courts have no pecuniary limitation but the other Courts have no such unlimited pecuniary jurisdiction.
iii. Jurisdiction as to subject matter of dispute:
The different Courts have power to decide different kinds of suit, like the Family Courts have jurisdiction to decide the suits/disputes relating to the matrimonial matters.
iv. Original and appellate jurisdiction:
In its original jurisdiction, a Court entertains and adjudicates suits while in its appellate jurisdiction a Court decides appeals.

Suit of Civil Nature

Introduction: A litigant having a grievance of a civil nat.ure has a right to institute a civil suit in a civil Court competent to hear and decide the matter unless its cognizance is either expressly or impliedly barred by any statute. It is a fundamental principle of English law that whenever there is a right, there is a remedy.

Meaning: According to S.9 a Civil Court has jurisdiction to try a suit, when the following two conditions are satisfied:

i. the suit is of a Civil nature, and

ii. the cognizance of such a suit is neither expressly nor impliedly barred.

The word "civil" has not been defined in the Code. The word "civil" means "pertaining to the private rights and remedies of a citizen as distinguished from Criminal, political, etc." The expression "Civil Nature" is wider than the expression "Civil Proceedings". Thus a suit is of a civil nature if the private question therein relates to the determination of a civil right and enforcement thereof. It is not the status of parties to the "suit, but the subject matter of it which determines whether or not the suit is one of a civil nature.

The expression is "suit of a civil nature will cover private rights and obligations of a citizen. Political and religious questions are not covered by that expression."

Explanation- 1 of S,9 says that a suit in which the right to property or to an office is contested is a suit of a Civil Nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Illustrations of suits of a civil nature:

The followings are the illustrations of the suits of a 'Civil Nature'-

Suits relating to right to property, right to worship, taking out of religious procession, right to share in offerings, suits for damages for civil wrong, for breach of contract, for a specific relief, for restitution of conjugal rights, for dissolution of marriage, for rent. for or on accounts; etc., etc.

Following are not suits of a civil nature:-

Suits involving principally caste questions, purely religious rights or ceremonies, for upholding mere dignity or honour or for recovery of voluntarily payments or offerings.

Cognizance not barred:

Court to try all civil suits unless barred-

'The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."17 The cognizance of a suit may be barred either expressly or impliedly.

a. Suits expressly barred:

A suit is said to be "expressly barred" when it is barred by any enactment for the time being in force by a competent Legislature, while keeping itself within the field of legislation and without contravening any provision of the constitution. Every presumption should be made in favour of the jurisdiction of the Civil Court and the provisions of the exclusion of the jurisdiction of a Court must be strictly construed. It is well settled that a civil court has inherent power to decide its own jurisdiction.

The matters falling within the exclusive jurisdiction of the Revenue Courts or under the Criminal Procedure Code or the matters dealt with by special tribunals, under the relevant statutes; eg., Bar Council, Medical Council, University, etc., are expressly barred from the cognizance of a civil court.

b. Suits impliedly barred:

A suit is said to be "impliedly barred" when it is barred by general principle of law. Where an Act creates an obligation and enforces the performance in a specified manner, that

performance cannot be enforced in any other manner, e.g., certain suits of a civil nature are barred from the cognizance of a Civil Court on the grounds of public policy. Thus, no suit shall lie for recovery of costs incurred in Criminal prosecution or for enforcement of a right upon a contract hit by Section 23 of Indian Contract Act, 1872 or against any Judge for acts done in the course of his duties. A Civil court has no jurisdiction to adjudicate upon disputes of political nature.

Exclusion of jurisdiction of civil court

The jurisdiction of a civil court is ambiguous except to the extent it is excluded by law or arising from such law.

In a landmark judgement of Dhulabhai v. State of M.P (AIR 1969 SC 78)

Chief Justice Hidayatullah summarised the following principles relating to the exclusion of jurisdiction of civil courts:

- When a tribunal is constituted through a special enactment, the jurisdiction of civil court's must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of a particular Act have not been complied with or the statutory tribunal has not acted in conformity with fundamental principles of judicial procedure.
- Where there is an express bar of jurisdiction of a court, an examination of the provisions of a specific Act to find the adequacy or sufficiency of the remedies provided might be relevant however this isn't decisive for supporting the jurisdiction of a civil court.
- Challenge to the provisions of a specific Act as ultra vires can't be brought before tribunals constituted under that Act. Indeed, even the High Court can't go into that question on a revision or reference from decisions of tribunals.
- When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit can be filed. A writ of certiorari may incorporate a course for a refund if the case is within the time recommended by the Limitation Act however it's compulsory but a necessary solution for supplanting a suit.
- Where the specific Act contains no machinery for a refund of tax collected in excess of constitutional limits or is illegally collected, a suit lies.
- Questions of the accuracy of an assessment, apart from its constitutionality, are for the decision of the authorities and civil suit doesn't lie if the orders of the authorities are pronounced to be conclusive or there is an express prohibition in a specific Act. In either case, the provisions of a specific Act must be examined for relevant enquiry.
- The exclusion of the jurisdiction of a civil court isn't ready to be derived unless the conditions above set down apply.
- If a dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act, the remedy lies only in a civil court.
- If a dispute is an industrial dispute emerging out of a right or liability under the general or common law and not under the Act, the jurisdiction of a civil court is alternative, leaving it to the election of a suitor or person concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.
- If an industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to a suitor is to get an adjudication under the Act.
- If the right which is sought to be enforced is a right created under the Act such as Chapter V-A then the remedy for its enforcement is either Section 33-C or the raising of an industrial dispute, as the case may be.

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RES SUB JUDICE AND RES-JUDICATA

Res Sub Judice (Stay of Suit)
Section-10: Provides
No court shall proceed with the trial' of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any other Court beyond the limits of India established or constituted by the Central Government and having like jurisdiction or before he Supreme Court."

Explanation: The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.
Object: The object of S.1 0 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The section intends to prevent a person from multiplicity of proceedings and to avoid a conflict of decisions.

Conditions:
This section will apply where the following conditions are satisfied:

1) Presence of Two Suits:
Where there are two suits, one previously instituted and the other subsequently instituted.
2) Matter in Issue:
The matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit.
3) Same Parties:
Both the suits must be between the same parties or between their representatives.
4) Pendency of Suit:
The previously instituted suit must be pending:-
a. in the same Court in which the subsequent suit is brought, or
b. in any other Court in India, or
c. in any Court beyond the limits of India established or empowered by the Central Government, or
d. before the Supreme Court.
e. **Jurisdiction:**
The Court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit.

f. **Same Title:**
Such parties must be litigating under the same title in both the suits.
Decree passed in contravention of S.10: It is the trial and not the institution of the subsequent suit which is barred under this section and therefore, a decree passed in contravention of S.10 is not a nullity, and the same can be executed.

Res-Judicata

Meaning:

"Res-judicata" consists of two Latin Words, 'Res' means a thing or a matter or a question and 'Judicata' means adjudicated, adjudged or decided. Therefore, the expression 'Res-judicata" means "a thing or matter already adjudged or adjudicated or decided".

Res-judicata means "a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto."

The principal of Res judicata is based on the need of giving finality to judicial decisions. When a matter-whether on a question of fact or a question of Law-has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.

Section 11:"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

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

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

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

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

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

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

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

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

Object :

The doctrine of Res Judicata is based upon the following four maxims-

a. Nemo debet lis vexari pro una et eadem causa***:***
no man should be vexed twice over for the same cause;

b. Interest republicae ut sit finis Iitium***:***
it is in the interest of the State that there should be an end to a litigation;

c. Res judicata pro veritate occipitur: an judicial decision must be accepted as correct.

d. Res judicata pro veritate habetur: an adjudicated matter shall be deemed correct.

To understand the doctrine of Res-judicata, it is essential to know the meaning of the following terms-
Matters in Issue: The expression 'matter in issue' means the right litigated between the parties. The matters in issue may be

Directly and substantially in issue:
"A matter is 'directly and substantially in issue' if it is necessary to decide it in order to adjudicate the principal issue and if the judgment is based upon at decision."
Directly:
A matter cannot be said to be directly in issue if the judgment stands whether the fact exists or does not exist.
Substantially:
means essentially, materially or in a substantial manner. A matter can be said to be substantially in issue if it is of importance for the decision of a case.
In order that a matter decided in a former suit may operate as res judicata in a subsequent suit, it must have been directly and subsequently in issue in the former suit.
Actually in issue***:***
A matter is actually in issue when it is in issue directly and substantially and a competent Court decides it on merit. A matter is actually in issue when it is alleged by one party and denied or admitted by the other
Constructively in issue ***:***
A matter can be said be constructively in issue when it "might and ought" to have been made a ground of defence or attack in the former suit. A. matter is constructively in issue when it might and ought to have been made a ground of defence or attack in the former suit.

Collaterally or incidentally in issue:"A matter is 'collaterally or incidentally in issue' if it is necessary to decide it in order to grant relief to a plaintiff or to a defendant and the decision on such issue either way does not affect the final judgment.
A collateral or incidental issue means an issue which is ancillary to the direct and substantive issue. It refers to a matter in respect of which no relief is claimed and yet it is put in issue to enable the Court to adjudicate upon the matter which is directly and substantially in issue. Decisions on the matters collateral and incidental to the main issues in the case will not operate as res-judicata.

To constitute a matter as Res judicata U/s 11, the following conditions must be satisfied -
a. **Matter in Issue :** The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.
b. Same Parties: The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.
c. Same Title: Such parties must have been litigating under the same title in the former suit.
d. Competent Court: The court which decides of the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequent raised.
e. Final decision of former suit: The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit.
Constructive **Res-Judicata**

The doctrine of constructive Res-judicata is provided in the Explanation IV of section 11 which explains that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter has been actually controverted and decided. The object of Expl. IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence which were open to him.

The rule of Constructive res judicata is an artificial form of res judicata, and provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject matter.

The principle underlying Expl. IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it can not be said to have beer actually heard and decided. It could only be deemed to have been heard and decided.

lIIustrations

1. A files a suit against B for declaration that he is entitled to certain lands as heir of C. The suit is dismissed.
The subsequent suit, claiming the same property on the ground of adverse possession, is barred by constructive res judicata.
2. A files a suit against B to recover money on a pro-note. B contends that the promissory note was obtained from him by undue influence. The objection is overruled and suit is decreed. B cannot challenge the promissory note on the ground of coercion or fraud on subsequent suit, in as much as he ought to have taken that defence in the former suit.
3. As a mortgagor A sues B for redemption of certain property alleging that he has mortgaged it with possession to B. The mortgage is not proved and the suit is dismissed. A files another suit against B for possession of the same property claiming to be the owner thereof. The suit is not barred.
4. A sues B for a declaration that he is entitled to certain property as an heir of X. The suit is dismissed. A files another suit for injunctions on the ground that he had become an owner of the property by adverse possession. This ground was available to him even at the time of previous suit but was not taken at that time. The subsequent suit is barred.

Section 11 is not exhaustive

It has been held in ***Lal Chand Vs Radha Kishan A IRs. 1977 S C 789 by Chandrachud, J.*** that . Section 11 is not exhaustive and the principle which motivates that section can be extended to cases which do not fall strictly within the letter of Law. The principle of res judicata is convinced in the larger public interest, which requires that all litigation must, sooner than later, come to an end.

Waiver of Plea of res-judicata:

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

Res-judicata between co-defendants:

A matter may operate as res-judicata between co- defendants and co- plaintiffs if the following conditions are satisfied:

a. There must be conflict of interest between the co-defendants.
b. It must be necessary to decide that conflict in order to give relief to the plaintiff.
c. The question between the co- defendants must have been finally decided; and
d. The co- defendants were necessary or proper parties in the former suit.

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

Distinction between Res Sub – Judice (S.10) and Res- Judicata (S.11)

Res-judicata between different stages of the same proceedings:

The principle of res- judicata applies in between two stages in the same Iitigation ". It is well settled that

principle of res-judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at thesubsequent stage of that proceeding ….."

Res-judicata and Issue Estoppel:

Issue Estoppel:

An issue or fact of law which has been determined in an earlier proceeding cannot be raised in a subsequent proceeding. The court has few inherent power in the interest of finality not to allow a particular issue which has already been litigated to be reopened.

Res-judicata Res Sub-Judice

1. It applies to a matter adjudicated upon (Res-judicatum)
2. It bars the trial of a suit or an issue, which has been decided in a former suit.

It applies to a matter pending trial (sub-Judice)It bars trial of a suit which is pending decision in a previously institute suit.

There is a distinction between 'issue estoppel' and 'res-judicata'. Res-judicata debars a court from exercising its jurisdiction to determine the *lis* if it has attained finality between the parties whereas the doctrine of issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the later proceeding.

Criminal Proceedings: The doctrine of res-judicata is of universal application, which applies even to criminal proceedings. Once a person is acquitted or convicted by a competent criminal court, he cannot once again, be tried for the same offence.

Res-judicate and Estoppel: Res-judicata is really estoppel by verdict or estoppel by judgment (record). The rule of constructive res-judicate is nothing else but a rule of estoppel. Even then, the doctrine of res-judicata differs in essentials particulars from the doctrine of estoppel.

Distinction Between Res-judicata & Estoppel

1. Origin: It results from a decision of the Court.

Estoppel flows from the act of parties.

2. Basis : The rule is based upon public policy, viz that there should be an end to litigation. It bars multiplicity of suits. It proceeds upon the doctrine of equity; that he who by his conduct, has induced another to alter his position to his disadvantage cannot turn round and take advantage of such alteration of the other's position.

3. Affects the jurisdiction : It ousts the jurisdiction of a court to try a case and precludes an enquiry in limine.

In other words, estoppel prevents multiplicity of representations.

4. Stop the Party: It prohibits a man averring the same thing twice in successive litigations.

It is only a rule of evidence and shuts the mouth of a party.

5. Binding effect on party/parties: This rule presumes conclusively the truth of the decision in the former suit. It binds both the parties to a litigation.

Estoppel prevents him from saying one thing at one time and the opposite at another. The rule of estoppel prevents a party from denying what he has once called the truth. i.e. estoppel binds only that party who made the previous statement or showed the previous conduct.

FOREIGN JUDGMENT

(A judgment of a Foreign Court)

Meaning: S.2(6) defines the foreign judgment as the "judgment of a foreign Court". The term foreign Court has been defined in s. 2(5) as a Court situate outside India and not established or continued by the authority of the Central Government.

Object: The judgment of a foreign Court is enforced on the principle that where a Court of Competent Jurisdiction has adjudicated upon a claim, a legal obligation arises to satisfy that claim. Section 13 embodies the principle of res-judicata in foreign judgments. This provision embodies the principle of private International Law that a judgment delivered by a foreign Court of competent jurisdiction can be enforced in India.

Example: A sues B in a foreign Court. The suit is dismissed. The judgment will operate as a bar to a fresh suit by A against B in India on the same cause of action.

Conclusive Nature: Section 13 of the Code provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between- parties under whom they or any of them claim litigating under the same title except as specified in clauses (a) to (f) of Sec. 13.

When Foreign Judgment Not Binding: According to Section 13 under the following six cases, a foreign judgment shall not be conclusive -

1) Foreign Judgment not by a Competent Court;
2) Foreign Judgment not on merits;
3) Foreign Judgment against International or Indian Law;
4) Foreign Judgment opposed to Natural Justice; Foreign Judgment obtained by fraud;
5) Foreign Judgment founded on a breach of Indian Law;

Foreign Judgment Not by Competent Court:

A foreign judgment must be pronounced by a Court of competent jurisdiction and must be by a Court competent both by the law of the State which has constituted it and in an International sense and it must have directly adjudicated upon the 'matter' which pleaded as res-
judicata. Only the judgment and not the reasons for the judgment is conclusive.

Foreign Judgment Not on Merits:

A judgment is said to be given on merits when, after taking evidence and application of mind, the Judges decide the case one-way or the other. The dismissal of suit for default of appearance or non-production of the document by the plaintiff or passing of decree due to default of defendant in furnishing security are not on merits and can not be conclusive.

Foreign Judgment Against International or Indian Law:

The mistake of International or Indian Law must be apparent on the face of the proceedings.
when a foreign judgment is founded on a jurisdiction or on a ground not recognized by International or Indian Law, it is a judgment which is in defiance of the law. Hence, it is not conclusive of the matter adjudicated therein and, therefore, not enforceable in this country.

Foreign Judgment Opposed to Natural Justice:

The judgment pronounced by a Foreign Court must be after the observation of the judicial process, i.e., the Court rendering the Judgment must observe the minimum requirements of Natural Justice. The judgment to be conclusive must be composed of impartial persons, act fairly, without bias, and in good faith; it must give reasonable notice to the parties to the dispute and to afford each party adequate opportunity of presenting his case.

Foreign Judgment Obtained by Fraud:

It is the fundamental Principle of Private international Law that a Foreign Judgment is obtained by fraud, it will not operate as res-judicata. It is the settled preposition of law that a judgment or decree obtained by playing fraud on the Court is a nullity and non est in the eye of law. Such a judgment/decree by the first Court or by the highest Court has to be treated as a nullity by every Court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings.

Foreign Judgment Founded On Breach of Indian Law:

It is implicit that the foreign law and foreign judgment would not offend against our public policy. Thus, a foreign judgment .for a gambling debt or on a claim which is barred under the Law of Limitation in India is not conclusive.

Presumption as to Foreign Judgments:

Section 14 provides that "the Court shall presume, upon the reduction of any document purporting to be

certified copy of the foreign judgment, that such judgment pronounced by a Court of Competent jurisdiction unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction."

Enforcement of Foreign Judgments:

A conclusive judgment U/s 13 can be enforced in India in the following two ways:-

1) By Instituting a suit on such Foreign Judgment: A foreign judgment may be enforced by institution of a suit within a period of 3 years from the date of the foreign judgment. **2) By Institution of Executing Proceedings:** A foreign judgment may be enforced by way of execution proceedings as per specified U/s 44-A of the Code and where all the conditions of S. 13 (a) to (f) are satisfied.

Effect of death, marriage and insolvency of parties

i. Death of a party (rule 1 to 6, 10A)
ii. Marriage of a party (rule 7)
iii. Insolvency of a party (rule 8) or;
iv. Assignment of interest (rule 10)

(I) Death Of Party: Rules 1-6

Death of plaintiff

Where the sole plaintiff dies, the suit will not abate, if the right to sue survives. It can be continued by the heirs and legal representatives of the deceased plaintiff. If the right to sue does not survive, the suit will come to an end.

Where one of the several plaintiff dies and the right to sue survives to the surviving plaintiff or plaintiff's, the court will make an entry to that effect and proceed with the suit by surviving plaintiff or plaintiffs.

Where plaintiff dies after hearing and before pronouncement of judgment, the suit shall not abate. The same principle will apply in case of death of the plaintiff after passing of preliminary decree and before final decree.

Once the final decree is passed, the rights of the parties are adjudicated and the question is only of execution of the decree. The provisions relating to abatement do not apply to execution proceedings; they, however, apply to appeals.

Death of defendant

Where the sole defendant dies, the suit shall not abate if the right to sue survives. It can be continued against the heirs and legal representatives of the deceased defendant. Where one of the several defendants dies and the right to sue survives against the surviving defendant or defendants, or where the sole surviving defendant dies and the right to sue survives, the court, on an application by the legal representative of the deceased defendant, will make him a party and proceed with the suit.

When no such application is made within the period of limitation (ninety days), the suit shall abate as against the deceased defendant.

Where the defendant dies after hearing and before the pronouncement of judgment, the suit shall not abate. The suit also does not abate on account of an unnecessary party.

Right to sue

As already noted, when a party to a suit dies, the first question to be decided a weather the right to sue survives or not. If doesn't, there is an end to the suit. If it does, the suit will not abate. It can be continued by or against the heirs and legal representative of the deceased party.

The expression right to sue has not been defined in the Code, but it may be interpreted to mean right to seek to relief. In other words, right to sue survives if the cause of action survives or continues.

The general rule is that all rights of action all demands whatsoever, existing in favour of or against a person at the time of his death, survive to or against his representatives. But in case of a personal actions, i.e. actions where the relief sought personal to the deceased or the rights intimately connected with the individuality of the deceased, the right to sue will not survive to or against his representatives. In these case, the maxim action personalis moritur cum persona (a personal action dies with the person) applies.

Applicability to other proceedings : Rules 11-12

The maxim actio personalis mortiur cum persona (a personal action dies with the person) does not apply only to suits in those cases where the plaintiff dies during the pendency of a suit but also to cases where the plaintiff dies during the pendency of appeal or appeals. This is on the footing that by a reason of the dismissal of the suit by the trial court or the first appellate court, as the case may be, the plaintiff stands relegated to his original position before the trail court.

Duty of pleader: Rule 10-A

Rule 10-A as inserted by the Amendment Act of 1976 imposes an obligation on the pleader of the parties to communicate to the court the fact to the death of the party represented by him.

Duty of Court: Rule 10-A

Rule 10-A also casts duty on the court to give notice of death of party to the other party. The duty is statutory and must be observed which is clear from the words the court shall thereupon give notice of such death to the other party.

Effect of abatement: Rule 9

Where the suit abates or is dismissed due to failure of the plaintiff to bring the legal representative or representatives of the deceased party, no fresh suit will lie on the same cause of action. The only remedy available to the plaintiff or the person claiming to be the legal representative is to get the abetment set aside.

Such abetment or dismissal of the suit, however, does not operate as res judicata.

Suit against dead person

No suit can be filled against a dead person. Such a suit is non est and has no legal effect. Likewise, a decree passed against a dead man is a nullity. But where a suit is filled against a dead person by the plaintiff without knowledge of such death, on the application by the plaintiff, the court may permit the legal representatives of the defendant to be brought on record. On such impleadment, the suit shall be deemed to have been instituted on the day the plaint was presented. The court's satisfaction breathes life into the suit.

(II) Marriage Of The Party : Rule-7

A marriage of a party does not have any substantial effect on the suit but there is an exception to it. A case or a situation in which a decree has been executed against a female who is married, the decree shall be executed against her only. It has been mentioned under Rule 7 of Order XXII of CPC that a decree which is in favour or against a wife, where the husband is legally entitled to the subject matter of the decree or if he is liable for the debt of his wife may, with the explicit permission of the court, it should be executed by or against him.

(III) Insolvency Of Party: Rule 8

a. Insolvency of plaintiff

The insolvency of plaintiff shall not cause the suit to abate and can be continued by his Assignee or Receiver for the benefit of his creditors. But if the Assignee or Receiver declines to continue the suit, or to give security for costs, as ordered by the court, the court may, on the application of the defendant, dismiss the suit on the ground of the plaintiff's insolvency. The court may also award the defendant costs for defending the suit, to be paid as a debt against the plaintiff's estate.

b. Insolvency of defendant

Rule 8 does not apply where the defendant becomes an insolvent. In such cases, the court may stay the suit or proceeding pending against the defendant who has been adjudged an insolvent. Rule 10 will also apply in those cases and a receiver will become a representative of the defendant debtor.

PLACE OF SUING (SECTION 15 TO 20)

The first and the important thing is the place of suing in order that a Court can entertain, deal with and decide
a suit. Section 15 to 20 of C.P.C. regulate the forum for the institution of suits.

Rules as to forum

The rules as to forum can be discussed under the following two heads-

a. Rules as to pecuniary jurisdiction:
The rule about the pecuniary jurisdiction is that the "Every suit shall be instituted in the court of the lowest grade competent to try it."
The above rule is one of procedure only and not of jurisdiction and therefore, exercise of jurisdiction by. a Court of higher grade than is competent to try the suit is mere irregularity covered by section 99 and the decree passed by the Court is not nullity while the exercise of jurisdiction by a Court of lower grade than the one which is competent to try it, is a nullity as being without jurisdiction.
b. Rules as to nature of the suit:
Suits may be divided into three c1asses-
i. Suits in respect of immoveable property,- section 16 to 18
ii. Suit for compensation for wrong (for torts) to person or movable property,- Section 19, and
iii. Suits of other kinds, - section- 20.
1) Suits in respect of immoveable property: Sections 16 to 18 deal with suits relating to immoveable property.

Suits to be instituted where subject-matter situate : Section 16 provides as Subject to the pecuniary or other limitations prescribed by any law, suits for the recovery of immoveable property with or without rent or profits-
a. for the partition of immoveable property;
b. for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;
c. for the determination of any other right to or interest in immovable property;
d. for compensation for wrong to immovable property,
e. for the recovery of immovable property actually under distraint or attachment,
shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.
Explanation: In this section "property" means property situate in India.

Suits for immoveable property situate within jurisdiction of different courts:
Section 17 provides as
"Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situated within the jurisdiction of different Courts, the suits may be instituted in any Court within the local limits of whose jurisdiction any portion of 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.

Place of institution of suit where local limits of jurisdiction of Courts are uncertain : Section 18 provides as
1. Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts
any immoveable property is situate, anyone of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction.
Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suits to exercise jurisdiction.
2. Where a statement has not been recorded U/s 18(1), and the objection is taken before an Appellate

Court or Revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the Appellate Court or Revisional Court shall not allow the objection unless in its opinion there was, at the time of institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

2) Suit for compensation for wrong to person or movable property: Section 19 provides as Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said courts.

Illustrations:

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

3. Suits for other kinds :

Section 20 provides as

Subject, to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-

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

b. any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gains, provided that in such case either the leave of the Court is given, or the defendant who does not reside, or carry on business, or personally work for gain, as aforesaid, acquiesces in such institution; or

c. the cause of action, wholly or in part, arises.

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

Illustration:

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

2) A resides at Shimla, B at Calcutta and C at Delhi. A, Band C being together at Banaras, Band C make a joint Promissory note payable on demand, and deliver it to A. A may sue Band 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 case, if the non-resident defendant objects, the suit can not proceed without the leave of the Court.

Objections to Jurisdiction - Section 21

Objections as to territorial (Place of suing) jurisdiction :

"No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless -

a. Such objection was taken in the Court of first instance.

b. at the earliest possible opportunity and in all cases where issues are settled at or before such settlement,

c. and unless there has been consequent failure of justice".

All these three conditions must co-exist.

Objections as to pecuniary jurisdiction :"No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court less-
1) such objection was taken in the Court of first instance,
2) at the earliest possible opportunity and in all cases where issues are settled at or before such settlement,
3) and unless there has been a consequent failure of Justice."
All these three conditions must co-exist.

Objections in execution proceedings :"No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction" shall be allowed by any Appellate or Revisional Court unless-
a. such objection was taken in the executing Court,
b. at the earliest possible opportunity,
c. and unless there has been a consequent failure of Justice."

Lack of jurisdiction and Waiver of defect as to place of suing: It is well settled principle of law that neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court otherwise incompetent a try a suit.

An objection as to local jurisdiction of a Court can be waived and this principle has been given a statutory recognition in Section 21 of the Code of Civil procedure and provides that the defect as to the place of suing under 15 to 20 may be waived.

Objections as to jurisdiction both territorial, pecuniary and technical are not open to consideration by an Appellate Court unless there has been prejudice on merits and the section does not preclude objections as to the place of suing being taken in the Appellate Court or Revisional Court, if the trial Court has not decided the suit on merits.

The mere lack of territorial or pecuniary jurisdiction is considered as merely technical and it can be waived in the sense that if objection with regards to them is not taken at the earliest opportunity, at any stage, at or before the settlement of issues, the same cannot be allowed to be raised at a later stage unless it is established that there is a consequent failure of Justice.

It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity and that invalidity could be set up wherever it is sought to be enforced or relied upon even at the stage of execution. The defect of jurisdiction whether it is pecuniary or territorial or whether it is in respect of the subject matter of the action strikes at the very authority of the Court to pass any decree and such defect cannot be cured even by consent of parties.

Section 21 is an exception and defect as to place of suing, that is to say, the local venue for suits cognizable by Courts under the Code may be waived under this section. Such waiver is limited to objections in the Appellate or Revisional Courts.

Bar of Fresh Suit - Section -21-A

Bar on suit to set-aside decree on objection as to place of suing: No suit shall lie challenging the validity of a decree passed in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, on any ground based on an objection as to the place of suing.

Explanation: The expression "former suit" means a suit which has been decided prior to the decision in the suit in which the validity of the decree is questioned, whether or not the previously decided suit was instituted prior to the suit in which the validity of such decree is questioned.

MODULE 2 Summons and Pleading

SUMMONS

Meaning: The word summons has not been defined in the Code, but according to the dictionary meaning;
"A summons is a document issued from the office of a court of justice, calling upon the person to whom it is directed to attend before a judge or office of the court for a certain purpose."

Essentials of summons:
Every summons shall be signed by the judge or such officer appointed by him and shall be sealed with the seal of the court [Rule1 (3)] and every summons shall be accompanied by a plaint or if so permitted, by a concise statement thereof.[Rule 2]
Contents of Valid Summons:
a. The summons must contain a direction whether the date fixed is for settlement of issues only or for final disposal of the suit (Rule 5).
b. In cases of summons for final disposal of the suit, the defendant shall be directed to produce his witnesses (Rule 8).
c. The Court must give sufficient time to the defendant to enable him to appear and answer the claim of the Plaintiff on the day fixed (Rule 6).
d. The summons shall contain an order to the defendant to produce all documents in his possession or power upon which he intends to rely on in support of his case (Rule 7).

Summons to Defendant:
Section 27: Where a suit has been duly instituted, a summon may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed on such day not beyond 30 days from the date of the institution of the plaint.
Order V: Rule 1 (1)
Rule 1(1): When a suit has been duly instituted, a summon may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of the service of the summons on that defendant;
Provided that no such summon shall be issued when a defendant has appeared at the presentation of Plaint and admitted the plaintiff's claim;
Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later that ninety days from the date of service of summons.

Appearance of Defendant [Order V Rule 1 (2)]
Rule 1(2) - A defendant to whom a summons has been issued under sub-rule (1) may appear
a. in person, or
b. by a pleader duly instructed and able to answer all material questions relating to the suit, or
c. by a pleader accompanied by some person able to answer all such questions. The Court, however,
may order the defendant or plaintiff to appear in person (Rule 3).
Rule 1 (3): Every such summons shall be signed by the judge or such officer as he appoints, and shall be sealed with the seal of the Court.

Exemption from Personal Appearance : Order V Rule 4
No party shall be ordered to appear in person

1. unless he resides-

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

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

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

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

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

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

i) Personal or direct service; (Rules 10 to 15 and 18)
ii) Substituted Service; (Rules 20, 17 and 19)
iii) Service by Court; (Rule 9) and
iv) Service by Plaintiff. (Rule 9-A)

1. Personal or direct service: This is an ordinary mode of service of summons. Under the following categories a service of summons should be made by delivering or tendering a copy thereof to the defendant personally or to his agent or other person on his behalf and for the proper service of summons following principles must be remembered-

a. Where there are two or more defendants, service of summons should be made on each defendant (Rule 11).

b. Wherever it is practicable, the summon must be served to the defendant in person or to his authorized agent (Rule 12).

c. In a suit relating to any business or work against a person, not residing within the territorial jurisdiction of the court issuing the summons, it may be served to the manager or agent carrying on such business or work (Rule 13).

d. In a suit for immoveable property, if the service of summons cannot be made on the defendant personally and the defendant has no authorized agent, the service may be made on any agent of the defendant in charge of the property (Rule 14).

e. Where the defendant is absent from his residence at the time of the service of summons and there is no likelihood of him being found at his residence within a reasonable time and he has no authorized agent, the summons may be served on any adult male or female member of the defendant's family residing with him (Rule 15).

The serving officer (a person to whom the copy is delivered or tendered to serve on the defendant) after making acknowledgment of service of summons must make an endorsement on the original summons stating the time and" manner of service thereof and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of summons .

2. "Substituted Service" means the service of summons by a mode which is substituted for the ordinary mode of summons. The circumstances for the substituted service are:-

a. i) Where the defendant or his agent refused to sign the acknowledgement or

ii) Where the serving officer, after. due and reasonable diligence cannot find the defendant, who is absent from his residence at the time when the service is sought to be effected on him at his residence and there is no likelihood of him being found at his residence within a reasonable time and there is no authorized agent nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain.

The serving officer shall then return the original to the Court from which it was issued, with a

report endorsed thereon or annexed thereto stating the fact about affixing the copy, the circumstances under which to do so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed (Rule 17). If the Court is satisfied either on the affidavit of the serving officer or on his examination on oath that the summons has been duly served; or may make further enquiry in the matter as it thinks fit, and shall either declare that the summon has been duly served or order such service as it thinks fit. (Rule19).

In the second mode as provided by Rule 17, the declaration by the court about the due service of the summons is essential. If the provisions of the Rule 19 have not been complied with, the service of summons cannot be said to be in accordance with law.

b. Where the Court is satisfied that there is a reason to believe that the defendant is avoiding the service of summons or for any other reason the summons cannot be served in the ordinary way, the Court shall order that the service may be effected in the following manner-

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

ii. In such manner as the court thinks fit [(Rule 20(1)]; or

iii. By an advertisement in the daily newspaper circulating in the locality in which the defendant is last known to have actually or voluntarily resided, carried on business or personally worked for gain [(Rule 20(1-A)].

Substituted service Under Rule 20 is as effective as personal service [(Rule 20(2)].

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

Declaration by Court:

The Court issuing the summons shall declare that the summons had been duly served on the defendant, where

a. the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept that summons by any other means specified in subrule (3) when tendered or transmitted to him, and

b. Where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within 30 Days from the date of issue of summons.

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

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

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

Discovery (5. 30 and Order XI)

Section 30 of the Code says that subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion on the application of any party,-

make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production impounding and return of documents or other material objects producible as evidence.

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

Where in the opinion of the judge, such proposed questions are proper, then he will compel the other side to answer them on oath before trial. This is called discovery of facts, while where information as to documents is required, then on the application of the party, an order to compel the other party to make a list of relevant documents in his possession or power and for permission to inspect and to take copies of those documents.

This is known as discovery of documents. Rules 1 to 11 of Order XI deal with the interrogatories while the rules 12 to 14 of Order XI deal with the discovery of documents. The Court may postpone a premature discovery.

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

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

Attendance of Witnesses: On or before such date, which may be fixed by the Court and shall not be later than 15 days from the date on which issues are settled, a list of proposed witnesses to give evidence or to produce document and obtain summonses to such persons for their attendance in Court, shall be presented in the Court by the parties.

A party shall file an application stating therein the purpose for which the witness is proposed to be summoned to the Court or to such officer as may be appointed by the Court in this behalf within five days of presenting the list of witnesses under rule 1(1).

On being shown sufficient cause for not mentioning that name of the witness in the list produced U/rule 1 (1), a party may be permitted by the Court, to call any witness whose name has not been mentioned in the list of evidence.

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

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

The provisions of Rule 6 shall apply to summons to produce documents while the procedure provided in ruIe 10 shall be applicable where witness fails to comply With summons and rule 12 where the witness fails to appear.

Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

Witnesses not to be Ordered to attend in Person: As per rule 19 of Order XVI, no one shall be ordered to attend in person to give evidence unless he resides:-

a. within the local limits of the Court's Ordinary Original Jurisdiction, or

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

Provided that where transport by air is available between the two places mentioned in this rule and the Witness is paid the fare by air, he may be ordered to attend in person.

PLEADING (ORDER VI)

Meaning: According to order VI Rule 1, pleading shall mean plaint or written statement.

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

In proceedings before a Civil Court pleading may include a petition and reply thereto by the respondent whether to the form of an affidavit or otherwise. Plaintiff's pleading is called a plaint while the defendant's pleading is called a Written Statement

Object: The object of pleading is to bring parties to definite issues and to diminish expense and delay and to prevent surprise at the hearing.

"The object of the rule is twofold. First is to afford the other side intimation regarding the particular facts of his case so that they may be met by the other side. Second is to enable the Court to determine what is really the issue between the parties."

"Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must lie.

The entire law governing the "Pleading" is contained in the provisions of Order VI (Pleading), Order VII (Plaint) and Order VIII (Written Statement) of the Code. Apart from this some important fundamental procedural matters relating to the practice are the provisions of Order I (Parties to suit), as to the manner in which a suit should be framed Order II (Frame of suit), as to who should sign the pleading Order III and Order IV (Institution of suit) and as to taking out of summons and their services Order V.

Fundamental Rules of Pleading: The general rule regarding the pleadings is as under:

1) Pleading must state facts and not law;
2) Only the material facts must be stated;
3) Pleading should not include the evidence, and
4) The facts stated must be in concise form.

Material Facts: The facts are of two types:

1) Facts probanda: the facts required to be proved (material facts); and
2) Facts probantia: the facts by means of which they are to be proved (particulars or evidence).

It is the fundamental rule of pleading that pleadings must include the material facts a and not the facts by means of which they are to be proved i.e., evidence. The term material facts means all facts upon which the plaintiffs cause of action or the defendant's defence depends, or all those facts which must be proved in order to establish the plaintiff's right to relief claimed in the plaint or the defendant defence.

Striking out Pleading: (Rule 16) If the pleading is unnecessary, scandalous, frivolous; or vexatious or tends to prejudice, embarrass or delay the fair trial of the suits or is otherwise an abuse of the process of the Court the Court may, at any stage of the proceedings, order to be struck out or amended any matter in it.

Signing (Rule 14) and Verification Rule (15) of Pleadings: Every pleading shall be signed by the party and his pleaders (if any) or by any person duly authorized to sign the same or to sue or defend on his behalf

and every pleading shall be verified 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. The person verifying shall specify what he verifies to his own knowledge and what upon. information received he believes to be true. The person verifying shall furnish an affidavit in support of his pleading and the verification shall be signed with date and place at which it was signed,

Amendment of Pleading (Order VI, Rule 17)

As a general rule, material facts and necessary particulars must be stated in the pleadings and the decision cannot be based on the grounds outside the pleadings. But due to various reasons parties have to amend their pleadings for which Order VI rule 17 states as under:

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

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial"

In order to try a case on its merits and for determining the real question in controversy between the parties

the Courts are empowered under 'rule 17 to allow the amendment of the pleadings. Amendment in the pleading may be with the permission of the Court.

Permission to amend when granted: A leave to. amend the pleading will be granted by the Court whereby the amendment no injury will be caused to the opposite party and he can be sufficiently compensated for by costs or other terms to be imposed by the order and where the amendment is necessary for the determination of the real question in controversy and no injustice will be caused to the other party the Court may allow the amendment of the pleadings.

The courts have a very wide discretion in the matter of amendment of pleadings. The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice. But the exercise of such far-reaching discretionary powers is governed by judicial considerations, and wider the discretion, greater alight to be the care and circumspection on the part of the Court."

Effect of amendment: Where an amendment is allowed, such amendment relates back to the date of the suit as originally filed. The court must look to the pleadings as they stand after the amendment and have out of consideration unamended ones.

Failure to amend : If a party remained failed to amend after the order of amendment, within the time specified for that purpose in the order or if no time is specified, then within 14 days from the date of the order, he shall not later on be permitted to amend after expiry of the specified time or of 14 days unless the time is extended by the court.

Failure to amend does not result in the dismissal of the suit and the court has discretion to extend the time even after the expiry of the period originally fixed.

Order under rule 17 is Revisable: An order granting or refusing amendment is a 'case decided' within the meaning of section 115 arid revisable by the Court. The above order is neither a decree nor appealable order and hence not appealable.

Plaint (Order VII)

Every civil suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in that behalf. Plaint is a pleading of the plaintiff. The word has not been defined is the code but it can be said to be a statement of claim, a document, by presentation of which the suit is instituted.

Title of the suits

Plaint : Body of Plaint

Relief Prayed for

Title of the suits Plaint: Body of Plaint Relief Prayed for

Title: Title of the suit consists of the name of the Court, case number to be given by the office of the Court and descriptions of parties.

Body of Plaint: In this part the plaint consists of the facts constituting the cause of action and when it arose.

Reliefs: The plaint shall finally contain the relief which the plaintiff claims either simply or in the end. Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative.

Generally, the plaintiff is not entitled to relief for which there is l0 foundation in the plaint, except in a case where on the pleadings, issues and evidence the relief is clear because the primary duty of the Court is to do justice and the rules of procedure are meant to advance the cause of justice and not to impead it.

The plaintiff ought to be given such relief as he is entitled to get on the facts established on the basis of the evidence in the case even if the plaint does not contain a specific prayer for the relief. The equitable relief under Order VII, Rule 7 may be granted even though grounds on which relief is sought have not been stated as required by the rule.

Particulars of Plaint: A plaint shall contained the following particulars:

1)

a) the name of the Court in which the suit if brought;

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

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

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

e) the facts constituting the cause of action and when it arose;

f) the facts showing that the Court has jurisdiction;

g) the relief which the plaintiff claims;

h) where the plaintiff has allowed a set off or relinquished a portion of his claim the amount so allowed or relinquished, and

i) a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of Court fees, so far as the case admits.

2) In case of recovery suit the precise amount claimed or where it is for the accounts or mesne profits or for moveable in the possession of the defendant or for debts, which cannot be determined, the approximate amount or value thereof.

3) The description of the immovable property.

4) The interest and liability of the defendant.

5) If the suit is filed in the representative character it must state the facts about an actual existing interest of the plaintiff in the subject matter and that all steps necessary have been taken by him to institute such suit.

6) The grounds upon which the exemption from the law of limitation where the suit is time barred.

Return of Plaint (Order 7 Rule 10)

Rule 10:

1) Subject to the provisions of Rule 1 GA, the plaint shall at any stage of the suit be returned to be presented to the Court in which it should have been instituted.

2) 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.

3) 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 representing it, and a brief statement of the reasons for returning it.

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

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

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

a. specifying the Court in which he proposes to present the plaint after its return,
b. praying that the Court may fix a date for the appearance' of the parties in the said Court, and
c. requesting that the notice of the date so fixed may be given to him and to the defendant.

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

a. fix a date for 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. Where notice of the date for appearances is given under Sub-rule (3),-

4) Where notice of he 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 summon for appearance in the suit, unless that court, for reasons to be recorded, otherwise directs, and

b. the said notice shall be deemed to be a summons for the appearance of the defendant in the suit 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.

Rejection of Plaint (Order 7 Rule 11)

Rule 11: 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 the time to be fixed by the Court fails to do so.
c. Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently

stamped, and the plaintiff on being required by the Court to supply the requisite stamp- paper within the 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.
e. Where it is not filed in duplicate.
f. Where the plaintiff fails to comply with the provisions of Rule-9.

Provided that the time fixed by the Court for the correction of the valuation or for the supply of the requisite stamp- papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by the cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, 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.

Rule 12: Procedure on rejecting plaint: Where a plaint is rejected the judge shall record an order to that effect with the reasons for such order.

Rule 13: Where rejection of plaint does not preclude presentation of fresh plaint: The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Procedure on Admitting Plaint : Where the plaint of plaintiff has been admitted and the Court directs that the summons be served on the defendant as provided in Order V, Rule 9, the Court will direct the plaintiff to present as many copies of the plaint on plain paper as there are defendants within 7 days from the date of such order along with requisite fee for service of summons on the defendants.

Production of Documents on Which Plaintiff Sues or Relies :

1. Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

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

3. A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court,. be received in evidence on his behalf at the hearing of the suit.

But, the provision of Rule 14 shall not apply to the following documents :
i) the document produced for the cross examination of the plaintiff witness, or
ii) handed over to a witness merely to refresh his memory.

Written Statement (Order VIII)

Meaning: A Written Statement is a pleading of the defendant for submission of every material fact to answer the allegation made by the plaintiff in his plaint. The word has not been defined in the code, but the same may be defined as under:

A Written Statement is the pleading of the defendant wherein he deals with every material fact alleged by the plaintiff in his plaint and also states any new facts in his favour or takes legal objections against the claim of the plaintiff.

Preparation of Written Statement: All relevant rules of pleading apply to a Written Statement and it should be prepared with great caution. In the Written Statement firstly, the defendant should mention the name of the Court trying the suit, then-1the names of the parties. It is not necessary to mention the names, directions and place of residence of all the parties in the title of the Written Statement, but mentioning the name of the 1st plaintiff and 1st defendant is enough. The number of suit may be mentioned thereafter.

The defendant thereupon replies to each Para of the plaint except where any preliminary objection like maintainability of the suit, locus standi of the plaintiff to file suit, the non-joinder or misjoinder of parties as to the jurisdiction of the Court or as to limitation, for consideration which is necessary in the 1 'nstance before the suit is tried on merits.

Rules of Defence: The denial in a Written Statement must be specific and not general. The grounds alleged by the plaintiff must be denied by a defendant specifically with each allegation of fact of which he does not admit the truth, except damages.

The denial should not be vague or evasive. Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken o be admitted except as regards a person under disability.

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

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

Extension of time to Present Written Statement: Ordinarily the time schedule prescribed by Order

VIII, Rule 1 has to be honoured. The extension of time sought for by the defendant from the Court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired.

The extension of time shall be only by way of exception and for reasons to be recorded in writing, how soever brief they may be, by the Court.

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

Failure to present Written Statement: Where a party fails to file a Written Statement as required under Rule 1 or Rule 9 within a time permitted or fixed by the Court, the Court shall pronounce judgment against him or make such order as it thinks fit and on such judgment a decree shall be drawn up.

The provisions regarding duty of defendant to produce documents upon which relief is claimed or relied upon by him have been given in Order VIII, Rule 1-A.

Set-Off (Order VIII, Rule 6)

Meaning: Set-off means a claim set up against another. It is a counter claim against the plaintiff but in essence it is a form of defence in which the defendant while acknowledging the justice of the plaintiffs claim sets up a demand of his own to counter balance it either in whole or in part.

The dorctrine of set – off is included in Order VIII, Rule 6 and is as under:

1. Where in a suit for 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 plaintiffs 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 plaint in a cross- suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this not after 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 a set-off.

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

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.

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

I. The suit must be for the recovery of money.
II. The sum of money must be ascertained.
III. Such sum must be legally recoverable.
IV. It must be recoverable by the defendant or by all the defendants, if more than one.
V. It must be recoverable by the defendant from the plaintiff or from all plaintiffs'; if more than one.
VI. It must not exceed the pecuniary jurisdiction of the Court in which the suit is brought.

Both the parties must fill in the defendant's claim to set-off, the same character as they fill in the plaintiffs
suit.

Counter-Claim (Rules 6-A to 6-G)

Meaning: It is a claim made by the defendant in a suit against the plaintiff and can be enforced by a cross action. Counter claim is a cause of action in favour of the defendant against the plaintiff.

A counter-claim is a weapon in the hands of a defendant to defeat the relief sought by the plaintiff

against him and may be set-up only in respect of a claim for which the defendant can file a separate suit and therefore, it is substantially a cross action.

The Court has power to treat the counter claim as a cross suit and hear the original suit and counter claim together if the counter claim is properly stamped.

Order VIll, Rule 6-A deals with the counter claim, which is as under:

a. 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 defence or before the time limited for delivering his defence has expired whether such counter claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

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

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

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

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

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

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

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

Rule 6 F : Relief to defendant where Counter Claim succeeds: Where in any suit a set-off or counter- claim is established as a defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party e'1titled to such balance.

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

Rule 7: Defence or set-off or counter- claim founded upon separate grounds: Where the defendant relies upon several distinct grounds of defence of set-off or counter - claim founded upon separate and distinct facts, they shall be stated, as far as may be separately and distinct.

Distinction between Set-off and Counter-claims

Basis of Distinction	**Set-off**	**Counter-Claim**
1. Nature	It is statutory defence to a plaintiff's actions.	It is substantially a cross- action
2. Same Transaction:	It must be either for an ascertained sum or must arise out of the same transaction.	It need not arise out of the same transaction.
3. Date for recovery of amount:	In legal set-off the amount must be recoverable at the date of the suit.	In it the amount must be recovered at the date of Written Statement.

4. Demand: The defendant's demand for an Where -the demand is for a larger amount below or up to the suit claim is a set- amount the claim for excess amount off in strict sense. is really a counter.

5. Ground of: It is a ground of defence to the It is a weapon of offence which plaintiff's action which if established, enable the defendant to enforce the would afford an answer to the claim against the plaintiff effectually plaintiff's claim in toto (as a whole) as an independent actions,or protanto (in proportions)

Module 03 Preliminary Procedures,

Issues,

Framing of Issue (Order 14):- The next stage is framing issues**.** The job of framing issues is assigned to a judge. Issues are framed considering provisions of order 14 rule 1 of C.P.C.

Rule 1 sub rule (1) states, "Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other."

Sub rule (2) states, "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 defense,"

Sub rule (3) States "Each material proposition affirmed by one party denied by other shall form subject of distinct issues."

- Issues of fact
- Issues of law.

Hearing and Judgment and Orders :

Hearing Of Suits And Examination Of Witnesses (Order 18) :- The plaintiff is entitled to have first right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of relief. In such case defendant has the right to begin.

The plaintiff has to state his case in front of the judge. The plaintiff has to submit the evidence that was earlier marked. If any evidence was not marked earlier then it will not be considered by the court. Then the plaintiff will be cross-examined by the defendant's Advocate. The witnesses from plaintiff's side also have to appear in the court, who are also cross-examined by the defendant's lawyer.

The defendant also presents his side of the story supported by his witnesses and evidence from his side. The evidence needs to be be marked earlier by the court, otherwise it will not be considered by the court. The plaintiff's lawyer will then cross-examine the defendant.

Judgment (Order 20) :-Judgment means the statement given by the judge on ground of which a decree is passed.

The court after the case has been heard shall pronounce judgment in open court either within one month of completion of arguments or as soon thereafter as may be practicable, and when the judgment is to be pronounced judge shall fix a day in advance for that purpose.

Examination of parties by court,

ORDER X EXAMINATION OF PARTIES BY THE COURT - RULE 1, 2, 3, 4 OF CODE OF CIVIL PROCEDURE 1908

Rule 1 Order X of Code of Civil Procedure 1908 "Ascertainment whether allegations in pleadings are admitted or denied"

At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

Rule 2 Order X of Code of Civil Procedure 1908 "Oral examination of party, or companion of party"

(1) At the first hearing of the suit, the Court-

(a) shall, with a view to elucidating matters in controversy in the suit examine orally such of the parties to the suit appearing in person or present in Court, as it deems fit; and

(b) may orally examine any person, able to answer any material question relating to the suit, by whom any party appearing in person or present in Court or his pleader is accompanied.

(2) At any subsequent hearing, the Court may orally examine any party appearing in person or present in Court, or any person, able to answer any material question relating to the suit, by whom such party or his pleader is accompanied.

(3) The Court may, if it thinks fit, put in the course of an examination under this rule questions suggested by either party.

Rule 3 Order X of Code of Civil Procedure 1908 "Substance of examination to be written"

The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Rule 4 Order X of Code of Civil Procedure 1908 "Consequence of refusal or inability of pleader to answer"

(1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Discovery and inspection

Discovery and Inspection (Order 11) :- The purpose of discovery and inspection of document and facts is to enable the parties to ascertain the facts to be proved. With the leave of the court the plaintiff or

defendant may deliver interrogatories in writing for examination of opposite parties which are required to be answered and which are related to the matter.

Admissions and effect,

Admissions – Order 12

Admission basically means the voluntary acknowledgement made by the person against his own interest. It can be an important piece of evidence against a person. It can either be in oral, electronic form or documentary in nature.

Judgment on admissions

As per Rule 6 Order 12, Judgment on admissions can be read as-

Where admissions are made during:

1. Facts or pleading or otherwise;
2. May be in oral or in writing;

The court at any stage of the suit-

1. Either on the application or of its own motion;
2. Without waiting for the determination of questions by parties;

can give out judgment as it may think fit, with regard to such admissions

Production, impounding and return of documents

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS ORDER XIII

(1) The parties or their pleaders shall produce, at or before the settlement of issues, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced: **Provided** that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

2. Effect of non-production of documents.

(1) No documentary evidence in the possession or power of any party which should have been, but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

(2) Nothing in sub-rule (1) shall apply to documents,-
(a) produced for the cross-examination of the witness of the other party, or
(b) handed over to a witness merely to refresh his memory.

3. Rejection of irrelevant or inadmissible documents.

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

4. Endorsements on documents admitted in evidence.

(1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which as been admitted in evidence in the suit the following particulars, namely-
(a) the number and title of the suit,
(b) the name of the person producing the document,
(c) the date on which it was produced, and
(d) a statement of its having been so admitted,
and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

5. Endorsements on copies of admitted entries in books, accounts and records.

(1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891 (18 of 1891) where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or a or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished-
(a) where the record, book or account is produced on behalf of a party, then by that party, or
(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after accusing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

6. Endorsements on documents rejected as inadmissible in evidence.

Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b), and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

7. recording of admitted and return or rejected documents.

(1) Every document which has been admitted in evidence or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

List of witnesses, Summons to witness, Expenses of witness, Witness to give evidence and production of documents

SUMMONING AND ATTENDANCE OF WITNESSES- ORDER XVI

List of witnesses and summons to witnesses.

(1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such person for their attendance in Court.

(2) A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.

(3) The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule (1), if such part shows sufficient cause for the omission to mention the name of such witness in the said list.

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Production of witnesses without summons.

party to the suit may, without applying for summons under rule 1, bring any witness to give evidence or to produce documents.Expenses of witnesses to be paid into Court on applying for summons.Time, place and purpose of attendance to be specified in summons.Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

Summons to produce document .Any person may be summoned to produce a document, without being summoned to give evidence, and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

Summons given to party for service.

The Court may, on the application of any party for the issue of a summons for the attendance of any person, permit such party to effect service of such summons on such person and shall, in such a case, deliver the summons to such party for service.

Adjournments

Order XVII deals with the situations when adjournment can occur and the procedure to be followed by the court during the adjournment of a hearing. **Rule 1** of the Order empowers the court to adjourn a hearing in a suit if a party seeking adjournment shows the court that there is sufficient reason for the adjournment.

Withdrawal and adjustment of suits ORDER XXIII . *Withdrawal of suit or abandonment of part of claim*— At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim: Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court. An application shall be accompanied by an affidavit .

Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

Payment into court ORDER XXIV

1. Deposit by defendant of amount in satisfaction of claim— The defendant in any suit to recover a debt or damage may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

2. Notice of deposit— Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

Judgment, Its contents, Decision on each issue

sec. 2(9) Judgment means the statement given by the judge on the ground of a decree or order. A judgment is said to be the final decision of the court on the said matter before the court in the form of suit towards parties and to the world at large by formal pronouncement in open court. Order 20, Rule 4(2) says that a judgment shall contain a concise statement of the case, the points for determination, the decision thereon and all the reasons for such decision.

Contents of Judgment: Judgments of a Court of Small Cause need not contain more than the points for determination and the decision thereon. In suit, in which issues have been framed, the court shall state its finding or decision with the reasons therefore, upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

Interest

Costs, Compensatory costs, Costs for causing delay

Section 35- "Costs"- Section 35 of the Code of Civil Procedure provides for the costs. The provision grants right to the discretion of the court that it may grant order for paying the cost to the winning party for the expenses incurred in maintaining the suit or to pay for the amount that the winning party has incurred while drafting legal notices and contracts.

Section 35A- Compensation in respect of false or vexatious claims

If any suit or other proceedings including an execution proceeding but any party objects to the claim of defence on the ground that the claim or defence or any part of it, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court may after recording its reasons for holding such claims defence to be false or vexatious make an order for the payment to the object or by the party by whom such claim or defence has been put forward, of cost by way of compensation.

Section 35- Costs for Causing Delay- This Section was inserted via amendment act of 1976. This Section provides for the fines that are imposed upon the defendant for causing delay.

Inherent powers of a court

The word "Inherent" is very wide in itself. It means existing and inseparable from something, a permanent attribute or quality, an essential element, something intrinsic, or essential, vested in or attached to a person or office as a right of privilege.[i] Hence, inherent powers are such powers which are inalienable from courts and may be exercised by a court to do full and complete justice between the parties before it.

There are many sections in the CPC that provides for the same.

Section 148 Enlargement of time:- Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period *[not exceeding thirty days in total], even though the period originally fixed or granted may have expired.

Section 148-A:Right to lodge a caveat

Section 151 Saving of inherent powers of the code:- Nothing in this code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of the justice or to prevent abuse of the process of the court.

Section 152 Amendment of judgments, decrees or orders:- Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

Section 153 General powers to amend:- The Court may at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit, and all necessary amendments shall be made of the purpose of determining the real question or issue raised by or depending on such proceeding.

Section 153-A Power to amend decree or order where appeal is summarily dismissed:- Where an Appellate Court dismisses an appeal under rule 11 of Order XLI, the power of the Court to amend, under section 152, the decree or order appealed against may be exercised by the Court which had passed the decree or order in the first instance, notwithstanding that the dismissal of the appeal has the effect of confirming the decree or order, as the case may be, passed by the Court of the first instance.

Module 04 Interlocutory, Incidental and Supplemental Proceedings :

INCIDENTAL PROCEEDINGS

Commission (Sections - 75 to 78 and Order 26)

Meaning:'Commission' is a process through which the witnesses, who are sick or infirm and are unable to attend the Court, are examined by issuing a commission by the Court. Sections 75 to 78 and Order XXVI of the Code deal with the various provisions relating to the issue of Commission to examine witnesses who are unable to attend the Court for one or the other reasons.

Power of Court to issue Commissions: As a general rule, the evidence of a witness in an action, whether he is a party to the suit or not, should be taken in open' Court and tested by cross-examination. The court has a discretion to relax the rule of attendance in Court, under some circumstances and may justify issue of a commission. Section 75 of the Code -specifies the powers of a Court to issue Commission.

Section 75: Subject to the conditions and limitations as may be prescribed, the Court may issue a commission:-

a. to examine any person; order XXVI, Rule 1 to 8
b. to make a local investigation; order XXVI, Rule 9 to 10
c. to examine or adjust accounts; order XXVI, Rule 11 to 12
d. to make a partition ; order XXVI, Rule 13 to 14
e. to hold a scientific, technical or expert investigation; order XXVI, Rule 10-A
f. to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit; order XXVI, Rule 10-C
g. to perform any ministerial act; Rules 15 to 18- B deal with general provisions. order XXVI, Rule 10-B

Cases in which Court may issue Commission to examine a person (Witness): A commission may be issued in the following cases:

a. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person, if the person to be examined as a witness resides within the local limits of jurisdiction, and

i. Is exempted under the Code from attending the Court, or
ii. in the interest of justice, or for expeditious disposal of a case, or for any other reason his examination on commission will be proper; or

b. if he resides beyond the local limits of jurisdiction of the Court, or

c. he is about to leave the jurisdiction of the Court, or

d. If he is a Government servant and cannot in the opinion of the Court, attend without detriment to the public service, or

e. he is residing out of India and the Court is satisfied that his evidence is necessary.

Persons for whose examinations commission may be issued: Rule 4(1):

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

a. If he resides beyond the local limits of the jurisdiction of the court or [(Order XXVI, Rule4(1)(a)]

b. if he is about to leave the jurisdiction of the Court, or [(Order XXVI, Rule4(1)(b)]

c. if he is a Govt. servant and cannot, in the opinion of the court, attend without detriment to the public service, or [(Order XXVI, Rule4(1)(c)]

d. if he is residing out of India and the Court is satisfied that his evidence is necessary. Rule 5

To whom Commission may be issued: [Rule 4 (2) and (3)]

Rule 4(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 pleaded or other person whom the Court issuing the commission may appoint.

Rule 4(3): The Court on issuing any commission under this rule shall direct whether the commission hall be returned to itself or to any subordinate Court.

Order for Issue of Commission: (Rule-2)

The Court may issue such a commission –

a. either sue motu (of its own motion) or

b. on the application of any party to the suit, or

c. "ii) of the witness to be examined.

Evidence to be a part of Record: (Rule-7): The evidence taken on commission shall, subject to the provisions of rule 8, form part of the record.

When deposition may be read in evidence: (Rule-S) : Evidence taken under a commission shall not 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 for 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 his 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.

Letters Of Request: (Section 77): In lieu of issuing a commission the Court may issue a Letter of Request to examine a witness residing at any place not within India.

Arrest Before Judgment (Order 38, Rule 1 to 4)

Introduction: The general rule is that a creditor having a claim against the debtor has first to obtain a decree against him and then execute the said decree according to the provisions of Order XXI and may adopt the mode of his arrest or attachment of his property in such execution, but under special circumstances, the creditor, however can move for the arrest of the debtor or for the attachment of his property even before the judgment in order to prevent any attempt on the part of the defendant to defeat the execution of decree that may be passed against him.

Principle:

When can such order be passed: An application for arrest may be made by the plaintiff at any time after the plaint is presented, even before the service of summons is effected-on the defendant and the Court may pass the order of-arrest upon the satisfaction of the following two conditions:

a. The Plaintiffs suit must be bona fide and his cause of action must action be prima facie unimpeachable subject to his proving the allegations in the plaint, and

b. The Court must have reason to-believe on adequate materials that unless this extraordinary power is exercised there is a real danger that the defendant will remove himself or his property from the ambit of the powers to the Court.

Grounds of arrest before judgment: (Order 38, Rule 1) Where al any stage of the suit, other than a suit of the nature referred to in Section 16, clauses(a) to (d), the Court is satisfied, either by affidavit or otherwise –

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

a. has absconded or left the local limits of the jurisdiction of the Court, or
b. is about to abscond or leave the local limits of the jurisdiction of the Court, or
c. has disposed of or removed, from the local limits of the jurisdiction of the Court his property or any part thereof, or

b. that the defendant is about to leave India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

The Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance.

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 claims; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

Security : (Rule 2)

i. Where the defendant fails to show such cause the Court shall order him either to deposit in the Court money -or other property sufficient to answer the claims against him to furnish security for his appearance at the 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 been paid by the defendant under the proviso to the last preceding rule.

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

Procedure on application by surety to be discharged (Discharge of Security) : (Rule 3)

I. 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.

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

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

Procedure where defendant fails to furnish security or find fresh security: (Rule 3): 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 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.

Arrest on Insufficient Grounds:6 According to section 95, where, in any suit in which an arrest or attachment has been effected and-

a. it appears ,to the Court that such arrest or attachment was applied for on insufficient ground, or
b. the suit of the plaintiff fails and it appears to- the Court that there was no reasonable or probable ground for instituting the same,

on the application of the defendant the Court may, award against the plaintiff by its order such

amount, not exceeding fifty thousand rupees, as it deems reasonable compensation to the defendant for the expense or injury (including injury to reputation) caused to him.

Provided that a Court shall not award under this section, an amount exceeding the limits of its pecuniary jurisdiction.

Attachment Before Judgment (Order 38 Rules 5 - 12)

Object:In Sardar Govind Rao Vs Devi Sahai AIR 1982 S.C. 989, the Court held that "the sole object
behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of guarantee against decree becoming in fructuous for want of property available from which the plaintiff can satisfy the decree."

Grounds: Rule 5(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 -

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.

Rule 5(2): The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and estimated value thereof.

Rule 5(3): The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

Rule 5(4): If an order of attachment is made without complying with the provisions of Sub-rule 1 of Rule 5, such attachment shall be void.

Principles : The remedy of an attachment before judgment is an extraordinary remedy and must be exercised sparingly and strictly in accordance with the law and with the utmost care and caution," and the Court must be satisfied about the following two conditions before making such order of attachment-

a. that the defendant is about to dispose of the whole or any part of his property; and
b. that the disposal is with the intention of obstructing or delaying the execution of any decree that may be passed against him.

Chandrika Prasad Vs Hiralal, AIR 1924, Pat H C, Dawson Millar C.J.,- stated that" such a power is only given when the Court is satisfied not only that the defendant is about to dispose of his properties or to remove it from the jurisdiction of the Court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him, and so deprive the plaintiff, if successful, of the fruits of the victory."

As per Rule 12, the plaintiff cannot apply and the Court cannot order the attachment or production of any agricultural produce in possession of an agriculturist.

Right of Third Party

Rule 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 arties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Re-attachment In Execution: (Rule 11 and 11-A)

Rule 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 the Order 38, and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution f such decree to apply for a re-attachment of the property.

Rule 11-A : Provisions applicable to attachment:

a. The provision of this Code (Order 21) applicable to an attachment made in execution of a decree 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.

b. 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.

Withdrawal of Attachment:

Rule 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 costs of the attachment or when the suit is dismissed.

TEMPORARY INJUNCTION (ORDER XXXIX RULES 1 TO 5)

Meaning of Injunction: An injunction is an order by the Court to a party to the effect that he shall do or refrain from doing a particular act.

"A judicial process, by which one, who has invaded or is threatening to invade the rights (legal or suitable) of another, is restrained from continuing or commencing such wrongful act."

Characteristic of Injunction:

An injunction has three characteristics -

1. It is a judicial process,
2. The object thereby is restraint or prevention, and
3. The thing restrained or prevented is a wrongful act.

Classification of Injunction: The law relating to injunction is laid down in the Specific Relief Act, 1963 (Section 36 to 42)

An injunction may be classified according to the relief granted or according to its nature or according to the operation of Time

As regards the "time" of their operation the injunction may be divided into two categories-

i) Perpetual or (Permanent), and

ii) Interlocutory Or (Temporary)

i. Perpetual or (Permanent): A perpetual injunction restrains a party for ever from doing the specific act and can be granted only on merits at the conclusion of the trial after hearing both the parties to the suits. Section 37(2) of the Specific-Relief Act, 1963

ii. Interlocutory or (Temporary) :

Definition: A temporary injunction or interim injunction, restrains a party temporarily from doing the specified act and can be granted only until the disposal of the suit or until the _ further orders of the Courts. It is regulated by Order 39 rule 1 to 5 of the C.P.C. and may be granted at any stage of the suit.

Section 37(1) of the Specific Relief Act, 1963

Object: The primary object of granting temporary injunction is to maintain and preserve status quo at the time of institution of the proceedings and to prevent any change in it until the final determination of the suit.

Grounds: [Order 39 Rule 1, 2 and also Sec. 94 (c)] A temporary injunction may be granted by the Court under the following cases:

1. 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 Rule 1 (a)

b. the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors, or Rule 1 (b)

c. the defendant threatens to disposes the plaintiff in relation to any property in dispute in the suit, or Rule 1 (c)

The Court may by order grant a temporary injunction to restrain such act, or make such other order

for the purposes of staying and preventing the wasting, damaging, alienation, sale, removal or dispossession of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders.

2. Where the defendant is about to commit a breach of contract, or other injury of any kind, or Rule 2(1)

3. Where the Court is of the opinion that the interest of justice so requires: Section 94(c)

Principles: The power to grant a temporary injunction is in the discretion of the Court, but this discretion, should be exercised reasonably, judiciously and on sound legal principles. Generally, before granting the injunction, the Court must be satisfied about the following conditions:

i) Prima facie case;
ii) Irreparable Injury; and
iii) Balance of convenience

i) Prima facie case: The applicant must make out a prima facie case in support of the right claimed by him. The Court must be satisfied that there is a bona fide dispute raised by the applicant and on the facts before the Court there is a probability of the applicant being entitled to the relief claimed by him.

In deciding prima facie case; the Court is to be guided by the Plaintiffs case as revealed in the plaint, affidavits or other materials produced by him... and "while determining whether a prima facie case had been made out, the relevant consideration is, whether' on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at that evidence."?

ii) **Irreparable Injury:** The applicant must further satisfy the Court that he will suffer irreparable injury if the injunction as prayed is not granted, and there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury.
The expression "irreparable injury" means that the injury must be material one, Le. which cannot be adequately compensated by damages.

iii) **Balance of Convenience:** The balance of convenience must be in favour of the applicant. In other words the Court must be satisfied that the compensation, mischief or inconvenience which is likely to be caused to the applicant by withholding the injunction will be greater than that which is likely to be caused to the opposite party by granting it.

Discretionary Remedy: Since grant of injunction is discretionary and an equitable relief, even if all the conditions are satisfied, the Court may refuse to grant it for some other reasons e.g., on the ground of delay, latches or acquiescence or where the applicant has not come with clean hands or has suppressed material

facts, or where monetary compensation is adequate relief.

Notice: The Court shall before granting an injunction, give notice to the opposite party, except where it appears that the object of granting the injunction would be defeated by the delay.

According to proviso to Rule 3, when an ex parte injunction is proposed to be given the Court has to record the reasons for coming to the conclusion that the object of granting the injunction would be defeated by the delay and the Court shall order the applicant -

a. to deliver or to send by registered post a copy of the application for injunction together with -
i) a copy of affidavit filed in support of application,
ii) a copy of the Plaint, and
iii) copies of documents on which the applicant relies, and

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

In case of ex-parte injunction, the Court shall make an endeavour to finally dispose of the application within 30 days from the date on which the ex-parte injunction was granted. Where the Court finds it difficult to dispose of the application within the period of 30 days, the reasons are required to be recorded. (Rule 3-A)

An order of injunction may be discharged, varied or set aside by the Court on application being made

by any party dissatisfied with such order;9 or where such discharged, variation or set aside has been necessitated by the change in the circumstances, or where the Court is satisfied that such order has caused undue hardship to the other side.

Provided that if an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without "giving" nonce to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary to do in the interest of justice

Proviso to Rule 4

Provided further that where an order for injunction has been passed after giving 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 discharged, variation or set aside has been necessitated by the change in the circumstances, or unless the Court is satisfied that" the order has caused hardship to that party.

Consequences Of Disobedience Or Breach Of Injunction: Section 94(c) and Rule 2-A of Order 39 provide for the consequences of disobedience or breach of an order of an injunction issued by the Court. The penalty for disobedience or breach of injunction may be either arrest or attachment of his property or both of the opposite party who has committed breach. However, the detention in civil prison shall not exceed three months and the attachment of property shall not remain in force for more than one year.

If the disobedience or breach still 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. [Rule 2-A (2)]

The transferee Court can also exercise his power and can punish for breach of injunction granted by the transferor Court. [Rule 2-A (1)]

Injunction on insufficient grounds: When in any suit in which an order of temporary injunction has been obtained by the plaintiff on insufficient grounds, or where the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting it, on application being made by the defendant, the Court may order the plaintiff to pay such amount not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury to reputation caused to him.

An order declining to grant injunction and issuing notice to defendants V/s Rule 3 of Order 39 is not appealable under Order 43 Rule 1 (2) of the Code but when the ex-parte interim injunction is refused illegally, the Court can in exercise of its power of Superintendence under Section 115 of the Code, grant ad-interim injunction.

Interlocutory Orders (Order XXXIX Rules 6 to 10)

Meaning: Interim orders or interlocutory orders are those orders passed by a Court during the pendency of a suit or proceeding which do not determine finally the substantive rights and liabilities of the parties in respect of the subject-matter of the suit or proceeding.

After the suit is instituted by the plaintiff and before it is finally disposed of, the Court may make interlocutory orders as may appear to the Court to be just and convenient. **[Section 94 (e)]**

Interim orders or interlocutory orders are made in order to assist the parties to the suit in the prosecution of their case or for the purpose of protection of the subject matter of the suit.

Interlocutory Orders Under Order XXXIX:

1. Power of Court to Order Interim Sale: On the application of any party (an application by the plaintiff under Rules 6 or 7 may be made at any time after the institution of the suit while by the defendant, it may be made at any time after appearance) to the suit, the Court may, order the sale of any moveable property, being the subject-matter of such suit, or attach before judgment in such suit, which is subject to speedy and natural delay, or which for any just and sufficient cause it may be desirable to have been sold at once.

2. Detention, Preservation, Inspection, etc, of Subject-matter of Suit : The Court may make an order for detention, preservation and inspection of any property which is the subject-matter of the suit, or as to which any question may arise therein; and authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and authorize any sample 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.

Notice to Opposite Party: No order under rule 6 or 7 shall be made without giving notice to the opposite party, except where it appears to the Court that the object of making such order would be defeated by delay.

3. **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, or the party in possession of such land or tenure neglects to pay the government revenue, or the rent due to. the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the court), be put in immediate possession of the land or tenure; and the court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

4. **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 things as a true 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.

RECEIVER (ORDER XL)

Meaning: The word has not been defined in the Code. The same may be defined as under:-

"The receiver is an important person appointed by the Court to collect and receive, pending the proceedings, the rents, issues and profits of land, or personal estate, which it does not seem reasonable to the Court that either party should collect or receive, or for enabling the same to be distributed among the persons entitled."

The receiver is appointed for the benefit of all concerned; he is the representative of the Court, and for all parties interested in the litigation, wherein he is appointed. He is an officer or representative of the Court and he functions under its directions.

Appointment: In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property. The remuneration for the services of the receiver shall be paid by the order of Court.

Order XL : Rule 1 (1) provides that:-

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. remove25 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.

Duties and Enforcement thereof:

Rule 3: Duties : Every receiver so appointed shall-

a. furnish such security (if any) as the court thinks fit, duly to account for what he shall receive in respect of the property;

b. submit his accounts at such periods and in such form as the court directs;
c. pay the amount due from him as the court directs; and
d. be responsible for any loss occasioned to the property by his willful default or gross negligence.
e. fails to pay the amount due from him as the court directs, or occasions loss to the property by his

willful default or gross negligence,

Rule 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 as the courts directs, or
c) Occasions loss to the property by his willful 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.

According to **rule 5**, a collector may be appointed as a 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.

CAVEAT (Section 148-A)

Meaning: The word has not been defined in the Code. Literally, means "let him beware", a forma notice. It is a caution registered in a public Court or office to indicate to the officials that they are not to act in the matter mentioned in the caveat without first giving notice to the caveat.

Caveat meant "anything in the nature of an opposition at any stage, and is not confined to the opposition at the great seal, which was the meaning of 'caveat' under the old practice".

It is a legal notice given by an interested party to some officers not to do a certain act until the party in heard in opposition.

Provision: Section 148-A of the Code provides for lodging of a caveat.

Section 148-A: Right to lodge a caveat:

1. Where an application is expected to be made, or has been made, in a suit or proceeding 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 caveat or) shall serve a notice of the caveat by registered post, acknowledgment 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 have been, or may ,be, .filed by 'him in support of the application.

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

Where caveat lie: According to S. 148-A, a caveat can be lodged in a suit or proceeding. The expression 'Civil Proceeding' in S. 141 of the, Code includes all proceedings, which are not original proceedings.

Where caveat does not lie : The provisions of section 148-A are applicable only in the cases where the caveator is entitled to be heard before any order is made on the application already filed or proposed to be filed, but does not apply in cases where the Code does not contemplate notice.

Who can file caveat: A necessary as well as proper party may lodge a caveat U/s 148-A. A caveat may be filed by any person who is going to be affected by an interim order likely to be passed on an application which is expected to be made in a suit or proceeding instituted or about to be instituted in a Court.

Who may not file cavpat: A stranger to the proceeding or a person supporting the application for interim relief made by the applicant cannot lodge a caveat.

Time Limit: According to sub-section (5), a caveat filed U/s 148-A (1) shall remain in force for ninety days from the date of its filing.

Failure to hear Caveator: Once a caveat is filed, it is a condition precedent for passing an interim order to serve a notice of the application on the caveator who is going to be affected by the interim order. But an interim order passed without hearing the caveator is not without jurisdiction and operates unless set-aside.

Module 05 Decree, Meaning, Purpose, Court which passed the decree, Decrees granting particular reliefs

Meaning and Definition of Decree

Decree is formal expression of adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -

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

(b) any order of dismissal for default.

Explanation -

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

EXECUTION OF DECREES

S. 36 TO 74 AND O. 21: In a suit, after the pronouncement of judgment and passing of decree in respect of the relief given by the Court, the next step is the execution of decree or order.
Meaning: "Execution is the enforcement of decrees and orders of the Court by the process of the Court." As a matter of fact, execution is the formal procedure prescribed by law whereby the partly entitled to the benefit of a judgment may obtain that benefit.
Execution of Decree and Order: Section-36 of the Code lays down that the provision of the Code relating to execution of decrees (including provision relating to the payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order).

Subject Matter of Execution: The subject matter of execution may be either a decree or an order of a Court of competent jurisdiction. Every decree or order of a Court cannot be the subject matter of an execution, but only those decrees and orders are executable which finally determine and enforce the rights of the parties at the date when the decree or order is made.

Decree which may be executed:

Before a decree can be executed, it must be both valid and capable of execution. The decree put into execution must not be barred under any law. It is the decree passed by the Court of first instance which can be executed but when an appeal has been preferred against the original decree, it is the decree of the appellate Court, which alone can be executed. The decrees of the Court of first instance become merged in the appellate Court's decree. The appellate decree whether it confirms, varies or reverses the decree of original Court, it is the only decree which can be executed.

Court by which decrees may be executed: Section 38

According to S. 38, an executing Court may be either the Court which passed the decree, or the Court to which the decree is sent for execution.

The expression "Court which passed a decree" means –

1) The Court of first instance -

a) in case where the decree is passed by the Court of first instance, and

b) in case of appellate decrees,

2) The Court at the time of execution would have had jurisdiction to try the suit where the Court of first instance has either ceased to exist or ceased to have jurisdiction to execute the decree.

Explanation to S.37 says that

The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred form the jurisdiction of that Court; but, in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making application for execution of the decree it would have jurisdiction to try the said suit.

Application for Execution: The execution proceedings commence with the filing of an application for execution before the Court, which passed the decree, or before the Court to which the decree has been transferred for execution. Rules 10-25 and 105-106 of Order 21 deal with execution applications.

Who may apply for execution: Rule 10

An execution proceeding may be started on the application of the -

i) Decree holder- Rule10 of Order 21

ii) Where the decree-holder is dead, his legal representative-S 146.

iii) Any other person claiming under the decree-holder-S. 146.

iv) Representative of or a person claiming under the decree-holder - S. 146.

v) Transferee of decree-holder26, subject to the following-

a. Where the decree has been transferred by an assignment, in writing or by operation of law;

b. The application is to the Court which passed the decree;

c. Notice and after providing an opportunity of being heard to the transferor and the judgment debtor.

vi) One or more of the joint decree holders,27 subject to the fulfillment of the following conditions:

a. There is no contrary condition imposed by the decree.

b. The execution application is to the execution of the whole decree; and

c. The application is made for the benefit of all the joint decree holders; or if anyone of them is dead, for the benefit of the survivors and the legal representatives of the deceased decree holder.

]**Against whom an execution proceeding can be started:** Execution proceeding may be started against the following persons:-

a. Judgment debtor, S. 50, 0.21, R.15

b. When the judgment debtor is dead, against his legal representatives. But the legal

representatives shall be liable only to extent of the property of the judgment debtor received by them. -So 50, 52, 53.
c. Representative of or the person claiming under the judgment debtor.-S.146.
d. Surety of the judgment debtor. S. 150.

Court to whom an execution application may be made: As per S. 38, an execution application may be filed either in the Court who passed the decree or in the Court to whom the decree has been transferred for execution.

Contents of Application: According to Rule 11 of 0.21, every application for execution, except in a case of a money decree, shall be in writing, signed and verified by the applicant or by some other person acquainted with the fact of the case and shall contain the particulars like the number of the suit, the name of the parties, the date of the decree, the amount of the decree etc
Rules 11-A, 12, 13, 14 and R. 45(1) of 0.21 should be read together.

Procedure: Admission (Rule17) and Hearing (Rules 105-106)

Admission: According to Rule17 of 0.21, on receiving an application for execution of a decree, the Court must admit and register the application, if the Court is satisfied that the execution application complies with the requirements of Rule 11 to 14. Where such application does not comply with the above requirements then the Court shall allow the defect to be remedied then and there or within a time fixed by it, and if the defect is not remedied as specified then, the Court shall reject the application.

Hearing: Rules 105 and 106 deal with the hearing of an execution application and state that when an application is pending then, the Court shall fix a date of hearing and if the applicant is not present at the time of hearing, the Court may dismiss the application and when the applicant is present but the opposite party is not present, the Court may proceed ex-parte hearing and pass an appropriate order.
Under Rule 106, an order of dismissal for default or an ex-parte hearing may be set aside by the court on an application of the aggrieved party where there are sufficient causes shown to do so.

An order rejecting an application u/r 106(1) is appeallable.

Limitation for Execution: Any" application for execution of a decree can be filed within 12 years from the date of the decree while the period of limitation for the execution of a decree for mandatory injunction is 3 years from the date of the decree .

Stay of Execution: Rules 26 to 29 of Order XXI deal with the stay of execution. The provisions of Rule 26 are mandatory and imperative while the provisions of Rule 29 are not mandatory but discretionary. But this discretion must be exercised judicially and in the interest of justice.

The execution proceeding may be stayed either by the executing Court i.e. the Court which passed the decree or the Court to: -which the decree has been transferred for execution or by the Court having appellate jurisdiction in respect of the decree or to which the decree has been transferred for the execution thereof.

The provisions regarding stay of execution of a decree are made in Rule 26, which lays down that the executing Court (the Transferee Court) shall, on sufficient cause being shown by the judgment-debtor, and after furnishing security or fulfilling the conditions, which may be imposed upon him by the Court, stay the execution of a decree for a reasonable time, to enable the judgment debtor to apply to the Court which has passed the decree or to the appellate Court for an Order to stay execution. The transferor Court can stay the execution absolutely while the power to stay the execution by the Transferee Court is for a reasonable time to enable the judgment debar to apply to the transferor Court or to the appellate Court to grant stay against the execution.

Stay of Execution Pending suit:

Rule 29 of O. XXI deals with the provisions regarding stay of execution pending suit between the decree holder and the judgment debtor. Rule 29 says that "where a suit is pending in any Court against the holder of a decree of such Court or of a decree which is being executed by such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as it thinks fit, stay execution of the decree until the pending suit has been decided.

Provided that if the decree is one for payment of money, the Court shall if it grants stay without requiring

security, record its reasons for so doing.

Mode of execution: There are various modes of execution of decree provided in the Code. A decree may be enforced, as specified U/s 51 of the Code of Civil Procedure-

a. by delivery of any property specifically decreed;
b. by attachment and sale or by sale without attachment of any property.
c. by arrest and detention31 in prison for such period not exceeding the period specified in S. 58, where arrest and detention is permissible under that section;
d. by appointing a receiver; or
e. in such other manner as the nature of the relief granted may require.

Choice of mode of execution and simultaneous execution: As a general rule, it is for the decree holder to choose a particular mode of executing his decree and it is permissible too in law to opt for even a simultaneous execution, but the Court may in its discretion refuse execution at the same time against the person and property of the judgment debtor.

Modes of Execution:

1. By delivery of Property: Section 51 (a) Rules 31, 35 and 36.

a. Specific moveable property: The decree for any specific movable properties which do not include money and are in the possession of judgment debtor may be executed:-

i) by seizure and delivery of property; or
ii) by detention of the judgment debtor; or
iii) by attachment and sale of his property; or
iv) by attachment and detention both.

The provisions of Rule 31 of O. 21 are not applicable for the execution of a decree for money or where the property is not in possession of the judgment debtor but is in the possession of a third party.

b. Immovable property:

Rules 35 and 36 Of O. XXI provide the mode of executing decrees, for possession of immovable property. Where the decree is for immovable property in the possession of judgment debtor or in the possession of any person bound by the decree35, it can be executed by removing the judgment debtor or any person bound by the decree and by delivering possession thereof to the decree holder.

2. **Attachments and Sale of Property:**

Section 51(b) The Court is empowered to order execution of a decree by attachment and sale or by sale without attachment of any property36 and the sale of property without an attachment is merely an irregularity and such sale is not void or without jurisdiction and does not vitiate the sale. Sections 60 to 64 and Rules 41 to 57 of Order XXI deal with the subject of attachment of property.

An executing Court is competent to attach the property if it is situated within the local limits of the jurisdiction of the Court and the place of business of the judgment debtor is not material37. The provisions of the Code, however, do not affect any local or special law. The attachment and sale under any other statute can be made and the judgment debtor cannot claim benefit under the Code.

Modes of Attachment: Section 62 and Rules 43 to 54 of Order XXI lay down the procedure for attachment of different types of moveable and immovable properties. These are the provisions in the Code relating to mode of attachment of movable property, Negotiable instruments, Debt not secured by a Negotiable instrument, Share in capital of a corporation, Share or interest in movable property, Salary or allowance of a Public Servant or a Private employee, Partnership property, Property in custody of Court or Public Officer, Decree (i) for Payment of money or sale in enforcement of a mortgage or charge and (ii) Decree other than that mentioned above, Agricultural produce, Immovable property while S. 63 prescribes procedure to be followed in case the property is attached in execution of decrees by several Courts.

Properties, which can and cannot be attached: Section 60(1) of the Code specifies about the properties which can be attached and sold in execution of a decree while being subject to the provisions of sub-section (2) of section 60, the properties which can be attached and sold in execution of a decree are

specified in proviso to s. 60(1) and s. 61 of the Code.

Determination of Attachment: Under the following circumstances, an order of attachment under the Code shall be determined -
i. On the satisfaction of the decree either by the payment of the decreetal amount or otherwise;
ii. On the reversal or setting aside of the decree:
iii. On an order to release the property;
iv. Dismissal of execution application after the attachment of property:
v. On withdrawal of attachment by attaching Creditor;
vi. On failure by decree-holder to do what he is bound to do under the decree; and
vii. Where the attachment order is made before judgment and the defendant furnishes the necessary security.

3. Arrest and Detention:
Section 51 (c) One mode of the execution of a decree is arrest and detention of a judgment debtor in the Civil Prison. The provisions stated in proviso to Section 51 are relevant in this regard and are as under:-
An order of arrest and detention of judgment debtor in civil prison can be passed by the Court while executing the decree for payment of money, or for specific moveable property, or for specific performance of a contract, or for an injunction, or where a decree for specific performance of a contract or for an injunction is against a corporation.
But the persons like a woman, judicial officers, the parties and their pleaders, members of Legislative Bodies, a judgment debtor etc., can not be arrested under curtain circumstances.
An order of detention of judgment debtor in civil prison shall not be passed, in execution of a decree for the payment of money, where the total amount of such decree does not exceed two thousand rupees.
Period of detention: According to S. 58(1), every person detained in the civil prison in execution of a decree shall be so detained, where the detention is for the payment of a sum of money –
i) exceeding five thousand rupees- for a period not exceeding 3 months, and
ii) exceeding two thousand rupees, but not exceeding five thousand rupees - for a period not exceeding six weeks.
Release of person detained: A warrant for the arrest may be cancelled or an arrested judgment debtor may be released by the Court on the ground of his serious willness, while a judgment debtor, who has been committed to civil prison, may be release of therefrom, either by the State Government, on the ground of the existence of any infectious or contagious disease, or by the committing court or any superior court, onthe grounds of his suffering from any serious iIIness.
A judgment debtor may also be released as specified under proviso to s. 58, Le.
i. on the, payment of amount mentioned in the warrant, to the officer in charge of the civil prison, or
ii. on the otherwise satisfaction (by an order of the Court) of the decree, or
iii. on the request to release of the person on whose application he has been so detained, or
iv. on the omission to pay subsistence allowance, by the person, on whose application he has been so detained. But such release as specified in clause (iii) or on such omission shall noF1 be without an order of the Court.
Re-arrest:
A judgment debtor released under section 58 shall not be discharged from his debt but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison and if he has been released under section 59, he may be re-arrested but the detention period in civil prison shall - not exceed the aggregate period specified in S. 58.
4. **By' Appointment of Receiver:**
Section 51(d) The provisions relating to the execution by appointment of a Receiver are provided in Order XXI, Rule 11 (2) (J) (iv).
An execution of a decree by appointment of receiver is an equitable remedy which cannot be claimed as a

right and is granted by the Court in its discretion, and the same is an exception to the general rule that a decree holder can choose the mode of execution and that the Court has no power to refuse the mode chosen by him. The provisions of section 51 (d) should be read with - the provisions of Order XL, Rule 1.

Questions to be determined by the Executing Court: Section 47 provides the provisions regarding the matters arising subsequent to the passing of a decree, and deals with objections to execution, discharge and satisfaction of a decree.

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

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

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

Explanation II: (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and (b) All questions relating to the Delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

In **Jugal Kishore V. Raw Cotton Com. Ltd, AIR 1955, SC,** the Court has decided that once the suit is decreed, S. 47 requires that the executing Court alone should determine all questions in execution proceedings and filing of separate suit is barred. It does not matter whether such questions arise before or after the decree has been executed. For the said purpose, the Court can treat a suit as an execution application or an application as a suit in the interest of justice.

But after the Amendment Act of 1976, which deleted sub-section (2) of section 47, by which the Court was empowered to treat an application U/S 47 as a suit, or a suit as an application, now the Court cannot treat an application U/S 47 as a suit, or a suit as an application.

An Executing Court Can not go behind the Decree: The duty of an executing Court is to execute the decree as it is. An executing Court cannot go behind the decree. An executing Court has 'to take the decree as it stands and execute it according to its terms. The Court has no power to question the correctness of the decree.

Vague and Ambiguous Decree: But whenever a decree is found to be vague or ambiguous, it is within the power and duty of the executing Court to interpret the decree with the intent to find out the meaning of those terms.

Decree passed in Inherent lack of Jurisdiction:

When the executing Court finds that there was an inherent lack of jurisdiction, the decree passed by a Court is a nullity and when such a plea is put forward by an aggrieved party, it is obligatory on the part of the executing Court to consider such an objection, and such a decree cannot be executed, because there cannot be said to be a decree in such a case.

No Appeal against any determination U/s 47, but Revision Lies: Before the Amendment Act of 1976, the determination of any question U/s 47 was deemed to be a decree U/s 2(2) of the Code, but after the amendment, which deleted sub-section (2) of section 47, by which the Court was empowered to treat an application U/s 47 as a suit, or a suit as an application, and hence, now any determination U/ s 47 is not appealable U/s 96 or 100, but a revision lies, subject to the fulfillment of the conditions mentioned in s. 115 of the Code.

Module 06 Summary Suits

In order to institute a suit under summary procedure, the nature of suit must be among the following classes:-Suits upon bill of exchange, hundies and promissory notes.Suits for recovering a debt or liquidated demand in money, with or without interest, arising:-

1. On a written contract, or
2. On an enactment (the recoverable sum should be fixed in money or it should be in the nature of a debt other than a penalty), Or
3. On a guarantee (here the claim should be in respect of a debt or liquidated demand on)

procedure

- After institution of a summary suit, the defendant is required to be served with a copy of the plaint and summons in the prescribed form.
- Within 10 days of service of summons, the defendant has to enter an appearance.
- If the defendant enters an appearance, the plaintiff shall serve on the defendant a summons for judgment.
- Within 10 days of service of such summons, the defendant has to apply for leave to defend the suit.
- Leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just.
- If the defendant has not applied for leave to defend, or if such an application has been made and refused, the plaintiff becomes entitled to the judgment forthwith.
- If the conditions on which leave was granted are not complied with by the defendant then also the plaintiff becomes entitled to judgment forthwith.
- Sub-rule (7) of Order 37 provides that save as provided by that order the procedure in summary suits shall be the same as the procedure in suits instituted in an ordinary manner.

Suits by or against minors, lunatics

Order 32 has been specially enacted to protect the interests of minors and persons of unsound mind and to ensure that they are represented in suits or proceedings by persons who are qualified to act as such.

Definition of Minor

According to Rule 1 of Order 32 of the Code, minor means a person who has not attained the age of majority within the meaning of section 3 of The Indian Majority Act, 1875. Therefore, a minor is a person who has not attained the age of 18 years. In case of a minor for whom a guardian or next friend has been appointed by a court, or whose property is under the superintendence of a Court of Wards, the age of majority is 21 years.

Procedure

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. [O. 32, R. 1]. The next friend should be a person who is of sound mind, who has attained majority, who is not a defendant and whose interest is not adverse to that of the minor.

Where the suit is instituted without a next friend the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader off other person by whom it was presented. [O. 32, R. 2].

Where a suit has been instituted on behalf of the minor by his next friend, the court may, at any stage of the suit either of its own motion or on the application of any defendant and for reasons to be recorded, order the next friend to give security for the payment of all costs incurred or likely to be incurred by the defendant. Where such a suit is instituted by an indigent person, the security shall include the court-fees payable to the Government. (O. 32, R. 2-A).

Where the defendant is a minor, the court, on being satisfied of the fact of his minority, should appoint a proper person to be guardian for the suit for such minor, called the guardian ad litem.

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

A person appointed as guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including in any appellate or revisional court and any proceedings in any execution of a decree. (O. 32, R. 3).

Where the interest of the next friend is adverse to that of the minor or where he is connected with a defendant whose interest is adverse to that of the minor, or where he does not do his duty or, during the pendency of the suit, ceases to reside within India, or on any other sufficient cause, the court may, on an application made on behalf of the minor, order the next friend to be removed.

On the retirement, removal or death of the next friend of a minor, further proceedings are stayed until the appointment of a next friend in his place. Similarly, a guardian may also be removed if he does not do his duty or is allowed to retire by the court, and the court may appoint a new guardian in his place. (O. 32, R. 9).

Where the minor plaintiff attains majority, he may elect to proceed with the suit or elect to abandon it. If he elects the former course, he shall apply for an order discharging the next friend and for leave to proceed in his own name. The title of the suit will be corrected so as to read henceforth thus—

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

Where he elects to abandon the suit, he shall, if sole plaintiffs apply for an order to dismiss the suit in repayment of the costs incurred by the defendant or which may have been paid by his next friend. (O. 32, R. 12).

Where the minor applies to the court that the suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper and the court is satisfied of such unreasonableness or impropriety, it may grant the application and order the next friend to pay the costs of all parties in respect of the application and the suit, or make such other order as it thinks fit. (O. 32, R. 14).

All the above rules equally apply to persons adjudged to be of unsound mind.

SUITS BY INDIGENT PERSONS (ORDER XXXIII)

Introduction: The provision relating to suits by an indigent person is contained in Order XXXIII,

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

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

An indigent person is a person, who

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

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

Explanations II and III read as under -

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.

Procedure to sue as Indigent Person:

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

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

Contents of Application: Every such application shall contain the following particulars:-

a. the particulars required in regard to plaints in suits;

b. a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof; and

c. it shall be signed and verified as provided in Order VI rules 14 and 15.
The suit commences from the moment an application to sue in forma pauperis is presented According to Rule 1-A, an inquiry to ascertain whether or not a person is an indigent person shall be made.

Rule 1-A : Every inquiry into the question whether or not a person is an indigent person shall be made, in the first instance, by the chief ministerial officer of the court, unless the court otherwise directs, and the court may adopt the report of such officer as its own finding or may itself make an inquiry into the question.

Examination of Applicant and Rejection of Application:
Examination: (Rule 4)

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

2. If presented by agent, court may order applicant to be examined by commission - Where the application is presented by an agent, the court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

Rejection of Application: Rule 5: The court shall reject an application for permission to sue as an indigent
person –

1. Where it is not framed and presented in the manner prescribed by rules 2 and 3, or
2. Where the applicant is not an indigent person, or
3. Where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as an indigent person:

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

4. Where his allegations do not show a cause of action, or
5. Where he has entered into any agreement with reference to the subject matter of the proposed suit under which any other person has obtained an interest in such subject matter, or
6. Where the allegations made by the applicant in the application show that the suit would be barred by any law for the time being in force, or
7. Where any other person has entered into an agreement with him to finance the litigation.

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

Procedure at Hearing :

On the date fixed, the Court shall examine the witness (if any) produced by either party to the matters specified in clause (b), clause (c) and clause (e) of rule 5, and may examine the applicant or his agent to any of the matters specified in Rule 5 the Court after hearing the argument hall either allow or refuse to allow the applicant to sue as an indigent person.

Procedure if Application Admitted :

Where the application is granted, it shall be deemed the plaint in the suit and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except at the of any petition, appointment of a pleader or other proceedings connected with the suit.

Withdrawal of Permission :

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

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

Realization of Court fees: (Rule 14)

a. Where Indigent person succeeds: (Rule 10) Where the plaintiff succeeds in the suit, the court shall calculate the amount of court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person; such amount shall be recoverable by the State Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject matter of the suit.

b. Where Indigent person fails: (Rule 11) Where the plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed,-

I. because the summons for the defendant to appear and answer has not been served upon him in

consequence of the failure of the plaintiff to pay the court fee or postal charges (if any) chargeable for such service or to present copies of the plaint or concise statement, or

II. because the plaintiff does not appear when the suit is called on for hearing, the court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person.

c. Where an indigent person's suit abates :(Rule 11.A) Where the suit abates by reason of the death of the plaintiff or of any person added as a co-plaintiff, the court shall order that the amount of court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person shall be recoverable by the State government from the estate of the deceased plaintiff.

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

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

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

Defence by an indigent person: Rule 17:

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

Subject to the provisions of this order, the Central or State Government may make such supplementary provisions for free legal services to those Who have been permitted to sue as indigent persons,60 and where an indigent person is not represented by a pleader, the Court may, if the circumstances of the case so require, assign a pleader to him.

Indigent Person : A person unable to pay Court fees on memorandum of appeal may apply to allow him to

appeal as an indigent person. The necessary inquiry as prescribed in Ord.er XXXIII will be made before granting or refusing the prayer. But where the applicant was allowed to sue as an indigent person in the trial

Court, no fresh inquiry will be necessary if he files an affidavit that he continues to be an indigent person.

SUITS IN PARTICULAR CASES

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

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

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

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

Notice to whom:

a. Against Government: The Notice issued under section 80(1) shall be delivered to, or left at the office of –

1) In the case of a suit against Central Government -

i) a Secretary to that Government : when it does not relate to a railway, and
ii) the General Manager of Railway : when it relates to a railway.

2) In the case of a suit against the State Government of Jammu and Kashmir -
i) a Chief Secretary to that Government; or
ii) any other person authorized in this behalf by the State Government.
3) In the case of a suit against any other State Government -
i) a Secretary to that Government; or
ii) the collector of the district.

b) **Against Public Officer :** In the case of a suit against Public Officer notice shall be delivered to him or left at his office.

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

Exemption from Notice : A suit may, with the leave of the Court, be instituted to obtain an urgent or immediate relief without serving any notice as required under section 80(1).

But, in such suit, the Court shall not grant any relief, whether interim or otherwise; except after giving to the Government or Public Officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed in the suit.

It is also provided that the Court shall return the plaint for presentation to it after complying with the requirements of section 80(1), if after hearing the parties, the Court is satisfied that no urgent or immediate relief need to be granted.

No Dismissal of suit: Any suit instituted against the Government or such public officer shall not be dismissed, by reason of any error or defect in the notice, if such notice contains-

I. The name, description and residence of the plaintiff, so as to enable the Government or such public officer to identify the person serving the notice;

II. Notice has been delivered or left at the offices of the appropriate authority specified U/s 80(1); and

III. The cause of action and the relief claimed have been substantially indicated.

Procedure in Suit:

Signature and Verification of Plaint Or Written Statement

Agent and Authorized Agent:

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

Where in any case the Government Pleader is not accompanied by any person on the part of the Government, who may be able to answer any material. questions relating to the suit, the Court may, direct the attendance of such a person.

Duty of Court:

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

Procedure in Suit against Public Officer:

The defendant (public officer) on receiving the summons may apply to the Court to grant the extension of time fixed in the summons, to enable to him to make reference to the Government, and to receive orders thereon through the proper channeF6 and the Court shall, on such application extend the time for so long as it appears to it to be necessary.

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

Where the government undertakes the defence of a suit against a public officer, the government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

Where no application under sub-rule (1) is made by the government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties.

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

Exemption from Arrest, Personal Appearance and Attachment of Properly : According to section 81 of the Code, if the suit is against a public officer in respect of any act purporting to be done by him in his official capacity –

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

b. where the court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

Execution of decree :

Where, in a suit by or against the Government or by or against a public officer in respect of any act purporting to be done by him in his official capacity, any decree passed against the Union of India or a State or, as the case may be, the public officer, shall not be executed except in accordance with the provisions of sub-section (2) of S. 82. i.e.

An execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such decrep.

The provisions of sub-sections (1) and (2) shall apply in relation to an order or award as they apply in relation to a decree, if the order or award85 –

a. is passed or made against the Union of India or a State or a public officer in respect of any such act as aforesaid, whether by a Court or by any other authority; and

b. is capable of being executed under the provisions of this Code or of any other law for the time being in force as if it were a decree.

Definition of 'Government' and 'Government Pleader': Rule 8-8 of Order XXVII provides that in Order
XXVII 'Government' and 'Government Pleader' mean respectively"

i. in relation to any suit by or against the Central Government or against a public officer in the service of that Government- the Central Government and such pleader as that Government may appoint .

ii. in relation to any suit by or against a State Government or against a public officer in the service of a State- the State Government and such Government pleader as defined in Section 2(7), or such other pleader as the State Government may ,appoint.

Inter Pleader Suit (Section 88 and Order XXXV)

Meaning: An interpleader suit is a suit in which the real dispute is not between the plaintiff and the defendant but between the defendants only and the plaintiff is not really interested in. the subject matter of the suit.

Object: The primary object of instituting an interpleader suit is to get claim of rival defendants adjudicated

Principle: According to Section-

"Where two or more persons claim adversely to one another the same debts, sum of money or other property, moveable or immoveable, from another person, who claims no interest therein other than for charges and costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:

Provided that where any suit is pending in which the -rights of the parties can properly be decided, no such suit of interpleader shall be instituted.

Conditions for Application: Before the institution of aninterpleader suit, the following conditions must be satisfied:

a. Existence of some Debt, Money or Moveable or Immoveable Property: there must be some debt, sum of money or other moveable or immoveable property in dispute;

b. Adverse Claim by two or more persons: two or more persons must be claiming the above debt, money or property, adversely to one another;

c. The person from whom the debt, money or property is being claimed should not be interested in it: the person from whom such debt, money or property is claimed, must not be claiming any interest therein other than the charges and costs:

d. The above person must be ready to deliver it: The above person must be ready to pay or deliver it to the rightful claimant; and

e. No Pendency of Suit: there must be no suit pending in which the rights of the rival claimants can be properly decided.

Who may not institute an interpleader suit?

An Agent or Tenant:

An agent cannot sue his principal or a tenant his landlord for the purpose of compelling them to interplead with persons claiming through such principals or landlords, because ordinarily, an agent cannot dispute the title of his principal and a tenant cannot dispute the title of his landlord during the subsistence of tenancy.

Illustrations: A deposited a box of jewels with 8 as his agent:

a. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. 8 cannot institute an inter pleader suit against A and C. (C claims adversely to A, and therefore, no inter pleader suit can file.)

b. 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. 80th claim the jewels from B. B may institute an interpleader suit against A and C. (C claims through A and , therefore, it can file.)

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

Plaint in Interpleader Suit : In every interpleader suit the plaint in addition to other statements necessary for plaint, state –

a. that the plaintiff claims no interest in the subject matter in dispute other than the charges or costs;
b. the claims made by the defendants severally; and
c. there is no collusion between the plaintiff and any of the defendants.

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

Procedure where defendant is suing plaintiff (Stay of Proceedings): Where any of the defendants

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

Procedure of First Hearing:

1. At the first hearing, the Court may-

a. Declare that the plaintiff is discharged from ali liabilities to the defendants in respect of the thing claimed, award him his costs and dismiss him from the suit; or

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

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

3. Where the admissions of the parties do not enable the Court so to adjudicate the Court may direct -

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

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

Module 07 Appeals, Revision and Review, Recognition of Judgments :

Appeals (Section 96 to 112, Order 41-45)

Introduction: The provisions relating to appeals are contained in Sections 96 to 112 and Orders XLI to XLV of the Code of Civil Procedure and can be summarized as under:

a. First Appeal, Sections 96 to 99-A, 107 and Order XLI
b. Second Appeal, Sections 100 to 103, 108 and Order XUI
c. Appeals from Orders Sections 104, 108 and Order XLIII
d. Appeals by Indigent persons Order XLIV
e. Appeals to Supreme Court Section 109 and Order 45

Meaning: The appeal means " the Judicial examination of the decisions by a higher Court of the. decisions of an inferior Court"

Right to Appeal: The right to appeal is a vested right. The right to appeal is a substantive right and an appeal is a creature of statute and there is no right of appeal unless it is given clearly in express terms by a statute. Appeal is a vested right and accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced. The right of appeal is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. This vested right can be taken away only by a subsequent enactment if it so provides expressly or by necessary implication, and not otherwise.

First Appeal : (Sections 96 – 99-A, 107 and Order XLI)

Appeal from Original Decree:

S. 96 of the Code provides as:

1. Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction

to the Court authorized. to hear appeals from the decision of such Court.
2. An appeal may le from an original decree passed ex parte.
3. No appeal shall lie from a decree passed by the Court with the consent of parties.
4. No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of small causes, when the amount or value of the subject- matter of the original suit does not exceed ten thousand rupees.

Who may Appeal: The following persons are entitled to prefer an appeal :

1. A party to the suit who is adversely affected by the decree {Section 96(1)}, or his legal representative. (Section 146)
2. A person claiming under a title party to the suit or a transferee of interests of such party, who, so far as interest is concerned, is bound by the decree, provided his name is entered on the record of the suit. (Section 146)
3. A guardian ad litem appointed by the Court in a suit by or against a minor. (Section 147, Order 32, Rule 5)
4. Any other person, with the leave of the Court, if he is adversely affected by the decree.

An appeal may lie against an ex- parte decree {S- 96(2)}and no appeal shall lie from a decree passed with consent of parties {S- 96(3)}. The provision of S-96(3) is based upon principle of Estoppels. Once the decree is shown to have been passed with the consent of parties, Section 96(3) becomes operative and binds them. It creates and Estoppels between the parties as a judgment on consent. There shall be no appeal in petty cases as provided in Section 96(4) and an appeal lies against preliminary decree as in the case of all decrees, unless a final decree has been passed before the date of filing an appeal, but there shall be no appeal against final decree when there was no appeal against preliminary decree. In fact, final decree owes its existence to the preliminary decree.

Conditions before filing an appeal: An appeal can be filed against every decree passed by any Court in exercise of original jurisdiction upon the satisfaction of the following two conditions:

i) The subject matter of the appeal must be a "decree", and
ii) The party appealing must. have been adversely affected by such determination.

Order XLI - Appeal from Original Decrees.

Form of Appeal: Rule 1 to 4:

Memorandum of Appeal: Contains the grounds on which the judicial examination is invited. In order that an appeal may be validly presented, the following requirements must be compiled with:

a. It must be in the form of memorandum setting forth the grounds of objections to the decree appealed from.
b. It must be signed by the appellant Court or his pleader.
c. It must be presented to the Court.
d. The memorandum must be accompanied by a certified copy of the decree.
e. The memorandum must be accompanied by a certified copy of the judgment unless the Court dispenses with it; and
f. Where the appeal is against a money decree, the appellant must deposit-the decretal amount or furnish the security in respect thereof as per the direction of the Court.

Appeals From Appellate Decrees (Second Appeal Sections 100 to 103 and Order 42)

Section-100 Second Appeal:

1. Save as otherwise provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is, satisfied that the case involves a substantial question of law.
2. An appeal may lie under this section from an appellate decree passed ex- parte.
3. In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
4. Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate such question.
5. The appeal shall be heard on the question so formulated and the respondent shall, after hearing of the

appeal, be allowed to argue that the case does not involve such question:
Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.
Substantial Question of Law: Means a substantial question of law as between the parties in the case involved. A question of law is a substantial as between the parties if the decision turns one way or the other on the particular view of law. If it does not affect the decision, it cannot be said to be a substantial question of law.
Form of Second Appeal; A memorandum of second appeal precisely states the substantial question of law involved, but, unlike the memorandum of 1st appeal, it need not set out the ground of objections to the decree appealed from. Order 41 Rule 1.
Appeal From Orders (Section 104 and Order 43)
Section 104: Orders from which appeal lies-
1. An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:
I. An order under Section 35 A; [Sec. 104(1) (ff)]
II. an order under Section 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92 , as the case may be; [Sec. 104(1) (ffa)]
III. an order under Section 95 ; [Sec.1 04(1) (g)]
IV. an order under any of the provisions of the Code imposing a fine or directing the arrest or detention in the Civil prison of any person except where such arrest or detention is in execution of a decree; [Sec.104 (1) (h)]
V. an order made under rules from which an appeal is expressly allowed by rules; [Sec. 104(1) (i)]
Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made. {Proviso to, Section 1 04(1)}
2. No appeal shall lie from any order passed in appeal under this Section.
Section 105:
a. Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction but, where a decree is appealed from, any error defect or irregularity in any order, affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal.
b. Notwithstanding anything contained in sub-section (1) where any party aggrieved by an order of remand from which an appeal lies does not appeal there from, he shall thereafter be precluded from disputing its correctness.
Section 106 : What Courts to hear appeals: Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction then to the High court.
Appeals from Orders (Order XLIII)
Rule-1:Appeals from Orders: An appeal shall lie to the following orders under the provisions of Section 104, namely:
1. An order returning a plaint to be presented to the proper Court .
2. An order rejecting an application for an order to set aside the dismissal of a suit;
3. An order rejecting an application for an order to set aside a decree passed ex parte;
4. An order under rule 21 of Order XI;
5An order on an objection to the draft of a document or of endorsement;
6. setting aside or refusing to set aside a sale;
7, An order refusing to set aside the abatement or dismissal of a suit;etc.
1. Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that

such order should not have been made and the judgment should not have been pronounced.
2. In an appeal against a decree passed In a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not have been recorded.

REFERENCE (Section - 113 and Order XIII)

Section 113 provides provisions relating to reference and empowers any Court (subordinate Court) to state a case and refer the same for the opinion of the High Court. Such an opinion can be sought when the Court itself feels some doubt about a question of law. The provisions are subject to such conditions and limitations as may be prescribed.

Object: The object for reference is to enable the subordinate Courts to obtain in non-appealable cases the opinion of the High Court, on a question of law and thereby avoid the commission of an error which could not be remedied later on.

Conditions for Applications: (Order 46 Rule 1) The following conditions must be fulfilled, before High Court entertains a reference from a sub-ordinate Court, i.e.

1. Pendency: There must be pendency of a suit or appeal in which the decree is not the subject to appeal or a pending proceeding in execution of such decree.

2. Question of law: A question of law or usage having the force of law must arise in the course of such suit, appeal or proceeding ; and

3. Doubt in mind of Court: The Court trying the suit, appeal or executing the decree must entertain a reasonable doubt on such question.

Questions of law: The subordinate Court may be in doubt relating to the questions of law, which may be-

1. Those which relate to the validity of any Act, Ordinance or Regulation and the reference upon such questions of law are obligatory upon the fulfillment of the following conditions :

1. It is necessary to decide such question in order to dispose of the case;
2. The Sub- ordinate Court is of the view that the impugned Act, Ordinance or Regulation is ultra vires; and
3. That there is no determination by the Supreme Court or by the High Court, to which such Court is Subordinate that such Act, Ordinance or Regulation is ultra vires.

2. Other Questions: In this case the reference is optional.

Procedure: Who can make Reference: A reference can be made by the Court suo-motu or on application of any party.

Rule 1: The Referring Court must formulate the question of law and give its opinion thereon.

Rule 2: The Court may either stay the proceeding or may pass a decree or order, which cannot be executed until receipt of judgment of High court on reference.

Rule 3: The High Court after hearing the parties, if it so desires, shall decide the point of reference and the Subordinate Court shall dispose of the case in accordance with the said decision.

Provision as in Section 113: The provisions relating to reference, as has been specified in s. 113 of the Code are as under-

Section 113:Reference to High Court: Subject to such conditions and limitations as may be prescribed, any court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit:

PROVIDED that where the court is satisfied that a case pending before it involves a question 9S to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of, the High Court.

Powers and Duty of Referencing Court: A reference can be made on a question of law arisen between the parties litigating, in a suit, appeal or execution proceeding, during the pendency of such suit, appeal or proceeding and the Court is in doubt on such question of law.

Powers and Duty of High Court: The High Court entertains the consulting jurisdiction in cases of reference and can neither make any order on merits nor can it make suggestions. In case of reference the High Court may answer the question referred to it and send back the case to the referring Court for disposal in accordance with law.33 Where a case is referred to the High Court under Rule 1 of Order XLVI or under the proviso to section 113, the High Court may return the case for amendment, and may alter, cancel or set-aside any decree or order which the Court making reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit.

Review (Section 114 and Order XLVII)

Meaning: Review means re-examination or reconsideration of the case by the same judge. It is a judicial re-examination of the case by the same Court and by the same Judge. In it, a Judge, who has disposed of the matter, reviews his earlier order in certain circumstances.

Section 114 and Order XLVII: The provisions relating to review are provided in S. 114 (substantive right) and Order XLVII (procedure). The general rule is that once the judgment is signed and pronounced or an order is made by the Court, it has no jurisdiction to alter it. Review is an exception to this general rule.

Section 114:

Review: Subject as aforesaid, any person considering himself aggrieved

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

b. by a decree or order from which no appeal is allowed by this Code, or

c. by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order and the Court may make such order thereon as it thinks fit.

Who may apply to Review: Any person aggrieved by a decree or order may apply for a review of Judgment where no appeal is allowed or where an appeal is allowed but no appeal has been filed against such decree or order or by a decision on a reference from a small cause.

An 'aggrieved person'. means a person who has suffered a legal grievance or against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused in something or wrongfully affected his title to something.

A person who is not a party to the decree or order cannot apply for review since on general principle of B.W,

such decree or order is not binding on him and therefore he cannot be said to be an aggrieved person within the meaning of section 114 and order 47 Rule (1).

A party who has a right to appeal but does not file an appeal, may apply for a review of judgment, even if notwithstanding the pendancy of an appeal by some other party, excepts?

i. Where the ground of such appeal is common to the applicant and the appellant, or

ii. When, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Grounds of Review: Order XLVII, Rule (1) provides the following grounds:

i. Discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his (aggrieved person's) knowledge or could not be produced by him (aggrieved person) at the time when the decree was passed or order made; or

ii. on account of some mistake or error appear on the face of the record; or

iii. for any other sufficient reason.

Explanation to section 114 specifically provides that "the fact that the decision on a question of law or which the judgment of the Court is based has been reserved or modified by the subsequent decision or a superior court in any other case, shall not be a ground for review of such judgment".

Procedure: Where the Court is of the opinion that there is not sufficient ground for a review, it shall reject the application otherwise it shall grant the same but no such application shall be grantee without

previous notice to the opposite party; to enable him to appear and be heard in support of the decree or order, a review of which is applied for. Where more than one Judge hears a review application and the Court is equally divided the application shall be rejected.

Appeal Against Order on application U/s 114: An order of the Court rejecting the application shall no be appealable, but an order granting the application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit.

Bar of Certain Application: No application to review an order made on an application for a review or decree or order passed or made on a review shall be entertained.

REVISION (SECTION 115)

Meaning:'Revision' means "the action of revising, especially critical or careful examination or perusal with a view to correcting or improving". Revision is "the act of examining action in order to remove an defect or grant relief against the irregular or improper exercise or non- exercise of jurisdiction by a lower Court".

Object: The object of Section 115 is to prevent the subordinate Courts from acting arbitrarily, capricious and illegally or irregularly in the exercise of their jurisdiction. It enables the Court to correct, when necessary, errors of jurisdiction 'committed by the subordinate Courts and provides the means to aggrieved party to obtain rectification of a non- appealable order. The powers U/s 115 are intended to meet the ends of justice and where substantial justice has been rendered by the order of the lower Court the High Court will not interfere.

Provision U/s 115:

1. The High Court may call for the record of any case which has been decided by any COl subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears-

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

b. to have failed to exercise a jurisdiction so vested, or

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

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

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

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

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

Provision relating to Revision in Uttar Pradesh: For S. 115, the following section shall be substituted and be deemed to have been substituted with effect from July 1, 2002, namely:

"115. Revision -

1. A superior Court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate Court where no appeal lies against' the' order and where the subordinate Court has :

a) exercised a jurisdiction not vested in it by law; or

b) failed to exercise a jurisdiction so vested; or

c) acted in exercise of its jurisdiction illegally or with material irregularity.

2. A revision application under sub-section (1),.when filed in the High Court. shall contain a certificate on the first page of such application, below the title .0Mhe' case, to the effect that no revision in the case lies to the district Court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district Court.

3. The superior Court shall not, under this section, vary or reverse any order made except where-,

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

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

4. A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the superior Court.

Conditions: The following conditions must be satisfied before the revisional power can be exercised:

a. a case must have been decided;

b. the Court deciding the case must be one which is a Court sub-ordinate to the High Court or the Session Courts, as the case may be;

c. the order should be one in which no appeal lies; and

d. the sub-ordinate Court must have

i. exercised jurisdiction not vested in it by law; or

ii. failed to exercise jurisdiction vested in it; or

iii. acted in the exercise of its jurisdiction illegally or with material irregularity.

Application of S. 115:

"……. While exercising its jurisdiction U/s 115, it is not competent to the High Court to correct errors of fact, however gross they may be, or even errors of law, unless the said errors have relations to the jurisdiction of the Court to try the dispute itself. As cis. (a), (b) and (c) of section 115 indicate, it is only in cases where the sub-ordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked...."

It was decided by the Supreme Court in re **Smt. Vidyavati Vs Shri Devidas** AIR 1977 S. C. 397, that a revision against order on review application by sub-judge to High Court directly without going into appeal to District Court, is maintainable.

Meaning of Expression "case Decided": Apex Court in ***Baldevdas v. Filmistan Distributors*** AIR 1970 SC, held that a case may be said to have been decided if the Court adjudicates for the purpose of the suit some right or obligation of the parties in controversy. Every order in the suit cannot be regarded as a case decided within the meaning of S. 115.

Explanation to S.115, which was added by the Amendment Act of 1976, makes it clear that the expression "case decided" includes any order made, or any order deciding an issue, in the course of a suit or proceeding. The expression 'any case which has been decided', now, after the Amendment Act means "each decision which terminates a part of the controversy involving the question of jurisdiction.

Interlocutory Orders: Section 115 applies even to interlocutory orders. Interlocutory Orders which are not appealable are subject to revision U/s 115 of the Code, if the conditions laid down in the section are fulfilled.

Limitation for Revision: The period of limitation for revision application is 90 da s ... ecree or order sought to be revised.

Abatement: The provisions of Order XXII do not apply to revision application and such application does of abate on the death of the applicant or on account of failure to bring legal heirs of deceased applicant record. No letters patent appeal lies from an order made in the exercise of revisional jurisdiction and no revision lies against an order passed by a single judge of a High Court.

Module 8 The Limitation Act 1963

Law of Limitations: The Law of Limitations limits or prescribes a time after the lapse of which suit or other proceedings cannot be maintained in a Court of law or the persons liable to sue shall become exempt from answering therein. It does not postpone or suspend the right of claimants, it merely prescribes a period for the institution of suit and forbids them from being brought after periods, each of which starts from some definite event. It only restrains the holder of a right from enforcing his right by recourse to law after prescribed period of limitation.

Nature of Act:"The rule of limitation is a rule of procedure, a branch of adjective law. The intention of the law of limitation is not to create a right where there is none, nor to extinguish a right where there is one, but to interpose a bar after a certain period to enforce an existing right."1 The plea of limitation can be raised only as against the plaintiff and not against the defendant.

Law is "*lex feri":* It means whether an obligation is to be enforced or not depends exclusively upon the law of limitations of the country in which the suit is brought (lex feri)

Act is a Complete Code: The Limitation Act is an exhaustive code governing law of limitation in India in respect of all matters specifically dealt with by it and the Indian Courts are not permitted to travel beyond its provisions to add or to supplement them.

Interpretation Clause2: In this Act, unless the context otherwise requires -

a) "applicant" includes-

i. A petitioner;

ii. Any person from or through whom an applicant derives his right to apply;

iii. any person whose estate is represented by the applicant as executor, administrator or other representative;

b) “application” includes a petition;

c) "bill of exchange" includes a hundi and a cheque;

d) “defendant” includes-

e) "bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed or is not performed, as the case may be;

any person from or through whom a defendant derives his liability to be sued;

any person whose estate is represented by the defendant as executor, administrator other representative;

f) "easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in or attached to, or subsisting upon, the land of another;

g) "good faith"-nothing shall be deemed to be done in good faith which is not done with due care and attention;

h) "plaintiff includes-

i) any person from or through whom a plaintiff Jerives his right to sue;

ii) any person whose estate is represented by the plaintiff as executor,

administrator or other representative;

j) "period of limitation" means the period of limitation prescribed for any suit, appeal or application

by the Schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of this Act;

k) "promissory note" means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight;

l) "tort" means a civil wrong which is not exclusively the breach of a contract or the breach of a trust;

m) "trustee" does not include a benamidar, a mortgagee remaining in possession after the mortgagee has been satisfied Or a person in wrongful possession without title.

LIMITATION OF SUITS, APPEAL AND APPLICATIONS

Period of Limitation: Law of limitation is based on well known maxim *"Interest republica ut sit finis litum"*i.e., It is in the interest of the State that there should be an end to Initiative process. The law of limitation is based on the principle that the law aids the diligent and not the indolent, that a man who has negligently slept over his rights for an undue length of time will not be allowed to litigate in respect of them.

Law of Limitation is an absolute law and the parties cannot evade it by way of private agreement. Thus under Section 28 of the Contract Act, an agreement which limits the time within which any party thereto may enforce his rights by the usual legal proceedings in ordinary tribunals is void. Similarly, an agreement between the parties that defendant will not plead the law of limitation in a suit brought against him by the other is void.

In **Livi v. Raingi 3 Born 207**, it was observed that the object of the Act is not to create or define causes of action but simply to prescribe the period within which existing rights can be enforced in Court of Law.

Section 3 (1) of the Limitation Act provides as under:

"Subject to the provisions contained in Sections 4 to 24, every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence."

So Section 3 of Limitation Act gives the general rule of limitation by providing that a suit or an appeal or an application filed beyond the time prescribed there for shall be dismissed although limitation is not set up as defence by opposite party.

In Ashok K. Khurana v. Mis Steelman Industries and others, AIR 2000 Delhi 336 it was observed:

"Mere reading of Section 3 of the Act shows that it is mandatory and absolute in nature. It enjoins upon the court to dismiss any suit instituted, appeal preferred or application made after the prescribed period of limitation, although limitation has not been set up as a defence. Courts have no discretion or inherent powers to condone the delay if the suit is filed beyond the prescribed, period of limitation, rather a duty is cast on the court to dismiss the suit, appeal or application if the same is barred by limitation unless matter is covered by Sections 4 to 24 of the Act."

So it becomes clear that provisions of Section 3 of the Act are mandatory in nature. Section 3 enjoins a court to dismiss every suit, appeal or application, which is not within the prescribed period. Gateways from the peremptory provisions of Section 3 are provided by Sections 4 to 24. In other words, the court has no power, apart from the provisions of Sections 4 to 24, to relieve a litigant from the bar of limitation even on equitable consideration or on grounds of hardship or in exercise of its inherent powers.

Section 4 of the Act provid8s that where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens. Then Section 5 of the Act provides that an appeal or any application other than the application under any of the provisions of order Order 21 of the Code of Civil Procedure may be admitted after the prescribed period if the appellant or applicant satisfies the Court that he has sufficient cause for not preferring an appeal or making the application within such period. Sections 6 to 8 of the Act extend the period of limitation in cases where the limitation expires before the cessation of disability, i.e., minority, insanity or idiocy.

Sections 12 to 15 of the Act provide for excluding certain periods in computing the period of

limitation. Then Sections 16 to 24 of the Act provide for the effect of death, fraud, mistake, acknowledgement 'in writing, part payment, addition or substitution of new plaintiffs or defendants, and continuous wrong. In such cases, the Act provides the date from which the fresh period of limitation shall begin to run.

"**Limitation bars the remedy but does not destroy the right"**

Section 3 of Indian Limitation lays down the general rule of Limitation Act and reads as under:

"Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed; although limitation has not been set up as a defence."

The Limitation Act thus prescribes period within which various suits, appeals or applications for respective claims can be instituted in courts of law. If a party or claimant fails to do so, it cannot claim any further remedy at law.

The rule of limitation is a rule of procedure. It does not either create or extinguish a right. In the words of **Sir Richard Couch in Harrynath v. Mather, 20 LA.** 188: "The intention of the law of limitation is not to give right where there is none nor to extinguish a right where there is one but to interpose a bar after a certain period to a suit to enforce an existing right."

Limitation thus simply bars the judicial remedy, without extinguishing the right. For example, where the recovery of a debt has become time barred by the lapse of prescribed time, the right to the debt is not extinguished and the same applise to the debtor without being aware of the money due to him on the ground that his claim for recovery of the debt had become time barred.

In Punjab National Bank and others v. Surendera Prasad Sinha, AIR 1992 SC 1815 Section 3 of Limitation Act bars the remedy but does not destroy the right to which the remedy relates. Right to debt continues to exist notwithstanding remedy is barred. Right can be exercise in any other manner than by means of suit. It is settled law that the creditor would be entitled to adjust, from payment of sum by debtor towards time barred debt. It is also equally settled law that creditor when he is in possession of adequate security debt due could be adjusted from security in his possession.

Law of Limitation is an absolute law and the parties cannot evade it by way of private agreement. Thus under Section 28 of the Contract Act, an agreement which limits the time within which any party thereto may enforce his rights by the usual legal proceedings in ordinary tribunals is void. Similarly, an agreement between the parties that defendant will not plead the law of limitation in a suit brought against him by the other is void.

Exception: However, there is one exception to rule that law of limitation bars the remedy but not the right.

This has been incorporated in Section 27 of the Act. The Section provides:

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished. "

In **First National Bank Ltd. v. Seth Santlal, AIR 1954 Punjab 328** it was observed: "Section 27 of the Limitation Act is, however, an exception to the general rule that in personal actions, the Limitation Act bars only the remedy and does not extinguish the right. In a suit for possession of any property on the determination of the period of limitation net only the remedy but the right also, is extinguished under Section 27. But a debt does not cease to be due, because it cannot be recovered after the expiration of the period of limitation provided for instituting a suit for its recovery. After a debt becomes barred a person is still deemed to owe."

EFFECT OF SUFFICIENT CAUSE FOR NOT PREFERRING APPEALS OR MAKING APPLICATIONS WITHIN THE PERIOD OF LIMITATION

The provisions of Section 5 of the Act are an exception to the general rule laid down in Section 3 that

every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed.

Section 5 of Indian Limitation Act provides:

"Any appeal or any application other than an -application under any of the provisions of Order XXI of Code of Civil Procedure 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making tire application within such period."

Explanation says: If the appellant or the applicant was misled by the order, practice or judgment of the High Court in ascertaining or computing the prescribed period, it may be a sufficient cause within the meaning of this Section for extension of period of limitation.

It will be seen from the above that the provisions contained in Section 5 applies only to appeal and certain applications mentioned therein and not to the suits. The reason is that period prescribed for applications and appeals mentioned in this Section does not exceed six months while for suit it extends from 3 to 12 years. Therefore, this conclusion has been given in this Section for applications and appeals in certain circumstances.

'Sufficient Cause': It is necessary to get the benefit of this Section that the court must be satisfied with the 'sufficient cause' for not preferring the appeal or application. The term 'sufficient cause' used here has not been defined in this Act. Its meaning, therefore, can be accepted as a cause, which is beyond the control of the party invoking the aid of this Section. This term 'sufficient cause' must of course, be given a liberal meaning so as to advance substantial justice when any negligence or inaction or want of bona fide is 'not imputable to the appellant. The sufficient cause can be determined from the facts and circumstances of a particular case.

So any appeal or application (other than one made under Order XXI of C,P.C.) may be admitted after prescribed period if appellant or applicant as the case may be shows "sufficient cause" for not preferring appeal or making application within the prescribed period. But mere proof of existence of "Sufficient Cause"for not filing the proceeding within the prescribed period does not, under the section, ipso facto compel the Court to extend the time. The court has a discretion to admit or refuse the proceeding even' if sufficient cause is shown,

In **Sandhya Rani v. Sudha Rani AIR 1978 SC 537** Supreme Court observed:

"It is undoubtedly true that in dealing with the question of condoning the delay under Section 5, the party seeking relief has to satisfy the Court that he had sufficient cause for not preferring the appeal or making the application within the prescribed time and this has always been understood to mean that the Explanation

has to cover the whole period of delay. However it is not possible to lay down precisely as to what facts or matters would constitute 'sufficient cause' under Section 5. But those words should be liberally construed so as to advance substantial justice when no negligence or any inaction or want of bona fides is imputable to a party, i.e., the delay in filing an application should not have been for reasons which indicate the party's negligence in not taking necessary steps which he would have or should have taken. What would be such necessary steps will again depend upon the circumstances of a particular case.

Discretion is conferred on the Court before which an application for condoning delay is made and if the Court after keeping in view relevant principles exercises its discretion granting relief unless it is shown to be manifestly unjust or perverse, the Supreme Court would be loathe to interfere with it."

Explanation to Section 5 says that "the fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be "sufficient cause" within the meaning of this Section ", The following are some examples of what is and what is not "Sufficient Cause":

1. Illness: Illness is considered as 'sufficient cause' to get benefit of Section 5, but mere plea of illness is not sufficient cause for not filing proceeding in time unless it is shown that the appellant or applicant was utterly disabled to attend to any duty.

2. Imprisonment: A person can be given the benefit of Section 5 if he is undergoing imprisonment due to some criminal act. The time spent by him in the jail may be deducted from the prescribed period of time.

3. Mistaken Legal Advice: A mistaken advice given by a legal practitioner may in circumstances of particular case give rise to 'Sufficient Cause' within the meaning of Section 5. In State of WB. v. The Administrator, Howrah Municipality, AIR 1972 SC 749, it was held that if a party had acted in a particular manner on a wrong advice given by his legal advisor, he cannot be held guilty for negligence so as to disentitle the party to plead sufficient cause under Section 5 provided that no negligence, nor inaction nor want of bonafides is imputable to a party.

4. Illiteracy: The fact that appellant was illiterate is not sufficient reason to condone the delay.

5. Delay in obtaining copies: When a delay is caused:

1) in obtaining a copy of the order or decree of a court and such delay was caused by the officer of the court.

2) by the court itself in issuing orders.

3) due to the method wrongly adopted in procuring the copy of the decree or order of the court. Such delay shall be deemed as sufficient cause for granting benefit of Section 5 of this Act.

The power given to the courts under Section 5 above is discretionary yet it has to be exercised in a judicial manner keeping in view the special circumstances of each case.

In **Collector, Land Acquisition v. Mst. Katiji, AIR 1987 S. C. 1353**, their Lordships of the Supreme Court laid down the following guiding principles:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational commonsense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence; or on account of mala fides. A litigant does not stand to benefit by resorting to delay.

6. It must be grasped that judiciary is-respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and it is expected to do so.

It was pointed out that the Courts should adopt liberal approach in the matter of condonation of delay keeping in view the above principles.

LEGAL DISABILITY

Generally limitation begins to run from the date of cause of action. But the Indian Limitation Act itself provides certain exceptions to this general principle. Thus, in a case where the aggrieved party is suffering with some legal disability, the period of limitation does not run from the date of the accrual of the cause of action but runs from a subsequent date, on which the disability ceases. In this connection Sections 6, 7 and 8 of Indian Limitation Act are the counterpart of each other and they unitedly form one unit. The general rule regarding disability is provided by Section 6 which reads as under:

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

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

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

4. Where the legal representative referred to in sub- section (3) is at the death of person to whom he represents, affected by any of such disabilities the rules contained in sub-sections (1) and (2) shall apply.

5. Where a person under disability, dies after the disability ceases but within the period allowed to him under this Section, his legal repres19ntative may institute the suit or make the application within the same period after the death, as would otherwise have been available to that person had he not died.

Explanation: for the purposes of this Section 'minor' includes a child in the womb."

So Section 6 does not prevent running of limitation but only extends the period of limitation 'on the ground of disability of person entitled to sue or apply. Section 6 excuses an insane person, minor and an idiot to file a suit or make an application for the execution of a decree within the time prescribed by law and enables him to file the suit or make an application after the disability has ceased, counting the period of time from the date on which the disability ceased. If one disability supervenes on another disability or one disability is followed by another without leaving a gap the suit or application for execution may be filed after both disabilities have ceased to exist. If the disability or disabilities continue till the person's death then the legal representative of the deceased on whom the title devolves is allowed to file a suit or make an application for execution within the time allowed by law counting it from the death of the person entitled. The mere fact that here is a guardian for the person under disability does not deprive such person of the indulgence granted by Section 6.

In Akhtar Hussain v. Qudrat Ali AIR 1923 Oudh. 31 it was observed that Section 6 of Limitation Act has no application in case of appeals. Legal disability is ,inability to sue owing to minority, lunacy or idiocy. The effect of legal disability is that it extends the period of limitation but it does not prevent the period from running.

Sometimes a situation arises when one of the several persons jointly entitled to institute a suit or to execute a decree is under disability. In this connection Section 7 of Act says that if one of the several persons jointly entitled to institute a suit or make an application for the execution of a decree, is under any such disability and a discharge can be given without the concurrence of such person, the time will run against all of them.
However, if such discharge cannot be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the other or until the disability has ceased.

So Section 7 of Limitation Act would apply when the right to sue is joint irrespective of whether the substantive right is joint or not.

Section 8 of Indian Limitation Act makes it clear that Rules contained in Sections 6 and 7 are subject to the
following conditions:

1. They cannot be applied to the suits to enforce rights of pre-emption.
2. They cannot be applied to any of the cases in which extension of period of imitation for more than three years from the cesation of disability or the death of a person as the case may be, is sought for.

CONTINUOUS RUNNING OF TIME (SECTION 9)

It is a fundamental principle of law of limitation that "Once the time has commenced to run it will not cease to do so by reason of any subsequent event." In other words, the time runs continuously and without any break or: interruption until the entire prescribed period has run out and no disability or inability to sue occurring subsequently can stop it. This rule has been embodied in Section 9 of the Act in the following words:

"Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it."

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of a limitation for a suit to recover the debt shall be suspended while administration continues."

This Section applies not only to suits but to applications as well. This has not been expressly provided in the Section.

If at the date on which the cause of action arose the plaintiff was under no disability, or inability, then time will naturally begin to run against him because there is no reason why the ordinary law should not have full operation. Section 9 says that once time has begun to run, no subsequent disability or inability to sue can stop its running. This applies to a person himself as well as to his representatives-in-interest after his death.

The Section contemplates a case of subsequent and not of initial disability, that is, it contemplates those cases where the disability occurred after the accrual of the cause of action; whereas cases of initial disability have been provided for by Section 6.

Disability or inability to sue: Disability has been defined as the want of legal qualification to act and inability of the physical person to act. Thus according to Calcutta High Court in Pooran Chandra v. Sasson, AIR 1919 Cal. 1018, disability is the state of being minor, insane or idiot, whereas illness, poverty etc. are instances of inability.

In Union of India v. Tata Engineering and Locomotive Co. Ltd. AIR 1989 Pat. 272 it was observed "true it is that in terms of Section 9 when time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it but Section 9 does not provide for a computation of period of limitation."

Exceptions: The principle of Section 9 is strictly applied and no exceptions other than those which the Act itself prescribes can be recognised. Thus the running of time is suspended in following eight cases-

1. The proviso to Section 9 contains exception to the general rule that once time begins to run, no subsequent disability or inability to sue can stop it. The proviso lays down that when administration of an estate has been given to a debtor of the deceased, no time will run against such a debtor until the administration of estate which has been entrusted to him has been finished. In such cases, the law prevents the duty of properly administering the estate to come into conflict with the right of the person to sue for the debt, the hand to give and the hand to receive is the same.

2. The time spent in obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed shall be excluded while computing the period of limitation prescribed for an appeal or an application for leave to application and an application for review of judgment. In the same way the time spent in obtaining the copy of the award shall be excluded, while computing the period of limitation to file an application to set aside an award (Section 12).

3. The time taken for prosecuting an application for leave is to be excluded if leave is necessary while computing the period of limitation for a suit or appeal (Section 13).

4. When the plaintiff has been prosecuting with due diligence another same proceedings the time spent in it shall be excluded while computing the period of limitation (Section 14).

5. When an injunction order has been obtained to stay the institution of suit, the time Gpent in obtaining injunction or order shall be excluded while computing the period of limitation (Section 15(1).

6. When notice is served before the institution of a suit, the limitation shall be suspended during the period of notice (Section 15(1).

7. The period of limitation shall be suspended during the time for which the proceedings to set aside the sale have been prosecuted in a suit for possession by purchaser at an execution sale (Section 15(4).

8. If the defendant is absent from India or in the territories beyond India, under the administration of the Central Government, the time up to which he has been absent shall be excluded while computing the period of limitation (Section 15(5)).

COMPUTATION OF PERIOD OF LIMITATION AND EXCLUSION OF TIME IN ROCEEDING

Section 3 of Indian Limitation Act gives the general rule of limitation by providing "Subject to the provisions contained in Sections 4 to 24, every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence."

So the rule that suit, appeal or application filed after the period of limitation, shall be dismissed is subject to provisions contained in Sections 4 to 24 of the Act. Sections 12 to 15 of Limitation Act provide

for it, excluding certain periods while computing the period of limitation prescribed.

Section 12 of Act says that in computing the period of limitation of any suit, appeal or application-

a. the day from which period is to be reckoned.
b. the day on which judgment complained of was pronounced.
c. time requisite for obtaining a copy of decree, sentence or order appealed from or sought to be revised or reviewed.
d. time requisite for obtaining the copy of judgment on which decree or order is founded.
e. time requisite for obtaining a copy of award shall be excluded.

In Parthasarthy v. State of A.P. AIR 1966 SC 38, it was observed that in computing or calculating the period of limitation from a particular point, Section 12 enables the exclusion of a time from that period caused by an event that intervened between the commencement and termination of said period.

Section 13 of the Act lays down that the time during which the applicant has applied for leave to sue as pauper' shall be excluded. According to this Section, application must have been made for permission to sue as pauper in a suit and same is rejected. Such time which the applicant has spent in good faith for obtaining permission, shall be excluded in computing prescribed period upon payment of court fees.

Section 14 of the Act then provides: In computing the period of limitation prescribed for suit or application, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, should be excluded. The proceeding in such a case should have been founded upon the same cause of action and is prosecuted in good faith in court which from defect of jurisdiction or other cause of like nature, is to entertain it.

In Madhav Rao Narayan Rao Patwardhan V. R. K. Govind Bhanu AIR 1958 SC 767

It was observed that "the essential requisites for application of Section 14 of the Act are that the party seeking the benefit of Section 14 had to affirmatively show

i. that he had been prosecuting the previous suit with diligence
ii. that the matter in issue in the previous suit and new suit are the same
iii. that the previous suit was prosecuted in good faith, and
iv. that the court was unable to entertain that suit on account of defect of jurisdiction or other cause of a like nature.

Then Section 15 of the Act provides-

1. In computing the period of limitation for application for the execution of a decree, the execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn is to be excluded.

2. In computing the period of limitation for any suit of which notice has been given or for which the consent or sanction of the government or any other authority is required in accordance with the requirements of any law for the time being in force of such notice or as the case may be, the time for obtaining such consent or sanction is to be excluded.

3. In computing the period of limitation for any suit or application for execution of a decree by any receiver or 'interim receiver' appointed in proceedings for the adjudication of a person as or an insolvent or by any liquidator or provisional liquidator appointed in proceedings for the winding up of a company, the period beginning with the date of institution of such proceedings and ending with the date of institution of such proceedings and ending with the expiry of three months from the date of appointment of such receiver or liquidator, as the case may be, is to be excluded.

4. In computing the period of limitation for a suit for possession by a purchaser 'at a sale in execution of a decree' the time during which a proceeding to set aside the sale has been prosecuted is to be excluded.

5. In computing the period of limitation for any suit the time during which the defendant has absented from India and from the territories outside India under the administration of the Central Government is to be excluded (Section 15).

EFFECT OF "DEATH", "FRAUD", "MISTAKE" OR " ACKNOWLEDGEMENT IN WRITING"

Section 16 of Indian Limitation Act provides regarding the effect of death, in computing the

limitation period. Section 16 says:

1. Where a person who would, if he were living, have right to institute a suit or right to make application, dies before such right accrues or where right to institute suit or make application assures only on the death of a person, the period of limitation shall be computed from the time when there is a legal representative of deceased capable of instituting such suit or making such application.

2. Where a person against whom, if he were living, a right to institute suit or make application would have accrued, dies before such right accrues or where right to institute a suit or make application against any person-accrues only on death of such person, the period of limitation shall be computed from the time when there is legal representative of deceased against whom plaintiff may institute such suit or make such application."

Section 17 of Indian Limitation Act deals with the effect of 'fraud' or 'mistake' on period of limitation prescribed by the Act.

According to **Section 17:** The limitation shall be computed from the time when the fraud became known to the person defrauded. Therefore, if any person by the exercise of fraud has kept away other persons from the knowledge that he has a right to file a suit, limitation will be computed from the time when such fraud became known to the person so defrauded.

Where any document necessary to establish such right has been fraudulently concealed from him or where the suit or application is for the relief from the consequence of a mistake, limitation shall be computed from the time when he first has the means of producing the document or compelling its production and in latter case when the plaintiff or the applicant has discovered the mistake or could have discovered it. It should be from the date of the discovery of the document.

The following are the essential conditions for getting the advantage of the above Section:

1) The cause of action of plaintiff has been concealed from him by fraud.
2) The fraud has been done by the defendant or a person through him or who claims under him.
3) The plaint is in time since the discovery of the fraud.

Exceptions: The following, however, are exceptions to the rule laid down above:

"Nothing in this Section shall enable any suit to be instituted, application to be made to recover or enforce and charge against or set aside any transaction affecting any property, which,

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

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

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

The main object of this Section to keep the right of a person to sue suspended so long as he is not made aware of the fraud to be committed against him. Such a period is excluded from the prescribed period of limitation. It is based on the principle that a person should not be deprived of his legal right to sue simply because the period of limitation expired and he could not have knowledge of fraud done with him or likely to be done with him.

According to Section 17(1) where the execution of a decree or order within the period of limitation has been prevented by fraud or force of the judgment debtor, the court may on the application of judgment creditor made after the expiry of period of limitation, extend the period for the execution of decree or order. But such an application must be made by the judgment creditor within one year from the date of discovery of fraud or the cession of force as the case may be.

Valid Acknowledgement under Section 18: Section 18 of Indian Limitation Act lays down:

1. Where before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in

writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

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

Explanation (a) added to Section 18 says "an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay , deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled, to the property or right."

So where prescribed period for suit or application in respect of some property or right has begun to run but has not expired, an acknowledgement in writing of such right has been made, a fresh period of limitation should be computed from the time when the acknowledgement was so signed.

In ***Hindustan Apparel Industries v. Fair Deal Corp. New Delhi AIR 2000 Guj 261*** it was held that "the payment of cheque which is dishonoured would amount to acknowledgement of debt and liability and by necessary consequence there will be saving of Imitation as envisaged by Section 18 of Limitation Act. A cheque would prima facie amount to an admission of debt unless contrary intention has been expressed by the person issuing the cheque."

The principle on which Section 18 is based is that the bar of limitation should not be allowed to operate in cases in which the existence of a claim is acknowledged by persons who are under the liability.

In ***Tilak Ram v. Nathu AIR 1967 SC 935 it*** was pointed out that the Section requires (i) an admission or acknowledgement (ii) such acknowledgement must be of a liability in respect of property or right (iii) it must be made before the expiry of period of limitation (iv) it should be in writing and signed by the party against whom such property or right is claimed.

ACQUISITION OF OWNERSHIP BY POSSESSION

The general rule of law of limi1ation is that, it only bars the remedy- and does not extinguish the right itself. In other words law of limitation lays down the rule that when a suit or appeal or application is filed after the prescribed period of limitation, then such suit or appeal or application shall be dismissed, such dismissal means the court will not grant remedy if asked for after the prescribed of limitation but law does not dispute the right of litigant.

Section 27 of Act is the exception to this general principle so far as suits for possession of property are concerned and lays down that after the expiry of period thus prescribed for instituting a suit for possession of any property, the person who should have instituted such suit but has failed to do so, shall cease to have any right to the property. After the expiry of its period the law declares simply that not only the remedy is barred but that title is extinct in favour of the possessor.

In **Banarsi Das v. Jiwan Ram, AIR 1995 P & H 85** it was observed" A bare perusal of Section 27 of Indian Limitation Act would show that after expiry of the period of limitation prescribed for filing suit for possession under the Limitation Act, even the right to sue for possession is extinguished."

Article **64** of Schedule of Limitation Act says that period of limitation for suit for possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed is "twelve years" and such period begins to run from the date of such dispossession of plaintiff. Article 65 says that period of limitation for filing suit for possession of immovable property or any interest therein based on title is "twelve years" and period of limitation begins to run when the possession of defendant becomes adverse to the plaintiff. So in all suits for possession based on dispossession whether plaintiff had title or not, the burden of proof is on the plaintiff to prove that he was in possession and was dispossessed within 12 years of filing suit and in suit for possession based on title, burden of proof is on defendant to prove that his possession over suit property becomes adverse to plaintiff for beyond 12 years of the suit, upon the proof of defendant being in adverse possession for property for period of beyond 12 years (a period which Article 65 prescribes within which plaintiff can file suit for possession on the basis of title), plaintiffs right to property will extinguish 0

possessor.

The concept of adverse possession contemplates a hostile possession i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be a possession by a person who does not acknowledge the other's rights but denies them.

The full period prescribed for a suit for possession must have expired, otherwise the title of the true owner is not extinguished in favour of wrongdoer. An owner does not lose his right to it merely because it happens not to be in possession of it for twelve years but his right is extinguished only when somebody else is in adverse possession of property of lawful owner and no suit for possession has been filed within prescribed period of limitation. Institution of the suit for possession is sufficient to bar the operation of Section 27 of Limitation Act.

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