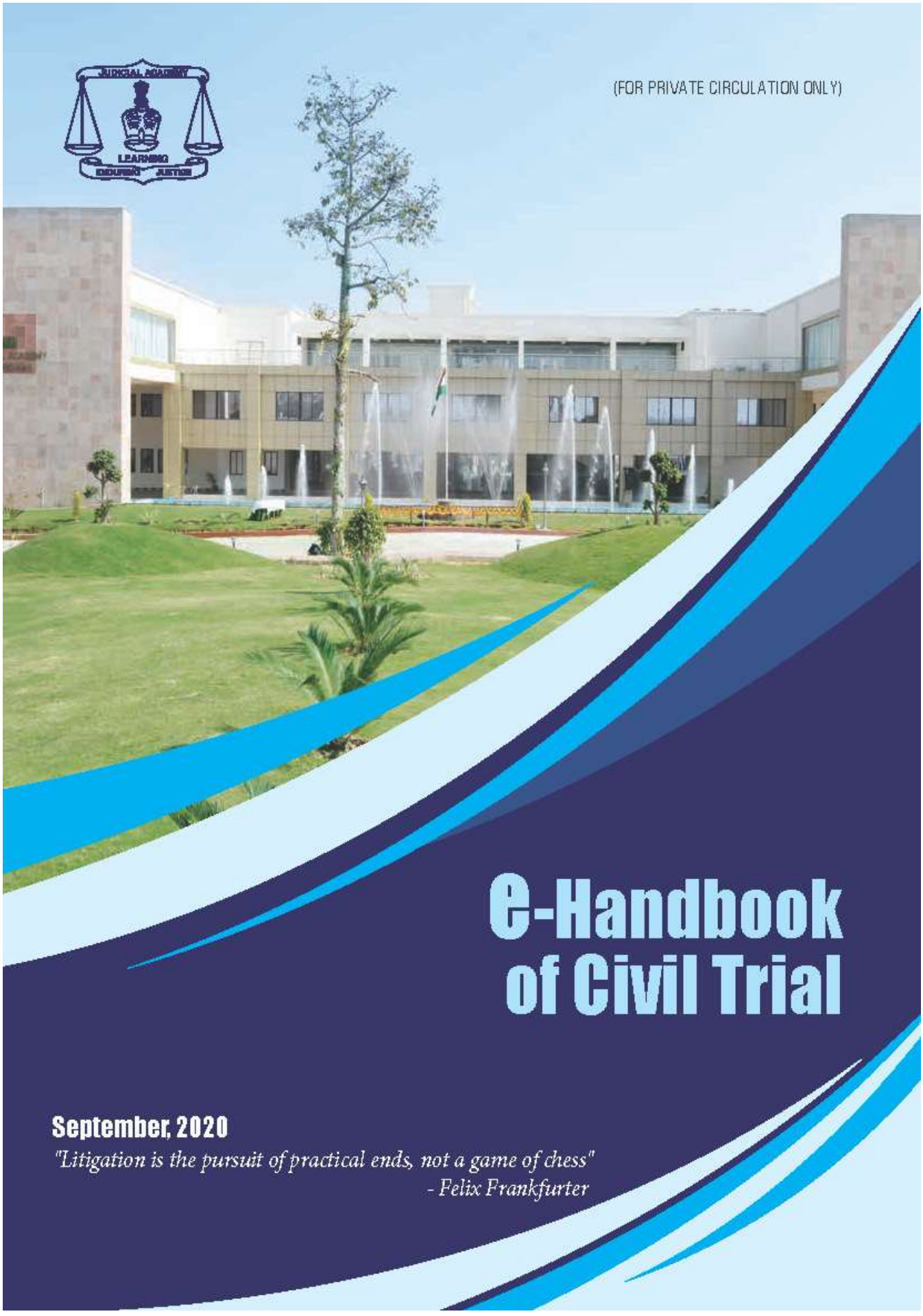
(FOR PRIVATE CIRCULATION ONLY)
e-Handbook
of Civil Trial
September, 2020
"Litigation is the pursuit of practical ends, not a game of chess"
- Felix Frankfurter

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e-HAND BOOK OF CIVIL TRIAL

CHAPTER I-GENERAL PROCEDURES

INSTITUTION OF SUIT

1. The procedure for institution of suit has been laid down under Section 26 r/w **Order IV R 1** of the Civil Procedure Code which provides:

Suit to be Commenced by Plaint (1) Every suit shall be instituted by presentation of plaint in duplicate supported by affidavit and duly verified 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 Civil *Saristedar* are authorized under Rule 22 of the Jharkhand Civil Court Rules (hereinafter called "JCCR") to receive the plaint, but after centralized computer filing, the plaint is presented as per Rule 8 of the JCCR in the CIS. Saristedar is appointed for receiving the plaint by the District Judge.

Rule 8 of JCCR **-** Plaints may be presented ***"in duplicate"*** after complying with the relevant Rule contained in Order VI of the Civil Procedure Code and within time during the Court hours before the Centralized Computer Filing Counter to facilitate immediate registration of cases, stamp reporting, calculation of Court fees and removal of defects, if any. The ministerial staff available at the centralized filing counter under the Saristedar at this very stage, will ensure that all defects are removed.

On receipt of the plaint, the Saristedar shall verify the plaint on the following and give **office note** on the following points;-

(1) Plaint is in proper form as per Order 7 Rule 1 of Civil Procedure Code and Rules 13 & 14 of the **JCCR**

(2) Complete address of the parties as provided in Rule **16 of the JCCR**

(3) Valuation of suit is properly mentioned.

(4) Proper Court fee has been paid.

(5) Court has got pecuniary and territorial jurisdiction

(6) Suit is not barred by the law of limitation.

Role and responsibility of presiding officer before admitting the suit for hearing- The stage when the plaint is presented before the Court is of crucial importance because it is the stage when the first order sheet is drawn. The report of the Saristedar is called for by the Presiding Officer of the Court, hereinafter called P.O., and after that the report need to be made immediately and preferably within maximum of three days. The P.O. must personally scrutinize the report of the Saristedar to ensure that the plaint is as per the requirements of the Civil Procedure Code (hereinafter called "the CPC") and the JCCR.

The P.O. shall verify the entire plaint on the following aspects-

- Jurisdiction of the Court to entertain the suit.
- Plaint is in proper form.
- Complete address of the parties are provided as per Rule 16 of the JCCR
- Whether the necessary parties have been added
- Valuation of suit is properly mentioned.
- Proper Court fee has been paid.
- Is the suit barred by the law of limitation or any other law

- If the suit is by or against a minor or a person under disability, whether the provisions under Order XXXII of the C.P.C has been complied with.
- If the suit is by or against the Government, whether the provisions under Order XXVII and Sections 79 and 80 of the C.P.C have been complied with.

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(1) – JURISDICTION OF THE Court

As stated above at the very outset the Court has to verify its jurisdictional competence to admit a suit. The CPC does not define the term jurisdiction. In fact, none of the substantive or procedural laws seeks to define the term “jurisdiction".

The Black’s Law Dictionary defines “jurisdiction" as “a Court’s power to decide a case or issue a decree."

The Calcutta High Court in a full bench judgment in ***Hirday Nath Roy vs. Ram Chandra Barna Sharma 1920 SCC OnLine Cal 85*** sought to explain the term jurisdiction. It stated *“... jurisdiction may be defined to be the power of Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it; in other words, by jurisdiction is meant the authority which a Court has to decide matters presented in a formal way for its decision."*

The jurisdiction can be demarcated into three categories -

- **Subject matter jurisdiction**, i.e. whether the particular Court in question has the jurisdiction to deal with the subject matter in question;
- **Territorial jurisdiction**, i.e. whether the Court can decide upon matters within the territory or area where the cause of action arose; and
- **Pecuniary jurisdiction**, i.e. whether the Court can hear a suit of the value of the suit in question.

Before going on any further, it must be mentioned that the jurisdiction of the Court is not whether the Court is entitled to pass a particular order or decree in a suit. It is whether the Court

has the right to hear a particular case. Further, the jurisdiction is decided by the averments made in the plaint, and not by the pleading of the defendant. Section 9 deals with subject matter jurisdiction.

Courts to try all civil suits unless barred (Section 9)—The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

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

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

Scope-

In Sanker Naryan Potti v K Sreedevi 1998(3) SCC 751 the Apex Court held "...it is obvious that in all types of civil disputes Civil Courts have inherent jurisdiction as per Section 9 of the CPC unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication, by any statutory provision and conferred on any other tribunal or authority."

The test adopted in examining such a question is (i) whether the legislative intent to exclude arises explicitly or by necessary implication,(ii) whether the statute in question provides for

adequate and satisfactory alternative remedy to a party aggrieved by an order made under it.

Where a statute gives finality to the orders of the special tribunals, the jurisdiction of the Civil Courts must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit**.** AIR 2000 SUPREME Court 2220 "State of A.P. v. Manjeti Laxmi Kantha Rao"

Thus, the law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be, unless it is barred by a statute.

Ramesh Gobindram vs Sugra Humayun Mirza Wakf 2010 (8)SCC726 -In this case the Court followed Rajasthan SRTC vs Bal Mukund Bairwa 2009(4) SCC 299 and held that there is a presumption that Civil Court has jurisdiction. Ouster of Civil Court's jurisdiction is not to be readily inferred. A person taking a plea contra must establish the same. Even where the jurisdiction is sought to be barred under a statute, the Civil Court can exercise its jurisdiction in respect of some matters particularly when the statutory authority or the tribunal acts without jurisdiction.

When the plaintiff has multiple options to institute the suit he can choose the jurisdiction as per his convenience. For example, in cases arising out of a motor vehicle accident, when the victim is a workman, he has an option to either file a claim under the Motor Vehicle Act or under the Workman Compensation Act. It is for him to opt for the particular jurisdiction. On this point, the Hon'ble Apex Court has observed in Dhannalal vs. Kalawatibai &

Ors 2002 (6) SCC 16: "Plaintiff is *dominus litis*, that is, master of, or having dominion over, the case. He is the person who has carriage and control of an action. In case of conflict of jurisdiction the choice ought to lie with the plaintiff to choose the forum best suited to him unless there be a Rule of law excluding access to a forum of plaintiffs choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of the process of law."

In a case Dhruv Green Field LTD. vs. Hukam Singh, (AIR 2002 SC 2841) the Hon'ble Supreme Court observed that-

(1) If there is an express provision in any special Act barring the jurisdiction of a Civil Court to deal with matters specified thereunder the jurisdiction of an ordinary Civil Court shall stand excluded.

(2) If there is no express provision in the Act but an examination of the provisions contained therein lead to a conclusion with regard to the exclusion of jurisdiction of a Civil Court, the Court would then inquire whether any adequate and efficacious alternative remedy is provided under the Act; if the answer is in the affirmative, it can safely be concluded that the jurisdiction of the Civil Court is barred. If, however, no such adequate and effective alternative remedy is provided then exclusion of the jurisdiction of the Civil Court cannot be inferred.

(3) Even in cases where the jurisdiction of a Civil Court is barred expressly or impliedly the Court would nonetheless retain its jurisdiction to entertain and adjudicate the suit provided the order complained of is a nullity.

Lala Ram Swarup & Ors. vs. Shikar Chand & Anr. [1966(2) SCR 553]. In this case, Gajendragadkar, CJ. speaking for a Constitution Bench of the Supreme Court, formulated the following tests:

"The two tests, which are often considered relevant in dealing with the question about the exclusion of Civil Courts jurisdiction are (a) whether the special statute which excludes such jurisdiction has used clear and unambiguous words indicating that intention; and (b) does that statute provide for an adequate and satisfactory alternative remedy to a party that may be aggrieved by the relevant order under its material provisions. Applying these tests the inference is inescapable that the jurisdiction of the Civil Courts is intended to be excluded."

General principles -From various decisions of the Hon'ble Supreme Court, the following general principles relating to jurisdiction of a Civil Court emerge:

a. A Civil Court has jurisdiction to try all suits of civil nature unless their cognizance is barred either expressly or impliedly.

b. Consent can neither confer nor take away jurisdiction of a Court.

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

d. There is a distinction between want of jurisdiction and irregular exercise thereof.

e. Every Court has inherent power to decide the question of its own jurisdiction.

f. The jurisdiction of a Court depends upon the averments made in a plaint and not upon the defense in a written statement.

g. For deciding the jurisdiction of a Court, the substance of a matter and not its form is important.

h. Every presumption should be made in favor of the jurisdiction of a Civil Court.

i. A statute ousting the jurisdiction of a Court must be strictly construed.

j. Burden of proof of exclusion of the jurisdiction of a Court is on the party who asserts it.

k. Even where jurisdiction of a Civil Court is barred, it can still decide whether the provisions of an Act have been complied with or whether an order was passed *de hors* the provisions of law

CASES IN WHICH JURISDICTION OF CIVIL COURTS OF JHARKHAND IS BARRED:

1. Where the Rent Act covered the field to the total exclusion of all other laws, it excluded the substantive aspect of the general law of the tenant-landlord relationship, and on the procedural aspect barred the forum of the Civil Courts.
2. Civil suit challenging assessment and levy of property tax.
3. Public Encroachment Act
4. Section 258 of the CNT Act subject to the ratio decided in Paritosh Maity case.
5. Where bar is contained in the Income Tax Act.

6. In case of simultaneous proceedings under an Act and the Code.

PLACE OF SUING - ***Sections 15 to 20*** of the Code contain detailed provisions relating to jurisdiction of Courts. They regulate forum for the institution of suits. They deal with matters of domestic concern and provide for the multitude of suits which can be brought in different Courts.

Jurisdiction is determined mainly on the grounds of:

1.Suit value

2.Geographical boundaries of a Court

Every suit shall be instituted in the Court of the lowest grade competent to try it.(Sec.15)--- This provision is with regard to the pecuniary jurisdiction.

In the state of Jharkhand the pecuniary jurisdiction of a Court is decided as per Section 19 of ***The Bengal, Agra and Assam Civil Courts Act, 1887*****.** The pecuniary jurisdiction of different Civil Courts subsequent to 2019 amendment stands as follows:

(i) Extent of jurisdiction of Additional Civil Judge (Junior Division) – Rs. 5,00,000/- (Additional Munsif).

(ii) Extent of jurisdiction of the Permanent Court of Civil Judge (Junior Division) – Rs. 7,00,000/- (Munsif)

(iii) Extent of jurisdiction of Civil Judge (Senior Division) – Unlimited.

(iv) **Appellate pecuniary jurisdiction of the District Judges – Less than Rs. 25,00,000/-**

Suits to be instituted where subject-matter situate (Sect.16) - Subject to the pecuniary or other limitations prescribed by any law, suits-

(a) for the recovery of immovable property with or without rent or profits,

(b) for the partition of immovable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

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

Explanation .-In this Section "property" means property situate in India.

Suits for immovable property situate within jurisdiction of different Courts (Sect.17)—Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts. the suit 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 (Sect.18)— (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immovable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction:

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

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

Scope -Place of suing in case where the subject-matter is immovable property (Sect.16 to 18)- Section 16 recognizes a well

established principle that actions against *res* or property should be brought in the forum where such *res* is situate. A Court within whose territorial jurisdiction the property is not situated has no power to deal with and decide the rights or interests in such property. In other words, a Court has no jurisdiction over a dispute in which it cannot give an effective judgment. The proviso to Section 16, no doubt, states that though the Court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in *rem* still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant. The principle on which the maxim was based is that Courts could grant relief in suits respecting immovable property situate abroad by enforcing their judgments by process in *personam*, i.e. by arrest of defendant or by attachment of his property. The proviso is thus an exception to the main part of the Section cannot be interpreted or construed to enlarge the scope of the principal provision. It would apply only if the suit falls within one of the categories specified in the main part of the Section and the relief sought could entirely be obtained by personal obedience of the defendant. Harshad Chiman Lal Modi vs D. L. F. Universal LTD, AIR 2005 SC 4446**,** (2005) 7 SCC 791, (2005) 6 Supreme 634.

Immovable property situated **within jurisdiction of different Courts** - A suit can be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situated, but where the defendant did not include a property in dispute, in a suit previously filed *inter se* between the parties, the principle of res judicata would apply and subsequent suit qua

that property is not maintainable, Sukhdev Singh & Anr. v. Gurdev Singh AIR 2010 (NOC) 861 (P. & H.)

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

Scope- When a suit for compensation for wrong done to person or to movable property is filed, the option is with the plaintiff to either institute the case based on such cause of action at the place where the defendant resides or works for gain or at the place where the wrong was committed. No other choice is available to the plaintiff besides the above, Sreepathi Hosiery Mills (P) Ltd., Calcutta and anr. v. Chitra Knitting Co., Tiruppnr AIR 1977 Mad. 258

Other suits to be instituted where defendants reside or cause of action arises (Sect.20)—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 gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally works for gain, as aforesaid, acquiesce in such institution; or

(c) The cause of action, wholly or in part, arises.

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

Scope- The question of jurisdiction, is to be decided according to **averments made in the plaint.** Section 20, however, starts with "subject to the limitations" mentioned therein whereas Section 16 provides that when the suit is regarding foreclosure, sale or redemption in the case of mortgage of or charge of immovable property, the suit shall be filed in the Court within whose jurisdiction the property that has been mortgaged, is situated.

Object of Section-Section 20 has been designed to secure that justice might be brought as near as possible to every man's hearthstone and that the defendant should not be put to the trouble and expense of traveling long distances in order to defend himself, Laxman Prasad v. Prodigy Electronics Ltd., AIR 2008 Supreme Court 685 : 2008 (1) SCC 618

Determination with regard to the maintainability of a suit must be made with reference to the date of the institution of the suit - Determination with regard to the maintainability of a suit, it is trite, must be made with reference to the date of the institution of the suit. If a cause of action arises at a later date, a

fresh suit may lie but that would not mean that the suit which was not maintainable on the date of its institution, unless an exceptional case is made out therefor, can be held to have been validly instituted. The material date for the purpose of invoking Section 20 is the one of institution of a suit and not the subsequent change of residence. Change of residence subsequent to the decision of a Court would not confer territorial jurisdiction on the Court which did not have it, Mohanakumaran Nair v. Vijayakumaran Nair, AIR 2008 SC 213

A plain reading of Section 20 of the Code leaves no room for doubt that it is a residuary provision and covers those cases not falling within the limitations of Sections 15 to 19. The opening words of the Section "Subject to the limitations aforesaid" are significant and make it abundantly clear that the Section takes within its sweep all personal actions. A suit falling under Section 20 thus may be instituted in a Court within whose jurisdiction the defendant resides, or carries on business, or personally works for gain or cause of action wholly or partly arises. Harshad Chiman Lal Modi vs D. L. F. Universal LTD, AIR 2005 SC 4446, (2005) 7 SCC 791, (2005) 6 Supreme 634.

Where on the basis of a contract to sell the land, a suit for specific performance has been filed, which also demanded possession, the suit will be governed by Section 16(d) and not under Section 20(c) of the CPC, Ananda Bazar Patrika Ltd. & Ors. v. Biswanath Prasad Maitin, AIR 1986 Pat. 57

Objections to jurisdiction (Sect.21) — (1) No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first

instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

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

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

Scope: It provides that the objections to the jurisdiction of a Court based on over-valuation or under-valuation shall not be entertained by an appellate Court except in the manner and to the extent mentioned in the Section. It is a self-contained provision complete in itself, and no objection to the jurisdiction based on over-valuation or under-valuation can be raised otherwise than in accordance with it. With reference to the objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional Court, unless there was a consequent failure of justice. Subhash Mahadevasa Habib vs Nemasa Ambasa Dharmadas (D)By Lrs, (2007) 13 SCC 650

Distinction between a decree passed by a Court having no territorial or pecuniary jurisdiction and a decree passed by a Court having no jurisdiction with regard to the subject matter of a suit - The principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. Any order passed by a Court without jurisdiction would be *coram non judice* and, thus, being a nullity, the same ordinarily should not be given effect to. A distinction must be made between a decree passed by a Court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure, and a decree passed by a Court having no jurisdiction with regard to the subject matter of a suit. Whereas in the former case, the appellate Court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with**,** Hashan Abbas Sayyad vs. Usman Abbas Sayyad, AIR 2007 SC 1077.

The objections when to be raised - When the stage of filing written statement has been reached, then the only option available to the defendants is to file their written statement raising therein their objection regarding jurisdiction. There is no other stage which gives a right to defendants to take out notice of motion taking objection to jurisdiction. Such an objection can only be raised in the written statement and if such an objection is raised then the Court can at the time of framing of issues under Order XIV of the CPC which empowers the Court to frame and decide the issues relating to the jurisdiction of the Court or

relating to bar to the suit created by the law for the time being in force, frame it as a preliminary issue, B.S.I. Ltd. vs M. V.Critian-C and Ors., AIR 1999 Bom. 320.

Bar on suit to set aside decree on objection as to place of suing (Sect. 21A) — 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.

Scope: The above provisions completely bars a suit to set aside a decree on the ground of absence of jurisdiction.

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(2) FORMAT OF PLAINT-

(I) As per **Order VII Rule 1** a plaint shall contain the following particulars:-

(a) the name of the Court in which the suit is brought ;

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

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

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

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

(f) the facts showing that the Court has jurisdiction;

(g) the relief which the plaintiff claims;

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

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

As per **Rule 16 of the JCCR,** every petition or pleading shall state concisely and clearly

(1) the facts, matters and circumstances upon which the applicant relies;

(2) the matter of complaint, if any, and the relief sought or prayer made.

(3) Age, category, contact number either of mobile or base phone and e-mail address, if available, of each plaintiff and

each of the defendant, if known to the plaintiff, shall be mentioned in the cause title of the plaint. Similarly, the defendants shall also furnish their age, category, contact number either of mobile or base phone and e-mail address, if available, on their appearance in statement of addresses, filed along with the written statement.

Section 26(2) mandates that in every plaint, facts shall be proved by affidavit. The requirement of affidavit has been introduced in 1999 following the 163rd Law Commission Report 1998. The Law Commission was of the opinion that the proposed amendment to Section 26 was salutary and may check the tendency to make false averments in the pleadings. In this connection, the Commission recalled the following observation of George Bernard Shaw - "*the theory of legal procedure is, if you set two liars to expose one another, truth will emerge.*" The object of this amendment requiring the plaint to be supported by affidavit is to ensure that there should be an element of truth and sanctity in the averments made in the plaint. In case of making false pleading the party concerned can also be prosecuted for perjury.

Every pleading shall be signed by the party and his pleader (if any) provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.(***Order 6 Rule14***). Save as otherwise provided by any law for the time being in force, 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, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true. The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed. The person verifying the pleading shall also furnish an affidavit in support of his pleadings.(Order 6 Rule15)

The affidavit required to be filed under amended Section 26(2) and Order VI Rule 15(4) of the Code has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof. Salem Advocate Bar Association, T. N. vs Union of India, AIR 2005 SC 3353

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II- Documents required along-with the plaint-(Order VII Rule 14)

(1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or 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, where 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.

(4) Nothing in this Rule shall apply to document produced for the cross-examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory.

Scope: It cannot be disputed that in terms of Order VII Rule 14, where a plaintiff sues upon a document in his possession or power in support of his claim, **he shall** enter such document 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. Sub-Rule (3) of Rule 14 thereof clearly provides that 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. Sub-Rule (4) thereof provides that nothing in the said Rule shall apply to document produced for the cross-examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory. Similar is the provision under the sub-clause (3) of Rule 1 of the Order XIII of the Code. Being so, it cannot be disputed that if the plaintiff fails to mention the documents in the list annexed to the plaint and to place on record a copy of such document, which is required to be produced under the law at the time of filing of the plaint, the plaintiff is not entitled to produce any additional document thereafter, without the leave of the Court. The contention that such leave has necessarily to be obtained prior to the documents being placed on record, cannot be found fault with. **But, at the same time, it is also to be noted that nothing prevents the Court in its discretion to grant leave subsequent to the documents being produced before the Court even though such documents were not entered in the list annexed to the plaint**. It would depend upon the facts of each case. Undoubtedly, the order of the Court in that regard will have to be a speaking and reasoned order. Mohanraj Rupchand Jain v. Kewalchand Hastimal Jain AIR 2007 Bombay 69.

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(3) Parties to the suit-

(1) All persons may be joined in one suit **as plaintiffs** where- **(Order I Rule 1)**

(a) any right to relief in respect of, or arising out of, the **same act or transaction** or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and

(b) if such persons brought separate suits, any common question of law or fact would arise.]

Scope: The scheme of Order 1 and Order 2 clearly shows that the prescriptions therein are in the realm of procedure and not in the realm of substantive law or rights. These Orders deal with joinder of parties and joinder of cause of action to some extent. The object of this provision is to avoid multiplicity of proceedings, waste of time and needless expense of the parties. The Code regards objections as to joinder of parties and frame of suit to be procedural, which is further clear from Section 99 of the Civil Procedure Code that no decree shall be reversed in appeal on account of misjoinder of parties or cause of action unless a Court finds that the non-joinder is of a necessary party. This is on the same principle as of Section 21 which provides that even an objection to territorial jurisdiction of a Court in which the suit is instituted, is to be taken at the first instance and it has to be shown that it has resulted in failure of justice.

“ Act or Transaction” and “ Cause of Action”

The expression “act or transaction” used in this Section is more comprehensive than the expression “cause of action” used in old

Section, for the same act or transaction may give rise to different cause of action, as when several persons are injured by the same act of negligence on the part of the railway company.

Plaintiff having Different Interests

A succeeds to B's estate by inheritance and assigns a portion thereof to C. D is in possession of the estate and disputes A's right of succession to it. A and C may under the present Rule, jointly sue D for the possession of the property of the portion of the estate to which they are entitled if the ground on which the relief is claimed is common to all the plaintiffs. It does not matter that the claim was made by A on the basis of inheritance and C on the basis of assignment. Thus such persons may be joined in a suit even if their interests are different.

Severally

The word severally in this Rule indicates an **involvement of some common questions of law or of fact**, and not the identity of interest or of the cause of action. Where a right to relief in respect of the same act or transaction is alleged to exist in two or more persons severally, **they may join as plaintiff in one suit** or **they may at their option bring separate suits**. This Rule does not necessitate one suit. Where the debts of several creditors to the same person are specified separately in an agreement relating to such debts and the agreement is jointly executed by the creditors, though each is to take his share, a separate suit by each creditor is maintainable.

Thus, when three pieces of land are mortgaged by three different persons in favour of a mortgagee, a single suit by the heirs of all

the three mortgagee is maintainable---Shukar Hanan Mutawali v. Malkappa, 1979 SCC OnLine Bom 207: AIR 1980 Bomb 213

A contract was with several promisees and a suit was filed by only some of the promisees, arraying the promisees who had refused to join as co-plaintiffs. The suit was held to be maintainable.

Where two or more persons **are jointly entitled to the same relief** in respect of a transaction, **they must join** as plaintiffs in one suit as they represent a single and indivisible right which cannot be adjudicated upon in the absence of any such persons.

Thus if A,B and C are joint owners of a property they must be joined together in a suit for recovery of the property. Thus, in a suit for recovery of a joint family property all the members should be joined together for the recovery of the property. Where, however when he sues or is sued as a manager of the joint family, it might not be necessary to add the other members as parties.

However, in a suit for recovery of suit property from trespasser, the members need not be joined as plaintiffs. In a suit for recovery of a trust property, all the members should be joined together.

The object of this Rule is to avoid multiplicity of suits and where the cause of action arises out of the act or transactions, the Court should consolidate the cause of action in one suit.

Consolidation of Suit

The Hon'ble Apex Court in Prem Lata Nahata vs. Chandi Prasad Sikaria, AIR 2007 SC 1247, (2007) 2 SCC 551 has observed

The Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common question of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits. (See *Halsbury's Laws of England, Volume 37, paragraph 69*). If there is power in the Court to consolidate different suits on the basis that it should be desirable to make an order consolidating them or on the basis that some common questions of law or fact arise for decision in them, it cannot certainly be postulated that the trying of a suit defective for misjoinder of parties or causes of action is something that is barred by law. The power to consolidate recognized in the Court obviously gives rise to the position that mere misjoinder of parties or causes of action is not something that creates an obstruction even at the threshold for the entertaining of the suit.

The ratio of the above ruling can be practicably used in land acquisition cases or in such cases where the relief claimed is based on the same cause of action. For example in motor accident claim cases where different claim cases have been

preferred by the victims arising of the same accident, then principle of consolidation can be applied.

(2) All persons may be joined in one suit **as defendants** where- **(Order I Rule 3)**

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.

Scope: This Rule contains a provision as to joinder of defendants. It assumes the existence of a suit in a proper forum i.e. in the Court having jurisdiction to try the suit. In order that a party may be impleaded in a suit as a defendant the party should have a legal interest in the subject-matter of the litigation i.e. an interest which the law recognises. A person who may be indirectly or commercially affected by the litigation cannot be impleaded.

Transferee pendente lite-- Ordinarily transferee pendent lite without permission of the Court cannot be impleaded as parties.--Bibi Zubaida Khatoon vs. Nabi Hussain Sahab (2004)1 SCC 191

Order 2 Rule 3 regarding joinder of cause of action and **Order 1 Rule 3** need to be read together because joinder of parties also involves the joinder of cause of action. The principle is that a person is made a party because there is a cause of action against him and when the cause of action are joined, the parties are also joined.

The plaintiff is *dominus litus* having domain in his suit. He has a right and the prerogative to choose and implead defendants in a suit. The condition precedent is that the Court must be satisfied that the presence of the party would be necessary to effectually and completely adjudicate upon and settle all questions in the dispute. In order to implead a defendant in a suit, it is necessary that the party has a legal interest in the suit as distinguished from mere equitable interest in the matter. A person who may be indirectly or commercially affected by the result of the suit need not be impleaded. Where in a suit there are two or more defendants and two or more cause of action, the suit will be bad for misjoinder of defendants and cause of action, if different cause of action are joined separately against defendants. Such a misjoinder is called multifariousness.

Question: In a suit for declaration that the plaintiff is the owner of the house and for cancellation of the sale deed executed by the defendant, with respect to a portion of the house claimed by the plaintiff to have obtained it on family settlement, whether the other co-sharers need to be impleaded as party?

Ans: No. This is because the suit is not filed for partition of shares, but only with respect to cancellation of the sale deed executed by the other co-sharer Lakhsmi Narayan vs The District Judge 1992(1)CCC 591 (All)

Bihar Scheduled Area Regulation, 1969 has amended Order 1, Rule 3 of the C. P. C. by adding a proviso which has already been quoted above. The Deputy Commissioner, therefore, is a necessary party in all suits whether for declaration of title or for

confirmation of possession of immovable property of a member of the Scheduled Tribe. Jutani Devi alias Rupa Loharin vs Gangau Singh, 1992 2 PLJR 375; 1992 0 Supreme(Pat) 119;

(3) One person may sue or defend on behalf of all in same interest.-(Order I Rule 8)

(1) Where there are numerous persons having the same interest in one suit,-

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-Rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted or defended, under sub-Rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-Rule (1), and no such suit shall be withdrawn under sub-Rule (3), of Rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under Rule 3 of that Order, unless the Court has given, at the

plaintiff's expense, notice to all persons so interested in the manner specified in sub-Rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this Rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation.-For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the person on whom behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be.

Scope: **Order 1 Rule 8** One or more of such person may, **with the permission of the Court sue or be sued**, or may defend such suit, on behalf of, or benefit of all persons **so interested**.

a. The **Court may direct** one or more of such persons to sue or to be sued, or to defend such suit , on behalf of , or for benefit of all such persons interested.
b. No such party suing or defending the suit on behalf of others can withdraw or abandon any part of claim in any compromise unless the Court has given, at plaintiff's expense notice to all parties interested.
c. The existence of community of interest among persons on whose behalf or against whom the suit is instituted is the condition precedent for application of this Rule. In order that

Order 1 Rule 8 may be invoked it is not necessary that the cause of action must be the same, what is required is that the parties should have the same interest in the suit that is,

i. common interest;
ii. common grievance.

d. The proper course under Rule 8 is to obtain permission before the suit is instituted, but if that is not done, the Rule does not forbid leave being granted even after the institution of the suit.
e. **Notice of suit-** where a person sues, or is sued, or defends, a suit on behalf of himself and others, any decree that may be passed in the suit is binding upon them all (Section 11 Explanation VI), unless the decree has been obtained by fraud or collusion (Section 44, The Evidence Act). It is , therefore necessary that the notice of the suit should be given to all the parties who would be bound by the decree. It is the duty of the Court to cause service of the notice or an advertisement to be published.
f. When the plaintiff sues or the defendant is sued on behalf of himself and others the fact should be stated in the title of the suit, and not merely in the plaint.
g. Where a plaintiff on record neglects to execute the decree passed in a suit brought under this Rule, the Court may add other persons having the same interest as plaintiffs to enable them to execute the decree.
h. The provisions of this Rule apply only if:
   i. the parties are numerous,
   ii. they have the same interest,

iii. the necessary permission is obtained- the necessary permission of the Court is mandatory

iv. notice given

i. When a representative suit is brought under this Rule, the person or persons appointed to conduct it are the only necessary party/parties. The others need not be shown as parties and if one of these others dies, the suit does not abate. Even if one of the persons permitted to conduct the representative suit dies, fresh proceedings need not be taken to bring on record other members of the public as representatives of the public and the persons whom the deceased represented will still be interested in the litigation and can be held to be constructive parties to the suit. If one of the persons appointed to conduct the suit dies any other may apply within the time prescribed under Article 81 of the Limitation Act to conduct the suit.

j. A representative suit affects the right of other persons not present in the Court and therefore, a duty is cast on the Court to follow meticulously the procedure as laid down by Order 1 Rule 8 and the provisions under it are to be treated as mandatory.

k. When a plaint contains an averment that the plaintiffs are filing the suit in representative capacity and later an application under Order 1, Rule 8 is made, the Court may either grant a conditional permission subject to objection being made by the parties to whom notice is issued or may immediately issue notice without granting a conditional

permission. After the notice is served, the Court must after disposing of the objections, if any, pass the final order granting or refusing permission.

1. Absence of express leave under the Rule—Notwithstanding the failure of a Court to pass an order under Order 1, Rule 8 the Court shall assume such permission being granted to the parties, where the Court has directed publication.-- Kamalakshi v. Bahulayan, 1971 SCC OnLine Ker 18 : AIR 1972 Ker 269

(4) Mis-joinder and non-joinder.

No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this Rule shall apply to non-joinder of a necessary party.**(Order I Rule 9)**

- All objections on the ground of non-joiner or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issue are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.**(Order I Rule 13)**

Scope - Though Rule 9 of the Order I of C.P.C. mandates that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, it is important to notice that the proviso thereto clarifies that nothing in that Rule shall apply to non-joinder of a necessary party. Therefore, care must be taken to ensure that the necessary party is before the Court, be it a plaintiff or a defendant, otherwise, the suit or the proceedings will fail. Rule 10 of Order I, C.P.C. provides remedy when a suit is filed in the name of wrong plaintiff and empowers the Court to strike out any party improperly joined or to implead a necessary party at any stage of the proceedings. Chief Conservation of Forests, Govt. of A.P. v. Collector, AIR 2003 SC 1805 : 2003(3)SCC 472

A suit will be defeated if necessary parties are not joined as no effective decree can be passed in the absence of such parties,

when the real cause of action is against the omitted parties, Taseruddin Sarkar and others Versus Salimuddin Seikh and others , AIR 1972 Gauhati 71.

A perpetual lease had been executed for a plot of land between an Educational Society and the State Government for the establishment of a college. The Principal of the college, acted on behalf of the Society. Eviction orders were passed against the petitioners against which writ petition was filed. It was held in the writ petition, that the Society was not a necessary party. In view of the clear mandate of Order 1, Rule 9 of the Code, the objection of the learned counsel for the said college is misconceived. Apart from that, the provisions of Order 1, Rule 13 of the Code also makes it clear that all objections on the ground on non-joinder or mis-joinder of parties must be taken at the earliest possible opportunity before settlement of issues and any such objection not so taken shall be deemed to have been waived. It is clear that in the case the so-called objection has been taken at the belated stage at the time of hearing of the matter. It does not appear that any objection was taken at the admission stage or even in the counter-affidavit. Therefore, the said objection cannot be entertained by the Court, in view of the clear provisions of the Code. M/s. Hindustan Petroleum Corporation Ltd. v. State of Bihar & Ors., AIR 1996 Patna 163

Dismissal of suit on failure to implead all persons interested - In a suit for partition all the persons interested in the property should be impleaded as parties. No doubt this Rule provides that no suit shall be defeated by reason of the mis-joinder of parties,

and the Court may, in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Notwithstanding this position, the Court will be justified in dismissing the suit if the necessary parties are not impleaded. T Panchapakesan v. Peria Thambi Naicker, (1972) 2 MLJ 590

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(5) Valuation of suit & Proper Court fee -

The Court Fees in a suit is paid on the basis of the relief claimed. Under Section 7(4)(c) of the Court Fees Act 1870 for a relief for declaration and consequential relief ad valorem Court fees, i.e as per the value of the suit property is to be paid. In other cases where consequential relief has not been prayed, only a fixed Court fees as provided under Article 17 of Schedule II is to be paid. For example the Court fees applicable in case of a suit where declaratory relief is claimed the fixed Court fee of Rs 250 shall be applicable. However, in case where a consequential relief of recovery of possession is prayed, the Court fee shall be paid as per the value of the suit declared by the plaintiff in the plaint. The relevant paragraph of the plaint expressly mentions that the valuation of the suit has been made for the purpose of the jurisdiction and applicable Court fee.

There is a difference in application of the Suit Valuation Act 1887 and the Court Fees Act 1870. While the former Act is applied for determining the valuation of the suit property, the latter determines the Court fees on the basis of the valuation of suit.

Section 3 of the Suit Valuation Act- Power of the State Government to make Rules determining value of land for jurisdictional purposes-

(1) The State Government may make Rules for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court-fees Act, 1870 (7 of 1870), Section 7, paragraphs v and vi and paragraph x, clause (d).

(2) The Rules may determine the value of any class of land, or of any interest in land, in the whole or any part of a local area, and may prescribe different values for different places within the same local area.

Section 4 Valuation of relief in certain suits relating to land not to exceed the value of the land-

Where a suit mentioned in the Court-fees Act, 1870 (7 of 1870), Section 7 paragraph iv, or Schedule II, article 17, relates to land or an interest in land of which the value has been determined by Rules under the last foregoing Section, the amount at which for purposes of jurisdiction the relief sought in the suit is valued shall not exceed the value of the land or interest as determined by those Rules.

Section8 Suit Valuation Act-- Court-fee value and jurisdictional value to be the same in certain suits-

Where in suits other than those referred to in the Court-fees Act, 1870 (7 of 1870), Section 7, paragraphs v, vi and ix, and paragraph x, clause (d), Court-fees are payable ad-valorem under the Court-fees Act, 1870, the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction shall be the same.

Scope: The valuation of a suit for the purpose of Court fee and the valuation of the suit for the purpose of jurisdiction are two different things. The jurisdiction of a Court depends upon the valuation of the suit. The valuation of the suit for the purpose of assessing the Court fee payable is determined on the basis of certain Rules. In a case where fixed Court fee is payable the

valuation of suit for purpose of Court fees is not very relevant but it is necessary for the plaintiff to disclose the value of the subject matter of the suit for the purpose of jurisdiction. However, there is exception to this general rule in as much as those suits which fall under some of the provisions of Section 7 of the Court Fees Act, the valuation of the suit for the purpose of Court Fees and jurisdiction shall be the same. This has been specified in Section 8 of the Suit Valuation Act.

Question: How the Court fees payable in a suit is assessed?

Answer: In order to understand the scheme for assessment of Court fee payable in a suit or appeal it will be necessary to understand the relation between The Suit Valuation Act 1887 and the Court Fees Act 1870.

The Suit Valuation Act 1887 is an Act to prescribe the mode of valuing certain suits for the purpose of determining the jurisdiction of Court with respect thereto. Part I of the Act empowers the State Governments to make Rules for determining the value of the land for the purposes of jurisdiction in certain classes of suits and Part II declares that in suits not coming within paragraphs V,VI, IX and X, clause (d) of Section 7 of the Court Fees Act, the value as determinable for the computation of Court Fee and the value for the purpose of jurisdiction shall be the same. In these cases mentioned in paragraphs V,VI, IX and X , clause (d) of Section 7 of the Court Fees Act, the suit valuation shall be made as per the market value of the suit property .

Court Fees

Fixed Court fee is chargeable as per Schedule II of the Court Fees Act. In other cases the Court fee is charged as per the valuation of suit.

For determining the **jurisdiction** of a suit, in case of fixed Court fee the jurisdiction shall be according to the valuation of suit as disclosed in the plaint.

In cases where the *ad valorem* Court fee is chargeable, the **jurisdiction** shall be determined as per the Suit Valuation Act. The value of the suit for the purpose of payment of Court fee is to be determined first and then such value is to be adopted to determine jurisdiction.

Ram Pravesh Singh vs Maneshwari Prasad Narain Deo, AIR 1958 (Pat) 129; 1957 0 BLJR 698; 1957 0 Supreme (Pat) 196,

The plaintiff/respondent in a proceeding before the Public Demand Recovery Act raised objection at the sale price of Rs 550/- on the plea that its real value was Rs 60,000/- This objection was not allowed and consequently he filed a suit for cancellation of sale deed in which the suit was valued at Rs 550/-- The defendant objected the valuation on the ground that the plaintiff himself had earlier state the value to be Rs 60,000/-.

The Hon'ble Supreme Court held that the valuation was challenged by the petitioner and though he himself in his written statement did not give his own value, but relied on the statement of the plaintiff himself in a previous application made by him for stay or delivery of possession. In that application the value of the property sold was given at Rs. 60,000. In this case it was conceded on behalf of the petitioner that no *ad valorem* Court-fee

was payable and that the Court-fee paid was sufficient. The Court below, therefore, held that it was a pure declaratory suit and the Court-fee paid for declaration under Schedule 2. Article 17(iii) of the Court Fees Act was sufficient. No objection had been raised in this regard in the revisional application filed in the Supreme Court. The only point that had been taken in the petition of revision is about the valuation. It is contended that the valuation of the property, which had been sold in a certificate sale under the Public Demands Recovery Act, was beyond the jurisdiction of the Court. The only point, therefore, that had to be determined in the present application was as to what should be the valuation, for the purpose of jurisdiction, in pure declaratory suit Sec.3 of the Suits Valuation Act provides for Rules to be made by the Provincial Government for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court Fees Act, 1870, Section 7, paras, (v) and (vi) and para, (x), Clause (d). Section 4 says that where a suit mentioned in the Court Fees Act, 1870, Section 7, para. (iv) or Schedule II, Article 17, relates to land or an interest in land of which the value has been determined by Rules under the last foregoing Section, the amount at which for purposes of jurisdiction the relief sought in the suit is valued shall not exceed the value of the land or interest as determined by those Rules. Unfortunately no Rule has been framed by the State Government in this regard. Section 8 of the Suit valuation act lays down that where in suits other than those referred to in the Court Fees Act, 1870, Section 7, paras. (v), (vi) and (ix) and para (x), Clause (d), Court-fees are payable ad valorem under the Court Fees Act, 1870, the value as

determinable for the computation of Court-fees and the value for purposes of jurisdiction shall be the same. Since, however, in the present case Court-fee is not payable ad valorem, this Section has no application. Section 9 provides for making of Rules by the High Court with the previous sanction of the Provincial Government for determining the valuation for the purpose of jurisdiction in suits other than suits mentioned in the Court Fees Act, 1870, in Section 7, paras, (v) and (vi) and para. (x), Clause (d). There is no other provision in the Suits Valuation Act for determining the valuation of a pure declaratory suit. That being the position, the valuation in such a suit may have to be determined under the general principle of law. It appears that the subject-matter of the declaration is the **certificate sale** held under the provisions of the Public Demands Recovery Act, which is sought to be declared to be void. The value of the certificate sale will, therefore, be the value of the suit for the purpose of jurisdiction. The question is what should be the value of sale. Obviously it cannot be the value of the land which has been sold. In my opinion its value will be the price for which it was held. That being the position, the value fixed in the present case at Rs. 550, as being the price of the certificate sale is the correct value for the purpose of jurisdiction.

Section 6 of the Court Fees Act- Fees on documents filed, etc., in Mofussil Courts or in public offices.--- Except in the Courts herein before mentioned, no document of any of the kinds specified as chargeable in the First or Second Schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer,

unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said Schedules as the proper fee for such document.

In a case Netramani Dibya v. Dasarathi Misra, 1985 SCC OnLine Ori 87 : AIR 1986 Ori 235 it has been held that while exercising the inherent powers the Court should apply Section 6 as Court fee has to be paid on the documents received by the Court. For this purpose the Court may afford an opportunity to the party to pay such Court-fee.

Sec 7. Computation of fees payable in certain suits.-

The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :-

for money.-

(i) In suits for money (including suits for damages or compensation, or arrears of maintenance, of annuities, or of other sums payable periodically)- **according to the amount claimed**;

for maintenance and annuities.-

(ii) In suits for maintenance and annuities or other sums payable periodically-according to **the value of the subject matter of the suit**, and such value shall be deemed to be ten times the amount claimed to be payable for one year; for other movable property having a market-value.

(iii) **In suits for movable property** other than money, where the subject-matter has a **market value** -according to such value at the date of presenting the plaint;

(iv) In suits for movable property of no market-value.-

(a) for **movable property** where the subject-matter has no market-value, as, for instance, in the case of documents relating to title, to enforce a right to share in joint family property.-

(b) to **enforce the right to share in any property** on the ground that it is joint family property, for a declaratory decree and consequential relief.-

(c) to **obtain a declaratory decree or order**, where consequential relief is prayed, for an injunction.-

(d) to obtain an injunction, for easements.-

(e) for a right to some benefit (not herein otherwise provided for) to arise out of land, and for accounts.-

(f) for accounts according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. *In all such suits the plaintiff shall state the amount at which he values the relief sought [ ];*

for possession of land, houses and gardens.-

(v) In suits for the **possession of land,** houses and gardens-according to the value of the subject-matter; and **such value shall be deemed** to be where the subject-matter is land, and-

(a) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue; and such revenue is permanently settled-ten times the revenue so payable;

(b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid; and such revenue is settled, but not permanently-five times the revenue so payable;

(c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue, and net profits have arisen from the land during the year next before the date of presenting the plaint fifteen times such net profits; but where no such net profits have arisen there from-the amount at which the Court shall estimate the land with reference to the value of similar land in the neighborhood;

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above mentioned- **the market-value of the land**; Proviso as to Bombay Presidency.-Provided that, in the territories subject to the Governor of Bombay in Council, the value of the land shall be deemed to be-

(1) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to Government-a sum equal to five times the survey assessment;

(2) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government-a sum equal to ten times the survey assessment; and

(3) where the whole or any part of the annual survey-assessment is remitted-sum computed under paragraph (1) or paragraph (2) of this proviso, as the case may be, in addition to ten times the assessment, or the portion of assessment, so remitted. Explanation.-The word "***estate***", as used in this paragraph, means any land subject to the payment of revenue, for which the proprietor or a farmer or ryot shall have executed a separate

engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue; for houses and gardens.-

(e) where the subject-matter is a house or garden-according to the market-value of the house or garden; to enforce a right of pre-emption.-

(vi) In suits to enforce a ***right of preemption***-according to the value [computed in accordance with paragraph (v) of this Section] of the land, house or garden in respect of which the right is claimed; for interest of assignee of land-revenue.-

(vii) In suits for the interest of an assignee of land-revenue-fifteen times his net profits as such for the year next before the date of. presenting the plaint; to set aside an attachment.-

(viii) In suits to set aside an attachment of land or of an interest in land or revenue-according to the amount for which the land or interest was attached: Provided that, where such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest; to redeem.-

(ix) In suits against a **mortgagee** for the recovery of the property mortgaged, to foreclose.-and in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute according to the principal money expressed to be secured by the instrument of mortgage; for specific performance.-

(x) **In suits for specific performance**-

(a) of a contract of sale-according to the amount of the consideration;

(b) of a contract of mortgage-according to the amount agreed to be secured;

(c) of a contract of lease according to the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term;

(d) of an award-according to the amount or value of the property in dispute; between landlord and tenant.-

(xi) In the following suits between landlord and tenant:-

(a) for the delivery by a tenant of the counterpart of lease,

(b) to enhance the rent of a tenant having a right of occupancy,

(c) for the delivery by a landlord of a lease,

(cc) for the recovery of immoveable property from a tenant, including a tenant holding over after the determination of a tenancy,

(d) to contest a notice of ejectment.

(e) to recover the occupancy of immoveable property from which a tenant has been illegally ejected by the landlord, and

(f) for abatement of rent according to the amount of the rent of the immoveable property to which the suit refers, payable for the year next before the date of presenting the plaint.

Case law

That in a suit for declaration with consequential relief falling under Section 7(iv)(c) of the Court-Fees Act, 1870, the plaintiff is free to make his own estimation of the reliefs sought in the plaint and such valuation both for the purposes of Court fee and jurisdiction has to be ordinarily accepted. It is only in cases where it appears to the Court on a consideration of the facts and circumstances of the case that the valuation is arbitrary,

unreasonable and the plaint has been demonstratively undervalued, the Court can examine the valuation and can revise the same. But the defendant has no right to raise such objection nor the Court should delve into the matter after filing of written statement on evidence. The law on this aspect, thus, should be taken to be as under:

(1) Where the question of Court fee is linked with jurisdiction a defendant has a right to raise objection and the Court should decide it as a preliminary issue.

(2) But in those cases where the suit is filed in Court of unlimited jurisdiction the valuation disclosed by the plaintiff or payment of amount of Court fee on relief claimed in plaint or memorandum of appeal should be taken as correct.

(3) This does not preclude the Court even in suits filed in Courts of unlimited jurisdiction from examining if the valuation, on averments in plaint, is arbitrary. Sujir Keshav Nayak vs Sujir Ganesh Nayak, AIR 1992 SC 1526, 1992 1 SCC 731

(i) In general the Court-fee has to be decided on the basis of the subject-matter of the suit and the appeal arising therefrom. It shall not be substantially affected by the claim as set out in the relief by the plaintiff; In Re. Thirupathiammal, AIR 1956 Mad 179.

(ii) It has been held that the question of Court-fee must be decided having regard to the averments made in the plaint itself and the contentions raised in the written statement or the final decision on merits cannot affect the same; Sathappa Chettiar v. Ramanathan Chettiar, AIR 1958 SC 245.

(iii) It has been held that when the plaintiff paid ad valorem Court-fee in a suit for recovery of a specific calculated amount as damages on account of leakage of cooking gas cylinder leading to accident the valuation was correct;--- The suit was found to be correctly valued for the purposes of Court fee and jurisdiction under Section 7(I) of the Court fees Act. - Bhagwant Sarup v. Himalay Gas Co., AIR 1985 HP 41.

(iv) It has been held that in a suit for partition the share claimed by the plaintiff would determine the Court-fee and not the property as a whole; Rakesh Chandra Das v. Khan Bahadur Abdul Majid Choudhary, AIR 1982 Gau 82.

(v) The Hon'ble Supreme Court has clearly held in AIR 1958 SC 245that ordinarily the valuation stated by the plaintiff should be accepted in cases falling under S. 7(iv)(b) and (c) of the Act. If it is read along with the other sentences in the judgment, then it is clear that the valuation given by the plaintiff in a case falling under Section 7(iv)(b) or (c) shall have to be accepted by the Cost; Kesho Mahton v. Ayodhya Mahton, AIR 1983 Pat 67.

(vi) It has been held that Section 7(iv)(f) is applicable to a suit for dissolution of partnership at will and rendition of accounts in as much as it is a suit for accounts and value for jurisdiction and Court-fee is the same ad valorem Court-fee to be paid under Section 7; Madan Mohan Sharma v. Uttam Singh Bagga, AIR 1985 J&K 87.

(vii) The Code of Civil Procedure empowers the Court to make up deficiency of Court-fees and under Order VII Rule 11 it is provided that the plaint shall be rejected where the relief claimed

is undervalued, and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so. It has been held in such cases where the valuation made by the plaintiff in respect of the suit property is unreasonable and arbitrary the Court can exercise its powers vested in it under Order VII Rule 11Civil Procedure Code; Mana Das v. Kisto Das, AIR 1983 Pat 272.

(viii) The Delhi High Court has held that if plaintiff files a suit for declarations and injunctions and the reliefs claimed are wholly independent of each other then the suit is not governed by Section 7(iv)(c); **S.C. Malik v. Surender Nath Puri, 1991 RLR (NOTE) 85.**

(ix) It has been held that the words 'subject-matter' used in the Section include relief or reliefs; Md. Hafiz v. Mustt Noorjahan, AIR 1989 Gau 13

(x) It has been held that in a single suit for recovery filed by a Bank against the defendant borrower pertaining to separate accounts in its different branches Court-fee has to be paid on each of the account separately; Bank of India v. Vinod Kumar Bhalla, AIR 1988 Del 79.

(xi) It has been held that paragraph (iv) of Section 7 of the Act gives a right to the plaintiff in any of the suits mentioned in the clauses of that paragraph to place any valuation that he likes on the reliefs he seeks, subject, however to any Rules made under Section 9 of the Suit Valuation Act and the Court has no power to interfere with the plaintiff s valuation; Commercial Aviation & Travel Co. v. Vimal Pannalal, AIR 1988 SC 1636.

(XII) **Court fees in partition cases: Section 7 (IV) (b)-A** suit to enforce a right to share in a joint family property is different from a suit where a share in the joint family property is claimed. This clause is applicable specifically to a suit where enforcement of right to share in the joint family property is claimed. The provision of this clause cannot apply to a suit for partition by a member of a joint family who is in joint possession of the property. It is therefore clear that a suit for partition where the plaintiff is in possession and the only question is his right to change the mode of enjoyment falls under Article 17 Schedule II (ie fixed Court fees) of the Court Fees Act and not under this clause.

The necessary ingredient to attract the provisions of this clause is that the plaintiff should seek to enforce a right to share in the property on the ground that it is a joint family property. The expression "to enforce right to share in any properly" used in this clause means to enforce a right to share in a property which stands in the name of others including the strangers.

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(6) When a suit is barred by law of limitation or any other law-

Subject to the provisions contained in Sections 4 to 24 (inclusive) of Limitation Act, 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.

Scope: The suits of which their cognizance is either expressly or impliedly barred - The question whether the words "barred by law" occurring in Order VII Rule 11(d) CPC would also include the ground that it is barred by law of limitation has been considered by a two Judge Bench of the Hon'ble Supreme Court (Balasaria Construction Pvt. Ltd. vs. Hanuman Seva Trust 2006 (5) SCC 658 decided on 8.11.2005 and it has been held :- "After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial Court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the paint it cannot be held that the suit is barred by time." This ratio has been followed in Ramesh B. Desai v. Bapin Vadilal Mehta, AIR 2006 SC 3672.

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(7) If the suit by or against minor or under disability, provisions under Order 32 C.P.C read with Sec.146 have to be complied with-

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

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

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

In the event the suit has been filed by a minor without the procedure as above mentioned, the Court may reject the plaint under Order 7 Rule 11(d).

Rule 3 further provides that the Guardian for the suit to be appointed by Court for ***minor defendant*** by the Court, on being satisfied of the fact of his minority,

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

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

(4) No order of appointment of guardian of a minor defendant shall be made on any application under this Rule except upon

notice to any guardian of such minor. Further such notice may also be issued to the minor defendant also.

Scope - Suit filed on behalf of the minor by mother as next friend. The suit filed by mother will be maintainable and it cannot be said that the mother should wait and see if father was ready to plead on behalf of the minor or not. Gitanjali Mishra v. Gangadhar Upadhyay, 1996 SCC OnLine Ori 55 : AIR 1997 Ori 88

Withdrawal of suit by next friend: Where suit by minor is withdrawn by his next friend without obtaining permission of the Court, such withdrawal will be voidable at the instance of such minor, however, the transaction will not be illegal or void. A. Perumal v. R. Jayaraman, 1986 SCC OnLine Mad 266 : AIR 1987 Mad 115 Appointment of next friend where wife of lunatic person sold his property against which suit filed by lunatic through his next friend, in such circumstances wife being defendant could not be appointed as next friend, therefore, absence of formal order of appointment of next friend was only an irregularity. Johri & Ors. v. Mahila Draupati alias Dropadi & Ors., AIR 1991 M.P. 340:

Qualification to be a next friend or guardian— Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

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

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(8) If the suit is by or against Government, there must be compliance of the provisions under Order 27 & Sections 79 & 80 of C.P.C Suits by or against Government— In any suit by or against the Government, the plaint or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case. The Court while admitting the suit need to verify the letter of authorization by the Govt. by which the concerned officer has been authorized to swear affidavit in support of the Plaint or W.S.

Suits by or against Government (Sec79)—In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be—

(a) in the case of a suit by or against the Central Government, 5 [the Union of India], and

(b) in the case of a suit by or against a State Government, the State.]

Notice(Section 80)—Save as otherwise provided in sub-Section (2), no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of **two months next after notice in writing** has been delivered to, or left at the office of—

(a) in the case of a suit against the **Central Government,** [except where it relates to a railway] a **Secretary** to that Government;

(b) in the case of a suit against the Central Government where it relates to railway, the General Manager of that railway;

(c) in the case of a suit against any other **State Government,** a **Secretary to that Government or the Collector of the district** and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) A suit to obtain an **urgent or immediate relief** against the Government or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-Section (I); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be ,a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, **return the plaint for presentation** to it after complying with the requirements of sub-Section (1).

(3) No such suit instituted against the Government **shall be dismissed merely by reason of any error or defect in the notice** referred to in sub-Section (I), **if in such notice—**

(a) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice

had been delivered or left at the office of the appropriate authority specified in sub-Section (1), and

(b) the cause of action and the relief claimed by the plaintiff had been substantially indicated.

Scope - Where appeal is filed on behalf of the State, on the date of presentation of appeal, no sanction had been given to the Standing Counsel on the date of appeal, the appeal will be deemed to have been filed by some incompetent persons. Such defect cannot be cured by obtaining sanction subsequently. State of Rajasthan & Ors. v. M/s. Jaipur Hosiery Mills (Pvt.) Ltd. & Ors., AIR 1997 Raj. 10.

From the above ratio it follows that if the Court at any stage deems it proper to implead the Govt or any public officer , it can do so and direct the plaintiff under Order 1 Rule 10 to add and issue notice to such Govt or public officer.

Court can allow addition of parties even at the final stage of the hearing, whenever the Court is satisfied that addition of such parties is necessary. The Court can even allow Government or other Authorities as defendant., Mahabir Prasad Lohia v. Karam Chand Thapar and Bros. Ltd., AIR 1985 Cal. 209

Section 80(1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim order in which case the Court may not insist on the rigid Rule of prior notice. The two months period has been provided for, so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and

controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefor, it is not only necessary for the governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, Government departments or statutory authorities are defendants in large number of suits pending in various Courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.These provisions cast an implied duty on all concerned governments and States and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, the Court directed all concerned governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to

nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him., Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR 2003 SC 189

In such cases where the plaintiff has not impleaded the Govt, but files a petition impleading State as a party without serving any prior notice that cannot dispense with the need of prior notice. It cannot be said that service of notice was empty formality rather it is issued to give time to the Government or Public Officer an opportunity to reconsider the legal position of the case and therefore, the petition without notice, held liable to be dismissed. S.K. Dofian Hossain v. Narayan Keshi and Ors 1997 I OLR 98.,

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Return of plaint

Order 7 Rule 10 - (1) Subject to the provisions of Rule 10A, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

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

Further, Rule 10A provides that where in any suit after the defendant has appeared, and the plaint is returned, the Court shall direct the plaintiff (1) to specify the Court in which he proposes to present the plaint after its return (2) the Court may fix a date for appearance of parties in said Court and give notice to both parties of such date. This notice of date shall be deemed to be a summon for the appearance of the defendant in such Court on the date fixed.

Question: Can a Plaintiff file an appeal from the order under Rule 10 of Order 7?

Answer: Yes, such appeal is maintainable under Order 43 Rule 1 (a) . But where the plaint was returned on an application made by the plaintiff under Order 7 Rule10A(2) such appeal is not maintainable.

Order 7 Rule10 (2) Procedure on returning plaint.-On returning a plaint, the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Scope - CPC provides that the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted. Once the Court has held that it has no pecuniary jurisdiction, it should not have dismissed the suit but is bound to return it for presentation to proper Court.

The return of the plaint with an endorsement on it is a part of the Court's duty and until an endorsement is made and the plaint is ready for return, the proceedings cannot be considered to be at an end. This means that the proceedings for the return of the plaint came to an end only when an endorsement was actually made on the plaint. Then only can the plaint be said to be ready for being returned for presentation to the proper Court. In view of the wording of Section 14 of the Limitation Act, it must be held that the date on which the plaint was tendered to the plaintiff will be the date on which the proceedings ended. Islam Shah v. Wali Mohammad Khan, 1971 SCC OnLine All 313 : AIR 1971 All 473

When it is found that the suit was barred under some statutory provisions, the proper procedure to be followed will be to reject the plaint and not to return it to the plaintiff. Ajmer Kaur & Ors. v. Punjab State & Ors., AIR 1991 (P& H) 12.

The Court finding that it has no jurisdiction to try the suit and therefore, dismissed the same. Held, the proper course for the Court was to return the suit for presentation to proper Court instead of dismissing it, R.S.D.V. Finance Company Ltd. v. Shri Vallabh Glass Works Limited, AIR 1993 SC 2094 : 1993(2) SCC 130:

Return of plaint by Court on ground that it lacked pecuniary jurisdiction. Right of defendant to file fresh written

statement and lead evidence on re-presentation of suit. Re-presentation of plaint is not a continuation of suit but a fresh proceeding in the case, defendant would get a right to file fresh written statement and to adduce evidence. T.H. Yashawanta & Ors. v. T.J. Jagadeesh & Ors., 1999(4) CCC 220 (Kant.).

If the Court has jurisdiction over some of the causes of action and thus has jurisdiction over a portion of the plaint there should be no reason why it cannot allow the plaintiff to amend the plaint to lop off those portions beyond its grip and proceed with the portions within its grasp. Where the Court finds that the plaint comprises causes of action within its jurisdiction as well as causes of action outside its jurisdiction, neither the suit can be dismissed as a whole nor the plaint can be returned as a whole. And the plaint, if it is to be returned, must be returned either as a whole or not at all and it is not for the Court to make a disSection of the plaint and then to retain a part and to return a part. Smt. Sheela Adhikari v. Rabindra Nath Adhikari & Ors., AIR 1988 Cal. 273 :

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Rejection of plaint

Order 7 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 a time to be fixed by the Court, fails to do so;

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

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

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

Scope – It is interesting to note that there are two consequences provided in the Code for not filing requisites and copies of plaint within seven days after the order of the Court under Order 7 Rule9. Firstly the plaint can be **rejected** under Order 7 Rule11(f). Secondly, the suit can be **dismissed** under Order 9 Rule2. However, the remedy in case of rejection of plaint is provided in Order 7 Rule13 **by way of presentation of fresh plaint.** In case of dismissal of suit, the remedy lies in Order9 Rule 4 which provides that the plaintiff may bring fresh suit or the Court may restore suit to file. Meaning thereby that when the plaint is rejected under Order7 Rule 11 (f) the same cannot be restored by the Court and the only remedy to the plaintiff is presentation of fresh plaint. In term of the definition of Decree as given in Section2(2) it is deemed to include rejection of a plaint.

In order to consider Order 7 Rule 11, the Court has to scrutinize the averments/plea in the plaint . At that stage ,the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. If the allegations are vexatious and meritless and not disclosing a clear right or material to sue, it is duty of the trial Court to exercise his power. If clever drafting has created the illusion of a cause of action it should be nipped in the bud at the first hearing by examination of the parties under order 10 of the code Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust, (2012) 8 SCC 706 which relied on T. Arivandandam v. T.V. Satyapal, (1977) 4 SCC 467

When the Court rejects plaint recording of reasons for, is mandated by order 7 Rule 12 Civil Procedure Code Ram Prakash Gupta v. Rajiv Kumar Gupta, (2007) 10 SCC 59

The real object of Order 7, Rule 11 of the Code is to keep out of Courts irresponsible law suits. Therefore, it is a tool in the hands of the Courts by resorting to which and by searching examination of the party in case the Court is prima facie of the view that the suit is an abuse of the process of the Court in the sense that it is a bogus and irresponsible litigation, the jurisdiction under Order 7, Rule 11 of the Code can be exercised. Sopan Sukhdeo Sable v. Assistant Charity Commissioner, AIR 2004 SC 1801.

The whole purpose of conferment of powers under Order 7, Rule 11 of the Code of Civil Procedure is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the Court and must be terminated and brought to an end at the earliest. The applicant should not be put to the long and expensive process of trial and the burden of litigation when it is clear at the outset that original plaintiff have no cause of action against the applicant and the plaint discloses no cause of action whatsoever. Kuok Oils and Grains PTE Ltd. v. Tower International Pvt. Ltd.AIR 2005 Guj. 9:

A perusal of Order VII, Rule 11, C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial Court can exercise the power under Order. VII, Rule. 11, C.P.C. at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an

application under Cls. (a) and (d) of Rule. 11 of Order. VII, C.P.C., the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7, Rule. 11, C.P.C. cannot but be procedural irregularity touching the exercise of jurisdiction by the trial Court. Sakeen Bhai v. State of Maharshtra, 2003(1) Supreme 433: AIR 2003 SC 759 : 2003 (1)SCC 557.

Cause of action and applicability of law are two distinct different and independent things and one cannot be confused with the other. The expression 'cause of action' has not been defined in the Code. It is however settled law that every suit presupposes the existence of a cause of action. If there is no cause of action, the plaint has to be rejected [Rule 11(a) of Order VII]. Stated simply, cause of action means a right to sue. It consists of material facts which are imperative for the plaintiff to allege and prove to succeed in the suit. The classic definition of the expression (cause of action) is found in the observations of Lord Brett in Cooke v. Gill, 1873 (8) CP 107: 42 LJ CP 98. A cause of action means every facts, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. Laxman Prasad v. Progigy Electronics Ltd., 2008 (1) SCC 618: AIR 2008 SC 685

Rejection of plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13. Sopan Sukhdeo Sable v. Assistant Charity Commissioner, 2004 (3) SCC 137: AIR 2004 SC 1801:

Order 7 Rule 11(d) speaks of the suit being "barred by any law". According to Black's Law Dictionary, '**bar**' means, a plea arresting a law suit or legal claim. It means as a verb, to prevent by legal objection. According to Ramanatha Aiyar's Law Lexicon, "bar" is that which obstructs entry or egress; to exclude from consideration. It is therefore necessary to see whether a suit bad for misjoinder of parties or of causes of action is excluded from consideration or is barred entry for adjudication. As pointed out already, on the scheme of the Code, there is no such prohibition or a prevention at the entry of a suit defective for misjoinder of parties or of causes of action. The Court is still competent to try and decide the suit, though the Court may also be competent to tell the plaintiffs either to elect to proceed at the instance of one of the plaintiffs or to proceed with one of the causes of action. On the scheme of the Code of Civil Procedure, it cannot therefore be held that a suit barred for misjoinder of parties or of causes of action is barred by a law, here the Code. This may be contrasted with the failure to comply with Section 80 of the Code. In a case not covered by sub-Section (2) of Section 80, it is provided in sub-Section (1) of Section 80 that "no suit shall be instituted". This is therefore a bar to the institution of the suit and that is why Courts have taken the view that in a case where notice under Section 80 of the Code is mandatory, if the averments in the plaint indicate the absence of a notice, the plaint is liable to

be rejected. For, in that case, the entertaining of the suit would be barred by Section 80 of the Code. The same would be the position when a suit hit by Section 86 of the Code is filed without pleading the obtaining of consent of the Central Government if the suit is not for rent from a tenant. Not only are there no words of such import in Order 1 or Order 2 but on the other hand, Rule 9 of Order 1, Rules 1 and 3 of Order 1, and Rules 3 and 6 of Order 2 clearly suggest that it is open to the Court to proceed with the suit notwithstanding the defect of misjoinder of parties or misjoinder of causes of action and if the suit results in a decision, the same could not be set aside in appeal, merely on that ground, in view of Section 99 of the Code, unless the conditions of Section 99 are satisfied. Therefore, by no stretch of imagination, can a suit bad for misjoinder of parties or misjoinder of causes of action be held to be barred by any law within the meaning of Order 7 Rule 11(d) of the Code. Thus, when one considers Order 7 Rule 11 of the Code with particular reference to clause (d), it is difficult to say that a suit which is bad for misjoinder of parties or misjoinder of causes of action, is a suit barred by any law. A procedural objection to the impleading of parties or to the joinder of causes of action or the frame of the suit, could be successfully urged only as a procedural objection which may enable the Court either to permit the continuance of the suit as it is or to direct the plaintiff or plaintiffs to elect to proceed with a part of the suit or even to try the causes of action joined in the suit as separate suits. Prem Lala Nahata v. Chandi Prasad Sikaria, 2007 (2) SCC 551. In Assembly of God Church v. Ivan Kapper ((2004) 4 CHN 360, it

was held that a defect of misjoinder of parties and causes of action is a defect that can be waived and it is not such a one as to lead to the rejection of the plaint under Order 7 Rule 11(d) of the Code. The said decision reflects the correct legal position.

In a Case *Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra)(D) Thr Lrs* 2020 SCC OnLine SC 562 ***Hon'ble Apex Court held that*** - The power conferred on the Court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order VII Rule 11 are required to be strictly adhered to.

1.Under Order VII Rule 11, a duty is cast on the Court to determine whether the plaint discloses a cause of action by scrutinizing the averments in the plaint, read in conjunction with the documents relied upon, or whether the suit is barred by any law.

2.The documents filed along with the plaint, are required to be taken into consideration for deciding the application under Order VII Rule 11 (a). When a document referred to in the plaint, forms the basis of the plaint, it should be treated as a part of the plaint.

3.In exercise of power under this provision, the Court would determine if the assertions made in the plaint are contrary to statutory law, or judicial dicta, for deciding whether a case for rejecting the plaint at the threshold is made out.

4.At this stage, the pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and cannot be adverted to, or taken into consideration.

5.The test for exercising the power under Order VII Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. This test was laid down in Liverpool & London S.P. & I Assn. Ltd. v. M.V.Sea Success I & Anr., (2004) 9 SCC 512.

6.It is not permissible to cull out a sentence or a passage, and to read it in isolation. It is the substance, and not merely the form, which has to be looked into. The plaint has to be construed as it stands, without addition or subtraction of words. If the allegations in the plaint prima facie show a cause of action, the Court cannot embark upon an enquiry whether the allegations are true in fact. Hardesh Ores (P.) Ltd. v. Hede & Co. (2007) 5 SCC 614.

7.If on a meaningful reading of the plaint, it is found that the suit is manifestly vexatious and without any merit, and does not disclose a right to sue, the Court would be justified in exercising the power under Order VII Rule 11 CPC.

8.The power under Order VII Rule 11 CPC may be exercised by the Court at any stage of the suit, either before registering the plaint, or after issuing summons to the defendant, or before conclusion of the trial. Saleem Bhai v. State of Maharashtra 7 (2003) 1 SCC 557.

9."Cause of action" means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. It consists of a bundle of material facts, which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit.

10.While considering an application under Order VII Rule 11 CPC what is required to be decided is whether the plaint discloses a real cause of action, or something purely illusory.

11.Law cannot permit clever drafting which creates illusions of a cause of action. What is required is that a clear right must be made out in the plaint. I.T.C. Ltd. v. Debt Recovery Appellate Tribunal, (1998) 2 SCC 170.

12.If, however, by clever drafting of the plaint, it has created the illusion of a cause of action, it should be nipped in the bud, so that bogus litigation will end at the earliest stage. Madanuri Sri Ramachandra Murthy v. Syed Jalal.

13.The Court must be vigilant against any camouflage or suppression, and determine whether the litigation is utterly vexatious, and an abuse of the process of the Court.

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SERVICE OF SUMMONS

Introduction: Practically after the presentation of the plaint and after perusing the report of the Serishtadar when it is found to be in order, the Court is required to draw a detailed order on the point of admission of the suit. It may pointed out that expression "admission" does not figure in the Code, but before issuing the summons to the defendants as per Order 7 Rule 9 the Court need to draw a specific order on the following points:

1. Valuation of the Suit
2. Court Fee Paid
3. Within the Jurisdiction of the Court
4. That the Plaint is in proper form (Detailed in O7 Rule1)

Procedure on admitting plaint (Order 7 Rule 9)- Where the Court orders that the summons be served on the defendants in the manner provided in Rule 9 of Order V, it will direct the plaintiff to present as many copies of the plaint on plain paper as there are defendants **within seven days from the date of such order** along with requisite fee for service of summons on the defendants.

Court Practice: The Court need to be vigilant while fixing date at this stage and should ideally fix the next date for furnishing of requisites after **seven days.** In practice it is sometimes seen that the case is posted after one month for direct appearance of the defendant and on the next date it is found that the requisites have still not been filed. Therefore, fixing of the case after seven days enables the Court to ensure that the requisites is filed without delay and summons is issued.

Question: What is the upper time limit for filing of requisites?

Answer: Legally speaking the mandate of seven days as provided under Order 7 Rule 9 is not inflexible in the light of the Proviso to Order 7 Rule 11 which provides that the time may be extended for the reasons to be recorded and satisfaction of the Court that the plaintiff was prevented by any cause of an exceptional nature. The discretion of the Court to extend the time shall be subject to Section 148 which provides the upper limit of 30 days in total. However, as per the ratio laid down in Salem Bar Association case extension beyond maximum of 30 days thus can be permitted if the act could not be performed within thirty days for reasons beyond the control of the parties. Section 151 has therefore to be allowed to operate fully. Section 27 further provides that a time limit of thirty days form institution of suit for issuance of summons.

Order 5 Rule 1

(1) When a suit has been duly instituted a summons 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 service of summons on that defendants**: Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim. **& Sections 27, 28 of Civil Procedure Code)**

(2) A defendant to whom a summons has been issued under sub-Rule (1) may appear-(a) in person, or(b) by a pleader duly instructed and able to answer all material questions relating to

the suit, or(c) by a pleader accompanied by some person able to answer all such questions.

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

Order 5 Rule 2-Every summons shall be accompanied by a copy of the plaint.

Scope- Order 5 Rule 1 need to be read with Order 5 Rule 7 and in the Summons there should be a specific direction to the defendant to produce on that day all the documents upon which the defendant intend to rely in support of his defence. ***Form No.P(2) in Volume II*** of Civil Court Rules makes a specific mention of such requirement. The object of this provision is to curtail delay in filing such document.

Further, Order 5 Rule 6 mandates the Court to fix the day for appearance of defendant in the summons.

It has been held in Autocars Vs. Trimurti Cargo Movers Ltd. 2018 (4) JLJR 458 SC- that mentioning of the specific day, date, year and time in the summons is a statutory requirement prescribed in the Code. Service of summons on defendants without mentioning therein day, date, year and time cannot be held as summons duly served on defendants within the meaning of Order 9 Rule 13.

The intent of the aforesaid Rule clearly is that where service of summons is to be made by affixation under Rule 17 of Order 5, summons should also be accompanied by a copy of the plaint. Where the summons served under Rule 17 are not accompanied by a copy of the plaint, it would not be a mere irregularity in

service of summons. It would be an illegality in the service in the same manner as there is illegality in service of summons under Rule 10 of Order 5,Civil Procedure Code without a copy of the plaint accompanying the summons which is tendered to the defendant, Singh v. Purbia, AIR 1989 H.P. 26

From the above ratio it is evident that the Service Report should specifically mention that the plaint along with the summons has been affixed in cases of substituted services.

(I) Delivery of summon by Court-

Delivery or transmission of summons for service (Order 5 Rule 9)- (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, **be delivered or sent to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.**

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

(3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-Rule (!) or by any other means of transmission of documents

(including fax message or electronic mail service) provided by the Rules made by the High Court:

(4) Notwithstanding anything contained in sub-Rule (1), 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)(except by registered post acknowledgment due), the provisions of Rule 21 shall not apply.

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-Rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-Rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel or courier agencies for the purposes of sub-Rule (1).

Scope- Under Order V Rule 9, the summons may be served by the officer of the Court and it permits service of summons by party or through courier. Order V Rule 9(3) and Order V Rule 9-A permit service of summons by courier or by the plaintiff.

Order V Rule 9(5) requires the Court to declare that the summons had been duly served on the defendant on the contingencies mentioned in the provision. It is in the nature of deemed service. The apprehension expressed was that service outside the normal procedure is likely to lead to false reports of service and passing of ex parte decrees. It is further urged that courier's report about defendant's refusal to accept service is also likely to lead to serious malpractice and abuse. The Hon'ble Supreme Court held that while considering the submissions, it has to be borne in mind that problem in respect of service of summons has been one of the major causes of delay in the due progress of the case. It is common knowledge that the defendants have been avoiding to accept summons. There have been serious problems in process serving agencies in various Courts. There can, thus, be no valid objection in giving opportunity to the plaintiff to serve the summons on the defendant or get it served through courier. There is, however, danger of false reports of service. It is required to be adequately guarded. The Courts shall have to be very careful while dealing with a case where orders for deemed service are required to be made on the basis of endorsement of such service or refusal. The High Courts can

make appropriate Rules and regulations or issue practice directions to ensure that such provisions of service are not abused so as to obtain false endorsements. In this regard, the High Courts can consider making a provision for filing of affidavit setting out details of events at the time of refusal of service. For instance, it can be provided that the affidavit of person effecting service shall state as to who all were present at that time and also that the affidavit shall be in the language known to the deponent. It can also be provided that if affidavit or any endorsement as to service is found to be false, the deponent can be summarily tried and punished for perjury and the courier company can be black-listed. The guidelines as to the relevant details to be given can be issued by the High Courts. The High Courts, it is hoped, would issue as expeditiously as possible, requisite guidelines to the trial Courts by framing appropriate Rules, order, regulations or practice directions, Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR 2003 SC 189

Application for setting aside for ex-parte decree on the plea of absence of notice. The evidence of process server and other facts revealed that the petitioner refused to put her thumb impression on the summons when they were handed over to her. It amounts to acceptance to notice and, therefore, ex-parte decree held to be proper. The Hon'ble Supreme Court refused to go into the merits of the case, Bhabia Devi v. Permanand Pd. Yadav, (1997) 3 SCC 631, AIR 1997 SC 1919.

Summons given to the plaintiff for service.(Order 5 Rule 9A)- (1) The Court may, in addition -to the service of summons under Rule 9, on the application of the plaintiff for the issue of a

summons for the appearance of the defendant, permit such plaintiff to effect service of such summons on such defendant and shall, in such a case, deliver the summons to such plaintiff for service.

(2) The service of such summons shall be effected by or on behalf of such plaintiff by delivering or tendering to the defendant personally a copy thereof signed by the Judge or such officer of the Court as he may appoint in this behalf and sealed with the seal of the Court or by such mode of service as is referred to in sub-Rule (3) of Rule 9.

(3) The provisions of Rules 16 and 18 shall apply to a summons personally served under this Rule as if the person effecting service were a serving officer.

(4) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or for any reason such summons cannot be served personally, the Court shall, on the application of the party, re- issue such summons to be served by the Court in the same manner as a summons to a defendant.**(Order 5 Rule 9A)**

Service to be on defendant on person when practicable, or on his agent.(Order 5 Rule 12)- Wherever it is practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

Service on agent by whom defendant carries on business.(Order 5 Rule 13)- (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is

issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

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

Service on agent in charge in suits for immovable property.(Order 5 Rule 14)- Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

Where service may be on an adult member of defendant's family.(Order 5 Rule 15)- Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf service may be made on any adult member of the family, whether male or female, who is residing with him.

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

Procedure when defendant refuses to accept service, or cannot be found.(Order 5 Rule 17) - Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, [who is absent from his residence at the time when service is sought to

be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did do, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.]

Scope-

The service of summons is not a mere mechanical formality but need to be observed meticulously. Where the summons were not served on defendant appellant according to Order 5 Rules 16, 17 and 18 CPC it was held that the trial Court failed to discharge its obligation under Order 9 Rule 6 CPC.

The Apex Court observed : We find several infirmities and lapses on the part of the process server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the summons does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop

and witnessed such procedure. The endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even prima facie. The tenant runs a shoe shop in the suit premises. Apparently, the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling persons requested by the process server to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses available on the spot is a statement which can be accepted only with a pinch of salt. Incidently, we may state that though the date of appearance was 23rd February, 1993 the summons is said to have been tendered on 22nd February, 1993, i.e., just a day before the date of hearing.

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Before service of summons by affixation, requirements of Order 5, Rule 17 must be complied with. Where identity of the person refusing to accept the summon, not established, affixation will not be valid. The first, requisite is that the serving officer, after using all due and reasonable diligence has not been able to find the defendant. This requirement is further elaborated and it requires that such of the defendant, who is absent from the house at the time when service is sought to be affected on him at his residence and there is no likelihood of his being found that the residence within a reasonable time and there is no agent empowered to accept service on his behalf. It is only in such of the cases when these requirements are fulfilled that the serving officer is enabled and authorised to 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 carried on business or personally works for gain, Rajesh Kochhar v. Babu Ram, AIR 1994 NOC 119 (H.P.).

Substituted service.(Order 5 Rule 20)- (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that

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

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

Scope- There is no requirement of law under this Rule that an order for substituted service could be passed by a Court only after more than one unsuccessful attempt had been made to serve summons personally on the defendant. All that the Rule requires is that the Court may order substituted service when it is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or for any other reason that the summons cannot be served in the ordinary way, Kadai Ram v. Ram Sunder Tewari, AIR 1973 All. 58.

2008(2) SCC 326:Sunil Poddar Vs Union Bank of India If the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiffs claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code

2018 (2) SCC 649 Neerja Relators Vs Jaglu (Dead through L.R) : Provisions of Order V, Rule 20 and 17 CPC have to be followed in service of summons.-- Evidently as the report of the bailiff indicates, he was unable to find the defendant at the address which was mentioned in the summons. The report of the bailiff does not indicate that the summons were affixed on a conspicuous part of the house, at the address mentioned in the summons. There was a breach of the provisions of Order V Rule 17. When the application for substituted service was filed before the Trial Court under Order V Rule 20, a cryptic order was passed on 2 September 2011. Order V Rule 20 requires the Court to be satisfied either that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason, the summons cannot be served in the ordinary way. Substituted service is an exception to the normal mode of service. The Court must apply its mind to the requirements of Order V Rule 20 and its order must indicate due consideration of the provisions contained in it. Evidently the Trial Court failed to apply its mind to the requirements of Order V Rule 20 and passed a mechanical order.

A defendant against whom an ex-parte decree is passed has two options: The first is to file an appeal. The second is to file an application under Order IX Rule 13. The defendant can take recourse to both the proceedings simultaneously. The right of appeal is not taken away by filing an application under Order IX Rule 13. But if the appeal is dismissed as a result of which the ex-parte decree merges with the order of the Appellate Court, a petition under Order IX Rule 13 would not be maintainable.

When an application under Order IX Rule 13 is dismissed, the remedy of the defendant is under Order XLIII Rule 1. However, once such an appeal is dismissed, the same contention cannot be raised in a first appeal under Section 96. The three Judge bench decision in Bhanu Kumar Jain has been followed by another bench of three Judges in Rabindra Singh v Financial Commissioner, Cooperation, Punjab, (2008) 7 SCC 663 and by a two Judge bench in Mahesh Yadav v Rajeshwar Singh, (2009) 2 SCC 205. In the present case, the original defendant chose a remedy of first appeal under Section 96 and was able to establish before the High Court, adequate grounds for setting aside the judgment and decree.

Where the defendant was carrying business at two places and suit for ejectment filed regarding premises at place one and substituted service also effected in the newspaper having circulation in that locality, it cannot be said that publication should also be at the second place where also the defendant was carrying business, M/s Radha Krishana Banshidhar (Pvt. Ltd.) v. Basudev Prasad & Ors., AIR 1988 NOC 43 (All)

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

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

Service of summons where defendant resides within jurisdiction of another Court.(Order 5 Rule 21)- A summons

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

Service on defendant in prison(Order 5 Rule 24).- Where the defendant is confined in a prison, the summons shall be delivered or sent[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 Court]to the officer in charge of the prison for service on the defendant.

Service on soldiers, sailors or airmen.(Order 5 Rule 28)— Where the defendant is a soldier, [sailor] [or airman],the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant.

(II) Method and Proof of services-(Order 5 Rule 10 read with Rules 48 to 58 of JCCR)

Mode of service (Order5 Rule 10) --Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Rule 48 JCCR.(1)Service should be personal wherever practicable and the Courts ought not in ex- parte cases to act upon anything short of personal service until they are satisfied that personal service could not reasonably be effected.

(2) Services may be affected within the jurisdiction of the Court by such Courier services also, which are approved by the Court.

(3) In addition to the service through registered post, the other modes Post, Fax message or electronic mail service may be ordered to be made, at the expense of plaintiff (Parties) to the defendant residing outside the Jurisdiction of the Court.

(4) The panel of such courier service or the other mode as specified in the above Sub-Rule 3 shall be made and approved by the High Court.

(5) In addition to the service of summon as mentioned above the Court on an application may permit the plaintiff to effect such service of summon on the defendants in accordance with the provisions of Order 5 Rule (9-A) (2).

Rule 49 JCCR. When a summon or notice is served personally, the service and the signature or thumb-impression of the person served on the back of the summon or notice should be proved and, in the case of a defendant or judgment-debtor his identity should also be proved.

Rule 50 JCCR. If the service is made under Order V, Rule 12, of the Code, on an agent, it should be proved that such agent was empowered to accept service, either by reason of his being one of the class of recognised agents described in Order III, Rule 2, Order XXVII, Rule 2, or Section 85 (1), or by virtue of appointment for that purpose in writing. The party causing the service to be effected must, in both the last mentioned cases, furnish the necessary proof to this effect.

Rule 51 JCCR.Where service is made under Order V, Rules 14, 15, 17 or 21 the necessary particulars must be strictly proved. In the case of such service it must also be proved that a reasonable attempt was made to find out the person to be served. Where service is made under Order V, Rule 20, it should, in addition to the particulars required by law, be proved how long and until what time the defendant or respondent resided in the house and what has become of him.

Rule 52 JCCR.If the service is made under Order XXIX, Rule 2, it should be proved that the summons or notice was left at the registered officer of the Company, or was delivered to any Director, Secretary or other principal officer.

Rule 53 JCCR. In the case of Railway Administrations or Companies in addition to service in the usual way, a copy of the summons should be sent by post under Order XXIX, Rule 2 (b); provided that if the summons is sent by registered post, service in the usual way may be dispensed with.

Rule 54 JCCR.If the service is made under Order XXX, Rule 3, clause (b), it should be proved that the person on whom the summons was served, has at the time of service, the control or management of the partnership business. If the summons or notice, when tendered, is declined by the defendant or his agent, or a male or female adult member of his family, besides the proof required as to identity, etc., as stated above, it

Rule 55 JCCR.should be proved that the party was informed that the document tendered was summons or notice, and that he was made acquainted with the nature and contents thereof.

Rule 56 JCCR.The proof required under the preceding Rules 49, 51 and 55 shall in the following cases ordinarily

(1) in the case of a respondent, the affidavit of the person by whom the service was effected;

(2) in the case of a defendant or judgment-debtor, the affidavit of the person by whom the service was effected, and in addition at least one of the following

(a) that affidavit of an identifier provided by the plaintiff or decree-holder and present at the service;

(b) verification in the form printed upon the back of the process and made; at the scene of the service, by a local villager, Chaukidar, Dafadar, Mukhia or Sarpanch present thereat;

(c) Proof referred to in Order "Order V Rule 9" C.P.C.; Provided that if deemed necessary the Court may require the examination upon oath or affirmation of such person or persons as it may think fit; Provided further that in the case of service upon any adult member of the family, whether male or female, residing with the defendant or respondent or Judgment-debtor or opposite party (as the case may be); the affidavit of the person, by whom service was effected, shall contain a statement that the adult members of the family receiving or taking the notice was residing with the defendant or the respondent or the judgment-debtor or the

opposite party at the time of the service and that he was satisfied that the person upon whom service was effected was not a servant but a member of the family;] Provided further, that in rent suits and execution cases arising there from and in case of Advocates appointed as guardians ad-litem Government Pleaders in suit against Government and Public Officers, service of summons or notice should be accepted as sufficient upon the peon's affidavit alone, if the peon certifies that he has served the summons or notice in the presence of two witnesses (name and addresses of the witnesses are to be given).

Rule 57 JCCR . As there is no legal obligation upon a plaintiff, decree-holder or appellant to supply an identifier for service of process or notice, process-servers must not return unserved any notice, process or summons tendered to them for service, by reason only of the fact that no identifier has been supplied by the party. They must make every possible endeavour to find out the person to -be served and to secure the verification referred to in Rule 56 (2) (b) above, making for that purpose careful enquiries in the locality. The Nazir should personally deal with all cases in which the process-server reports that he could not find the person upon whom service was to be made, and when necessary he should bring the matter to the notice of the Judge-in-charge of the department.

Rule 58 JCCR . When the summons which has been served is the summons of another Court transmitted to the serving Court for the purpose of service only, then, upon service

being effected , , this latter Court should re-transmit the summons to the Court by which it was issued together with (1) the Nazir's return and the affidavits, verified statements, or depositions of the serving officer and the witnesses relative to the facts of the service, (2) the record of such Court's proceedings with regard thereto (Order V, Rule 23), and (3) in case where any of these documents is in a language different from that of the district from which the process issued, an English translation of such document certified to be correct.

Note- By similar means, the Summons shall be issued to be served on the person detained in prison, through the Officer-In-Charge of the prison. The High Court of Jharkhand under the powers conferred in this Section, has made Rules to effect the service of summons and other processes by means of other modes as appended in Appendix IV of this Rule.

Jharkhand Civil Courts Rules

APPENDIX- IV

Service of summons and processes by other means.

In addition to the order for service of processes by post or by processes of the Court, the order may direct to serve the same personally by any of the modes given below :-

(i) By Fax to the parties at their official Fax number given either in the pleadings by the parties or in course of trial, furnished on affidavit and in proof of service by aforesaid mode the print generated by fax machines shall be kept on record of the case.

(ii) By any of registered courier service agency of repute, having its office in the District and in the panel as prepared by the

Principal District Judge with the approval of Jharkhand High Court,

(iii)Through E-mail, at the E-mail address given either in the pleadings by the parties or in course of trial, furnished on affidavit, by producing the receipt of sending report print out.

(iv) In all the cases referred to above, the party serving the summons shall enclose the proof of his step so taken and the service report thereof, supported with an affidavit

(v) Before preparing panel of any such courier agency, appropriate surety bond must be obtained, with an agreement of prompt and correct service of processes from the head of such agency.

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APPEARANCE OF DEFENDANT

Written statement (Order 8 Rule 1)-(1)]The defendant shall within thirty days from the date of service of summons on him present a written statement of his defence.

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than **ninety days from the date of service of summons.**

Scope -Extension of time – Provisions of Order VIII, Rule 1 including the proviso are not mandatory but directory – As such the delay can be condoned and the written statement can be accepted even after the expiry of 90 days from the date of service of summons in exceptionally hard cases. Zolba vs. Keshao (2008)11 SCC 769**,** Salem Advocate Bar Assn vs. Union of India (2005)6 SCC 344.

The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever, brief they may be, by the Court. In no case, shall the defendant be permitted to seek extension of time when the Court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The Court may impose costs for dual purpose; (i) to deter the defendant from seeking any extension of time just for asking, and (ii) to compensate the plaintiff for the delay and inconvenience caused to him. Aditya Hotels (P) Ltd. vs. Bombay Swadeshi Stores Ltd. 2007 (3) Supreme 291

Duty of defendant to produce documents upon which relief is claimed or relied upon by him (Order 8 Rule 1A)- (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

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

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

(4) Nothing in this Rule shall apply to documents

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

(b) handed over to a witness merely to refresh his memory.]

Subsequent pleadings (Order 8 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 and upon such terms as the Court thinks fit; 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 thirty days for presenting the same.

Scope : A pleading, once filed, is a part of the record of the Court and cannot be touched, modified, substituted, amended or withdrawn except by the leave of the Court. Order 8 Rule 9 CPC prohibits any pleadings subsequent to the written statement of a defendant being filed other than by way of defence to a set-off or counterclaim except by the leave of the Court and upon such terms as the Court thinks fit. Gurdial Singh v. Raj Kumar Aneja, AIR 2002 SC 1003.

Additional written statement When a plaint is allowed to be amended the Court must grant leave to the defendant to file an additional written statement. Salicharan v. Sukanti, A.I.R. 1979 Ori. 78.

Procedure when party fails to present written statement called for by Court (Order 8 Rule 10) — Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

Scope - Trial Court passing judgment only on basis of plaintiff's affidavit without proving the same – Not sustainable – Defendant should not be penalized for not filing written statement. C.N.Ramappa Gowda vs. C.C.Chandregowda (2012) 5 SCC 265

The Court does not have to act blindly upon the admission of a fact made by the defendant in his written statement nor should the Court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing

the facts set out by the plaintiff in the plaint filed in the Court. In a case, specifically where a written statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 of the CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could not possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in **Ruel 10 of Order 8.** Balraj Taneja v. Sunil Maan, AIR 1999 SC 3381 : 1999 (8)SCC 396.

Right to cross-examine witnesses in case of non-filing of written statement- The suit, however, was not taken up for hearing ex parte against the petitioner nor was it ordered to be so taken up. The position of law in such a case is that a defendant, even without filing a written statement, can take part in the

hearing of the suit. He may cross-examine the plaintiff's witnesses to demolish their version in examination-in-chief. Without written statement, however, he cannot be permitted to cross-examine the witnesses on questions of fact which he himself has not pleaded nor can he be allowed to adduce evidence on Questions of fact which have not been pleaded by him by filing any written statement. It should be further made clear that if a defendant files a written statement and does not controvert the allegations in the plaint then tacitly the fact not controverted is said to be admitted, but if he does not file written statement, it cannot be said that he has admitted all the facts pleaded by the plaintiff Siai Sinha v. Shivdhari Sinha, AIR 1972 (Pat.) 81.

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Set off and Counter claims

Particulars of set-off to be given in written statement (Order 8 Rule 6)- (1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, presents a written statement containing the particulars of the debt sought to be set-off.

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

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

Scope - The claim sought to be set off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set off or adjusted. Apart from the Rule enacted in Rule 6 there exists a right to set off, called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross demands, to be available for extinction by way of equitable set off, must have

arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the Court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross suit of his own. When a plea in the nature of equitable set off is raised it is not done as of right and the discretion lies with the Court to entertain and allow such plea or not to do so. Union of India v. Karam Chand Thapar and Brothers, (Coal Sales) Ltd., AIR 2004 SC 3024**:**

For the application of this Rule, the following ingredients must be satisfied:

(a) The suit of the plaintiff must be a suit for recovery of money

(b) The defendant must have a monetary claim against the plaintiff which is legally recoverable from the latter.

(c) The claim of set-off shall not exceed the pecuniary limits of the jurisdiction of the Court in which such a claim is made.

(d) Lastly, both the parties shall fill the same character as they fill in the plaintiff's suit.

Counter-claim by defendant (Order 8 Rule 6A)- (1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired. whether such counter-claim is in the nature of a claim for damages or not :

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

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

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

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

It has been held in 2020(2) SCC 394 Ashok Kumar Kalra vs. Wing Commandar Surendra Agnihotri : Procedural justice is imbibed to provide further impetus to substantive justice. Order 8 Rules 6 and 6A makes provision of set off and counter claim. Limitation for filing a counter claim depends on the nature of claim and governed by the period of limitation stipulated in Limitation Act – Rule 6A does not specifically require that a counter claim has to be filed along with WS – as long as the Court considers that it would be proper to allow a counter claim by way of subsequent pleadings, It is possible to file a counter claim after the filing of written statement

Bollepanda P. Poonacha vs. K.M.Madapa (2008)13 SCC 179 Order VIII, Rule 6A –The provision of Order VIII Rule 6A must be considered having regard to the aforementioned provisions. A right to file counter claim is an additional right. It may be filed in respect of any right or claim, the cause of action, however, must accrue either before or after the filing of the suit but before the defendant has raised his defence--A belated counter claim must

be discouraged by the Court. –-A defendant can be allowed to amend his written statement so as to enable him to elaborate his defence or to take additional pleas in support of his case – The Court in such matters has a wide discretion but the Court exercises the discretionary jurisdiction in a judicious manner. While doing so the statutory limitation shall not be overstepped. Thus, one cause of action cannot be allowed to be substituted by another and ordinarily, effect of an admission made in earlier pleadings shall not be permitted to be taken away.

Set-off is distinguishable from counter-claim both in its application and in its effect. In its application set-off is limited to money claims, whereas counter-claim is not so limited. Any claim in respect of which the defendant could bring an independent action against the plaintiff may be enforced by counter-claim subject only to the limitation that it must be such as can conveniently be tried with the plaintiff's claim. Thus, not only claims for money, but also other claims such as a claim for an injunction or for specific performance or for a declaration may be subject of a Counter-claim., M/s Anand Enterprises, Bangalore & Ors. v. Syndicate Bank, Bangalore, AIR 1990 Kant. 175: 1989(2) Kant

Counter-claim to be stated (Order 8 Rule 6B) Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.

Exclusion of counter-claim (Order 8 Rule 6C)- Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of

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

Effect of discontinuance of suit (Order 8 Rule 6D)- 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.

Default of plaintiff to reply to counter-claim (Order 8 Rule 6E)- If the plaintiff makes default in putting in 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.

Relief to defendant where counter-claim succeeds (Order 8 Rule 6F)- Where in any suit a set-off or counter-claim is established as defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.

Rules relating to written statement to apply (Order 8 Rule 6G)- The Rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.

Scope- Order 8, Rule 6A of the Code of Civil Procedure was introduced by Amendment Act of 1976 but the very purpose of introducing this new Rule on the recommendation of the Law

Commission of India was to avoid multiplicity of the proceedings in as much as giving right to the defendant to raise not only plea of set off but also counter claim by setting up rights to himself irrespective of the fact whether cause of action for counter claim had accrued afterwards of the filing of the suit. Counter claim for all intent and purposes is a suit filed by one figuring as defendant in another suit filed by the plaintiff., Praveen Kumar Sukhani v. Bishwanath Mahto, AIR 2006 Jhar.1

It is not necessary that nature of suit or relief claimed by plaintiff as well as defendant must be same to treat plea of defendant as counter-claim. Defendant's cause of action for counter-claim can be different from cause of action of plaintiff's suit. Only limitation in filing counterclaim is that it must be made before written statement is filed or before date of filing of written statement expires., Sabitri Nath and Ors vs. Sabitri Deb, AIR 2010 Gau. 169.

Can a counter-claim be directed solely against the co-defendants be maintained.?—Normally, a counter-claim, though based on a different cause of action than the one put in suit by the plaintiff can be made. But a counterclaim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against co-defendants in the suit. But a counter-claim directed solely against the co-defendants cannot be maintained. By filing a counter-claim the litigation cannot be converted into some sort of an inter-pleader suit., Rohit Singh v. State of Bihar (now State of Jharkhand) AIR 2007 SC 10

Limitations of right to counter-claim-A right to file counter claim is an additional right. It may be filed in respect of any right or claim, the cause of action therefore, however, must accrue either before or after the filing of the suit but before the defendant has raised his defence. Bollepanda P. Poonacha v. K.M. Madapa .AIR 2008 SC 2003

What is laid down under Rule 6-A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not. Mahendra Kumar v. State of Madhya Pradesh, AIR 1987 SC 1395

Looking at the scheme of Order VIII as amended by Act No.104 of 1976, there are three modes of pleading or setting up a counter-claim in a civil suit. **Firstly**, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6A. **Secondly**, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. **Thirdly,** a counterclaim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim though referable to Rule 6A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under Order VI, Rule 17 of the CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under

Order VIII, Rule 9 of the CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a reopening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written statement within the meaning of Rule 6A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter claim therein. Equally, there would be no question of a counter-claim being

raised by way of 'subsequent pleading' as there is no 'previous pleading' on record. In the present case, the defendant having failed to file any written statement and also having forfeited his right of filing the same the Trial Court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A refusal on the part of the Court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim., Ramesh Chand Ardawatiya v. Anil Panjwani, AIR 2003 SC 2508.

Maintainability of counter-claim When defendant comes with counter-claim, he has to make specific statement about his claim and must deposit Court fee required to be paid under the law., Rammani Ammal v. Susilammal, AIR 1991 Mad. 163.

Dismissal of suit by withdrawal. The counter-claim filed would not get dismissed on that score. It shall have the same effect as a cross-suit. No illegality in allowing the counter-claim filed to be further proceeded with bearing a separate number**.,** M.S. Mohammed Yahya v. M.S. Mohammed Jaffer, 1989(1) Cur.C.C. 677 (Mad).

Exclusion of counter-claim & Payment of Court fee. -When and at what stage counter-claim may be excluded. Before the issues are settled in relation to counter-claim the plaintiff can apply to the Court to exclude the counter-claim and permit the defendant to pursue the same by way of separate suit. If a counter claim is set up in the written statement and no Court fee is paid, it is as good as filing a plaint without a Court fee.

Provisions of Order 7, Rule 11 are attracted to a counter-claim. If the Court fee is found to be insufficient the Court has to fix a date for payment of Court fee., Smt. Paravathamma v. K.R. Lokanath & Ors. AIR 1991 Kant 283.

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APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE ORDER IX

Dismissal of suit where summons not served in consequence of plaintiffs failure to pay cost (Order 9 Rule 2) - Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, or failure to present copies of the plaint or concise statements, as required by Rule 9 of Order VII, the Court may make an order that the suit be dismissed :

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

Where neither party appears suit to be dismissed (Order 9 Rule 3)—Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

Plaintiff may bring fresh suit or Court may restore suit to file (Order 9 Rule 4)—Where a suit is dismissed under Rule 2 or Rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for[such failure as is referred to in Rule 2], or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

Scope- If a suit is dismissed under Order 9, Rule 3 of the C.P.C. in the absence of both the parties, the Court has jurisdiction or power to restore the suit if sufficient cause is shown, without issuing notice to the opposite side. Even if notice was issued to the opposite side, held that it was not necessary to frame an issue and then to try this matter for couple of years and then to find out whether the suit is to be restored or not. This matter should have been decided merely on affidavits in the shortest possible time**.** Pritam Chand v. Shamsher Singh & Ors., AIR 1986 P&H 300

The Explanation of Rule 2, Order 17, permits the Court in its discretion to proceed with a case where substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned. As the provision itself shows, discretionary power given to the Court is to be exercised in given circumstances. For application of the provision, the Court has to satisfy itself that (a) substantial portion of the evidence of any party has been already recorded; (b) such party has failed to appear on any day and (c) the day is one to which the hearing of the suit is adjourned. Rule 2 permits the Court to adopt any of the modes provided in Order 9 or to make such order as he thinks fit when on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear. The Explanation is in the nature of an exception to the general power given under the Rule, conferring discretion on the Court to act under the specified circumstance, i.e., where evidence or a substantial portion of evidence of any party has been already recorded and such party fails to appear

on the date to which hearing of the suit has been adjourned. If such is the factual situation, the Court may in its discretion deem as if such party was present. Under Order 9, Rule 3, the Court may make an order directing that the suit be dismissed when neither party appears when the suit is called on for hearing. There are other provisions for dismissal of the suit contained in Rules 2, 6 and 8. The crucial words in the Explanation are 'proceed with the case'. Therefore, on the facts, it has to be seen in each case as to whether the Explanation was applied by the Court or not. In Rule 2, the expression used is "make such order as it deems fit", as an alternative to adopting one of the modes directed in that behalf by Order 9. Under Order 17, Rule 3(b), only course open to the Court is to proceed under Rule 2. When a party is absent, explanation thereto gives a discretion to the Court to proceed under Rule 3 even if a party is absent. But such a course can be adopted only when the absentee party has already led evidence or a substantial part thereof. If the position is not so, the Court has no option but to proceed as provided in Rule 2. Rules 2 and 3 operate in different and distinct sets of circumstances. Rule 2 applies when an adjournment has been generally granted and not for any special purpose. On the other hand, Rule 3 operates where the adjournment has been given for one of the purposes mentioned in the Rule. While Rule 2 speaks of disposal of the suit in one of the specified modes, Rule 3 empowers the Court to decide the suit forthwith. The basic distinction between the two Rules, however, is that in the former, any party has failed to appear at the hearing, while in the latter the party though present has

committed any one or more of the enumerated defaults. Combined effect of the Explanation to Rule 2 and Rule 3 is that a discretion has been conferred on the Court. The power conferred is permissive and not mandatory. The Explanation is in the nature of a deeming provision, when under given circumstances, the absentee party is deemed to be present. The crucial expression in the Explanation is "where the evidence or a substantial portion of the evidence of a party". There is a positive purpose in this legislative expression. It obviously means that the evidence on record is sufficient to substantiate the absentee party's stand and for disposal of the suit. The absentee party is deemed to be present for this obvious purpose. The Court while acting under the Explanation may proceed with the case if that prima facie is the position. The Court has to be satisfied on the facts of each case about this requisite aspect. It would be also imperative for the Court to record its satisfaction in that perspective. It cannot be said that the requirement of substantial portion of the evidence or the evidence having been led for applying the Explanation is without any purpose. If the evidence on record is sufficient for disposal of the suit, there is no need for adjourning the suit or deferring the decision., B. Najakiramaiah Chetty v. A. K. Parthasarthi, AIR 2003 SC 3527 : 2003 (5) SCC 641

In cases of dismissal of suit in default when the party approaches the Court within statutory period, for restoration, discretion should be exercised, normally in favour of the applicant. G.P. Srivastava v. R.K. Raizada and Ors., AIR 2000 SC 1221

Limitation- Dismissal of suit in default. Application for restoration is maintainable and limitation for that purpose will be governed by Article 137 of Limitation Act, which is, 30 days from the date of the order.

Dismissal of suit where plaintiff after summons returned unserved, fails for seven days to apply for fresh summons (Order 9 Rule 5) - (1) Where after a summons has been issued to the defendant, or to one of several defendants, and returned unserved the plaintiff fails, for a period of seven daysfrom the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that-

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

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

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

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

Scope : Vishwanath Satwaji Gaikwad vs. Laxman s/o Abaji Kavale & Others,AIR 2000 Bom 307 Order IX, Rule 5(1), (2) and Section 151-Dismissal of suit under Order IX, Rule 5 for failure to take steps for service of summons - Remedy under sub-Rule (2) to file fresh suit subject to law of limitation is provided-

Exercise of inherent jurisdiction of Court to set aside order of dismissal of suit is impliedly prohibited.-Order IX, Rule 5(1) of the Civil Procedure Code provides that when the summons is returned unserved, the plaintiff has to take steps within the period of two months (Now after amendment one week) for issuing fresh summons to the defendant or he has to apply for extension of time within the said period of two months on any of the grounds mentioned in clauses (a), (b) and (c). However, if the plaintiff fails to take steps for issuance of fresh summons, or to make an application for extension of time within the period of two months, the Court has to dismiss the suit against such defendant on whom summons could not be served. Sub-Rule (2) of Rule 5 of Order IX, makes a clear provision that the plaintiff can file a fresh suit subject to the law of limitation. That means, the plaintiff is not without any remedy. Because of the dismissal of the suit, under Order IX, Rule 5 of the Code, the situation is brought up like this, that there is no suit instituted against such defendant and, therefore, the provisions of sub-Rule (2) make it clear that the plaintiff can file a fresh suit subject to the provisions of law of limitation. Because of this peculiar provision, under sub-Rule (1) and sub-Rule (2) of Rule 5 of Order IX of the Code, the Court cannot exercise inherent jurisdiction and set aside the order of dismissal of the suit. The provisions of Order IX, Rule 5, sub-Rule (1) and sub-Rule (2), prohibit the Court from exercising inherent jurisdiction. A remedy is provided under sub-Rule (2), in case, the suit is dismissed by the Court. Thus, there is implied prohibition against the use of inherent jurisdiction of the Court.

Procedure when only plaintiff appears (Order 9 Rule 6) - (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then-

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

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

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

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

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance (Order 9 Rule 7)- Where the Court has adjourned the hearing of the suit ex-parte and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day, fixed for his appearance.

Scope - The provision contained in Order 9 Rule 6 CPC is pertinent. It contemplates three situations when on a date fixed for hearing the plaintiff appears and the defendant does not appear and three courses to be followed by the Court depending on the given situation. The three situations are : (i) when summons duly served, (ii) when summons not duly served, and (iii) when summons served but not in due time. In the first situation, when it is proved that the summons was duly served, the Court may make an order that the suit be heard ex parte. The provision casts an obligation on the Court and simultaneously invokes a call to the conscience of the Court to feel satisfied in the sense of being "proved" that the summons was duly served when and when alone, the Court is conferred with a discretion to make an order that the suit be heard ex parte. The date appointed for hearing in the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court may result in depriving a person of his valuable right to participate in the hearing and may result in a defendant suffering an ex parte decree or proceedings in the suit wherein he was deprived of hearing for no fault of his., Sushil Kumar Sabharwal v. Gurpreet Singh, AIR 2002 SC 2370.

Every Judge in dealing with an ex parte case should take good care to see that the plaintiff's case is at least prima facie proved. The mere absence of the defendant does not of itself justify the presumption that the plaintiff case is true. If notwithstanding the plaintiff failing to prove his case, a decree is passed, the

defendant is entitled *ex-debitio justiciae* to have such a decree set aside**.,** Gwalior Municipality v. Moti Lal, AIR 1977M.P. 182

Application of Rule- Provision of Order 9 Rule 7 postulates application till suit is at stage of hearing and, thus, when Court has adjourned suit for pronouncing the judgment, application under Order 9 Rule 7 would not be maintainable., Bhanu Kumar Jain v. Archana Kumar, AIR 2005 SC 626.

Order 9, Rule 13 vs. Order 9, Rule 7

There is distinction between applications which are filed under Order 9, Rule 13 and those filed under Order 9, Rule 7, in that while the former seeks cancellation of decrees finally disposing of suits, the latter seeks cancellation of only orders setting the applicant ex parte, thus, preventing him from participating in further proceedings in the suit. It is also true that unlike applications under Order 9, Rule 13, there is no article in the Limitation Act providing any specific period of limitation for applications under Order IX Rule 7. Such applications will be governed by Article 137, the residuary article which prescribes a period of three years. C. L. Cleetus v. South Indian Bank Ltd., AIR 2007 Kerala 301.

Procedure where defendant only appears (Order 9 Rule 8) - Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the **suit be dismissed**, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Decree against plaintiff by default bars fresh suit.(Order 9 Rule 9)- (1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit. and shall appoint a day for proceeding with suit.

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

Scope- An order dismissing suit for non-production of evidence without going into pleadings or material on record is an order under Order 9, Rule 8 and not under Order 17, Rule 3(a) and, thus, an application filed for restoration under Order 9, Rule 9 ought not to have been dismissed as not maintainable., Ashok Kumar Singh v. Prabhat Kumar Ghose, AIR 2008 Jhar. 76.

Where the suit is dismissed under Rule 8 for non-appearance of the plaintiff, though the defendant is present, it will not be possible for the plaintiff to bring a fresh suit in respect of the same cause of action on account of the prohibitions contained in sub-Rule (1) of Rule 9 of Order 9. But it will be open to the Court to recall the order and restore the suit. New India Assurance Co. Ltd. v. R. Srinivasan, 2000(3) SCC 242

Limitation for filing application for restoration of suit dismissed in default.—An application for restoration of suit dismissed in default, is required to be filed under Article 122 of

the Limitation Act, 1963 within 30 days of dismissal and not from the date of knowledge. Sau. Madhavi S.Kulkarni v. Vishram S. Bhakre AIR 2007 Bom. 61

Nature of the bar- Suraj Ratan Thirani v. Azamabad Tea Co., A.I.R. 1965 S.C. 295 **In this case Their Lordships of the Hon'ble Supreme Court laid down:**

"We are not however impressed by the argument that the bar imposed by O.9, R.9 creates merely a personal bar or estoppel against the particular plaintiff suing on the same cause of action and leaves the matter at large for those claiming under him. Beyond the absence in O.9, R.9 of the words referring "to those claiming under the plaintiff" there is nothing to warrant this argument. It has neither principles nor logic to commend it. The Rule would obviously have no value and the bar imposed by it would be rendered meaningless if the plaintiff whose suit was dismissed for default had only to transfer the property to another and the latter was able to agitate rights which his vendor was precluded by law from putting forward."

Non-applicability of the Rule- A judgment in probate proceedings operates as a judgment in rem unlike a judgment in an ordinary suit which operates inter parties and hence it will not be appropriate to apply the provisions of this order which are intended to apply to ordinary suits to applications for probate or letters of administration. Sadashiv Rao v. Anand Rao, AIR 1973 Bom 284

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person (Order 9 Rule 12) -Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing Rules applicable to plaintiffs and defendants, respectively who do not appear.

Scope of Rule- Rule 1 of Order III of the Code of Civil Procedure, 1908 ('Code' for short) states that a party may appear in Court either in person or by his recognized agent or by a pleader on his behalf. The proviso to the said Rule, however, declares that any such appearance shall, if the Court so directs, be made by the party in person. Likewise, Rule 12 of Order IX provides that where a plaintiff or defendant, who was ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the said Order applicable to plaintiffs and defendants respectively who fails to appear. It is thus clear that in appropriate cases, a Civil Court may direct a party to the suit—plaintiff or defendant, to appear in person. Jagraj Singh v. Birpal Kaur, AIR 2007 SC 2083.

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EXAMINATION OF PARTIES BY THE COURT & ADR

Ascertainment whether allegations in pleadings are admitted or denied (Order 10 Rule 1) — 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.**

Direction of the Court to opt for any one mode of alternative dispute resolution(Order 10 Rule 1A) —After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-Section (1) of Section 89. On the option of the parties, **the Court shall fix the date of appearance** before such forum or authority as may be opted by the parties.

Appearance before the conciliatory forum or authority(Order 10 Rule 1B)—Where a suit is referred under Rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

Appearance before the Court consequent to the failure of efforts of conciliation.(Order 10 Rule 1C)—Where a suit is referred under Rule 1A, and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it

shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.

Sec 89. Settlement of disputes outside the Court.—(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for :—

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat: or

(d) mediation.

(2) Were a dispute has been referred— (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-Section (1) of Section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if

the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

As per JCCR Rule 82-The Court after recording the admission and denial and before the recording of evidence, shall direct the parties to the Suit/ Proceeding to opt either mode of settlement out side the Court and may refer the case to :-

(a) Arbitrator

(b) Conciliator

(c) Judicial settlement including settlement through Lok Adalat

(d) Mediator

(ii)In cases so referred to above, the Court shall give the certificate to the plaintiff authorizing him to receive back the full Court fee paid from the Deputy Commissioner of the district.(Amended Section 16 of the Court Fee Act, 1870)

(iii) If the matter is referred to the mediator so appointed by the parties, or from the panel of mediators, as approved by Jharkhand High Court in terms of the Civil Procedure Mediation Rules, 2003 as contained in Part II of Jharkhand High Court Mediation Rules ; the procedure laid down in this Rule shall be followed during mediation proceeding and the result thereof shall be submitted to the referral Court which shall proceed further depending upon the nature of result as

contained in Rule 25. Provided further that consequent to the failure of efforts of conciliation or other modes of settlement as provided in Section 89 and also under order 10 Rule 1(C) of the

Code of Civil Procedure between the parties, the Court shall frame issues on the next day fixed in the case.

Oral examination of party, or companion of party (Order 10 Rule 2)—(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.

Substance of examination to be written (Order 10 Rule 3)—The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Consequence of refusal or inability of pleader to answer (Order 10 Rule 4)—(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 day not later than seven days from the date of first hearing 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.

Scope - Judges who refer the cases for settlement through any of the ADR methods are known as referral judges. The role of a Referral Judge is of great significance in Court-referred mediation. All cases are not suitable for mediation. Only appropriate cases which are suitable for mediation should be referred for mediation. Success of mediation will depend on the proper selection and reference of only suitable cases by referral judges.

Stage of Reference - The appropriate stage for considering reference to ADR processes in civil suits is after the completion of pleadings and before framing the issues. If for any reason, the Court did not refer the case to ADR process before framing issues, nothing prevents the Court from considering reference even at a later stage.

However, considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the **ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent**. An order referring the dispute to ADR processes may be passed only

in the presence of the parties and/ or their authorized representatives

Consent - Under Section 89 CPC, consent of all the parties to the suit is necessary for referring the suit for arbitration where there is no pre-existing arbitration agreement between the parties. Similarly, the Court can refer the case for conciliation under Section 89 CPC only with the consent of all the parties. However, in terms of Section 89 CPC and the judicial pronouncements, consent of the parties is not mandatory for referring a case for Mediation, Lok Adalat or Judicial Settlement. The absence of consent for reference does not affect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation.

Choice of Cases for reference - As held by the Supreme Court of India in Afcons Infrastructure Ltd. and Anr. vs. Cherian Varkey Construction Co. Pvt. Ltd. and Ors., (2010) 8 SCC 24, having regard to their nature, the following categories of cases are normally considered ***unsuitable for ADR process:***

i. Representative suits under Order I Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the Court.

ii. Disputes relating to election to public offices.

iii. Cases involving grant of authority by the Court after enquiry, as for example, suits for grant of probate or letters of administration.

iv. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.

v. Cases requiring protection of Courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.

vi. Cases involving prosecution for criminal offences.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in Civil Courts or other special tribunals/forums) are normally ***suitable for ADR processes:***

i)All cases relating to trade, commerce and contracts, including, disputes arising out of contracts(including all money suits), disputes relating to specific performance, disputes between suppliers and customers, disputes between bankers and customers, disputes between developers/builders and customers, disputes between landlords and tenants/licensor and licensees, disputes between insurer and insured.

ii)All cases arising from strained or soured relationships, including, disputes relating to matrimonial causes, maintenance, custody of children, disputes relating to partition/division among family members/coparceners/co-owners and ,disputes relating to partnership among partners.

iii)All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including ,disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.), disputes between employers and employees, disputes among members of societies/associations/apartment owners' associations.

iv) All cases relating to tortious liability, including claims for compensation in motor accidents/other accidents; and

v) All consumer disputes, including- disputes where a trader/ supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

The above enumeration of "suitable" and "unsuitable" categorisation of cases is not exhaustive or rigid. They are illustrative which can be subjected to just exceptions or addition by the Courts/tribunals exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

In spite of the categorization mentioned above, a referral judge must independently consider the suitability of each case with reference to its facts and circumstances.

Referral Order - The mediation process is initiated through a referral order. The referral judge should understand the importance of a referral order in the mediation process and should not have a casual approach in passing the order. The referral order is the foundation of a Court-referred mediation.

An ideal referral order should contain among other things details like name of the referral judge, case number, name of the parties, date and year of institution of the case, stage of trial, nature of the dispute, the statutory provision under which the reference is made, next date of hearing before the referral Court, whether the parties have consented for mediation, name of the institution/mediator to whom the case is referred for mediation, the date and time for the parties to report before the institution/ mediator, the time limit for completing the mediation, quantum of fee/remuneration if payable and contact address and telephone numbers of the parties and their advocates.

Role after conclusion of mediation - The referral judge plays a crucial role even after the conclusion of mediation. Even though the dispute was referred for mediation the Court retains its control and jurisdiction over the matter and the result of mediation will have to be placed before the Court for passing consequential orders. Before considering the report of the mediator the referral judge shall ensure the presence of the parties or their authorized representative in the Court .If there is no settlement between the parties, the Court proceedings shall continue in accordance with law. In order to ensure that the confidentiality of the mediation process is not breached, the referral judge should not ask for the reasons for failure of the parties to arrive at a settlement. Nor should the referral judge allow the parties or their counsel to disclose such reasons to the Court. However, it is open to the referral judge to explore the possibility of a settlement between the parties. To protect confidentiality of the mediation process, there should not be any communication between the referral judge and the mediator regarding the mediation during or after the process of mediation .If the dispute has been settled in mediation, the referral judge should examine whether the agreement between the parties is lawful and enforceable. If the agreement is found to be unlawful or unenforceable, it shall be brought to the notice of the parties and the referral judge should desist from acting upon such agreement. If the agreement is found to be lawful and enforceable, the referral judge should act upon the terms and conditions of the agreement and pass consequential orders. To

overcome any technical or procedural difficulty in implementing the settlement between the parties, it is open to the referral judge to modify or amend the terms of settlement with the consent of the parties.

Important Guidelines for Referral Judges - 1) As per Section 89 and Rule 1-A of Order 10, the Court should explore the possibility of referral to ADR processes after the pleadings are complete and before framing the issues when the case is taken up for preliminary hearing for examination of parties under Order 10 of the Code. If for any reason, the Court could not consider and refer the matter to ADR processes before framing issues, the case can be referred even after framing of the issues. In family disputes or matrimonial cases, the ideal stage for mediation would be immediately after service of respondent and before filing of objections/written statements. In such cases, the relationship between concerned parties becomes hostile on account of the various allegations in the petition. The hostility would be further aggravated by the counter-allegations made in written statement or objections.

2)After completion of the pleadings and before framing of the issues, the Court shall fix a preliminary hearing for appearance of parties to acquaint itself with the facts of the case and the nature of the dispute between the parties.

3) The Court should first consider whether the case is not fit to be referred to any ADR processes. If the case is not suitable for any ADR process then Court should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. If case can be referred to ADR processes, the Court

should explain the choice of five ADR processes to the parties to enable them to exercise their option.

4) The Court should first ascertain regarding choice of parties for arbitration and should inform the parties that arbitration is an adjudicatory process and reference to arbitration will permanently take the suit outside the ambit of the Court.

5) If the parties are not agreeable for arbitration, the Court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the Arbitration and Conciliation Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the Court can refer the matter to conciliation in accordance with Section 64 of the Arbitration and Conciliation Act.

6) If parties are not agreeable for arbitration and conciliation, the Court after taking into consideration the preferences/options of parties, refer the matter to any one of the other three other ADR processes:

(a) Lok Adalat;

(b) Mediation by a neutral third party facilitator or mediator; and

(c) A judicial settlement, where a Judge assists the parties to arrive at a settlement.

7) If the case is simple or relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties, the Court may refer the matter to Lok-Adalat.

8) If the case is complicated and requires negotiations, the Court should refer the case to mediation. If the facility of mediation is not available or where the parties opt for the guidance of a Judge

to arrive at a settlement, the case can be referred to another Judge for attempting settlement.

9) If ADR process is not successful, then Court shall proceed with hearing of the case. If case is settled, then Court shall examine the settlement and shall make a decree in terms of it keeping in view the legal principles of Order 23 Rule 3 of the Code.

10) If the settlement includes terms and conditions which are not the subject matter of the suit, the settlement shall be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok-Adalat or by mediation which is a deemed Lok-Adalat).

11) If any term of the settlement is ex-facie illegal or unenforceable, the Court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

12) The Court shall record the mutual consent of the parties if the case is referred to arbitration or conciliation. If the reference is to any other ADR process, the Court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok-Adalat, or mediation or judicial settlement, as the case may be. The Referral Order should not be an elaborate order.

13)The requirement in Section 89(1) that the Court should formulate or reformulate the terms of settlement would only mean that Court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

14) If the Presiding Judge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is, therefore, advisable to refer cases proposed for Judicial Settlement to another Judge.

15) If the Court refers the case to an ADR process (other than Arbitration), it should keep track of the case by fixing a hearing date for the ADR Report. The period allotted for the ADR process should not exceed from the period as permitted under applicable Mediation Rules .The Court should take precaution that under no circumstances the ADR process shall be used as a tool in the hands of an unscrupulous litigant to delay the trial of the case.

16)The Court should not send the original judicial record of the case at the time of referring the case for an ADR forum, however only copies of relevant papers of the judicial record should be annexed with referral order. If the case is referred to a Court annexed Mediation Center which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

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SETTLEMENT OF ISSUES

Framing of issues(Order 14 Rule 1)—

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

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

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

(4) Issues are of two kinds:

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements if any, and 1 [after examination under Rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

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

Court to pronounce judgment on all issues (Order 14 Rule 2)—(1) Notwithstanding that a case may be disposed of on a preliminary issue, the **Court shall,** subject to the provisions of sub-Rule (2), pronounce judgment on all issues.

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

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

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

Scope - Issue of jurisdiction as a preliminary issue - Order XIV, Rule 2, C.P.C. is a relevant provision under which an issue could be framed as a preliminary issue. Looking to the language of Order XIV, Rule 2, C.P.C. it is clear that the Legislature has left a discretion on the Court to come to the conclusion regarding framing of the preliminary issue. No doubt in doing so there is a rider on the Court that a preliminary issue should be an issue of law only and that relates to the jurisdiction of the Court, or a bar to the suit created by any law for the time being in force. Under this, the Court has been given discretion either to decide the issue of jurisdiction as a preliminary issue or decide along with other issues, Ms. Ram Babu Singhal Enterprises (P) Ltd. v. M/s. Digamber Parshad Kirti Prashad, AIR 1988 All. 299

Order 14, Rule 2(1), C.P.C. requires the Court to pronounce judgment on all issues. However, there is an exception in sub-Rule 2 of Rule 2, which empowers the Court to dispose of a suit on a preliminary issue, if such issue is an **issue of law only and**

relates to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force. Section 3 of the Limitation Act imposes a duty on the Court to ascertain as to whether a suit filed is within the time and empowers the Court to dismiss such suit barred by time although the limitation has not been set up as a defence. The Limitation Act, 1963 prescribes the period of limitations for filing different kinds of suits. Therefore, it is not that the question of limitation cannot be decided as preliminary issue at all. However, if in the opinion of the Court while deciding such question of limitation it requires to go into the question of fact related to the plea of limitation, the Court no doubt cannot decide such issue as a preliminary issue, the same being the mixed question of law and facts but when the averments made in the plaint is clear and from reading of such averments and by accepting the same as true, if it is evident that the suit is barred by time, the Court no doubt can decide the question of limitation as preliminary issue., Lalchand Sha v. Kalabati Devi, 2007 SCC OnLine Gau 169 (2008) 2 AIR Jhar R (NOC 421) 158.

Normally the Court should pronounce judgment on all issues and piecemeal trial of a suit should be avoided. In sub-Rule (2) of Rule 2 , a discretion has been conferred on the Court to treat any issue of law as preliminary issue. In this regard a departure has been made from the earlier provisions and the word “shall” which was used in the earlier provision and which indicated that the Court has used in the earlier provisions and which indicated that the Court was obliged to treat and decide an issue of law, as a

preliminary issue has been replaced by the word "may" in the amended provision which indicated that it is in the discretion of the Court to try an issue of law as preliminary issue. Sub-Rule (2) also further curtails the power of the Court in the matter of the decided an issue which related to the jurisdiction of the Court or to a bar to the suit created by a law for the time being in force. This would show that the intention of legislature, in introducing the amendment in Order 14, Rule 2 of the Code is to restrict the power of the Court in the matter of decided an issue of law as a preliminary issue., Panchayat Shri Digamber Jain Mandir, Baguwala v. Shri Chiranji Lal Patni, 1989(1) C.C.C. 395 Raj.

Sub-Rule (2) of Rule 2 of Order 14 of the Civil Procedure Code lays down that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before the Hon'ble Supreme Court in Major S. S. Khanna vs. Brig. F.J. Dillon AIR 1964 SC 497, and it was held as under :- "Under O. 14, R. 2 where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only

where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court : not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit." Though there has been a slight amendment in the language of Order 14, Rule 2Civil Procedure Code by the Amending Act, 1976, but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issue of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue. Ramesh B. Desai v. Bipin Vadilal Mehta, AIR 2006 SC 3672.

When defendant is proceeded ex-parte, normally issues are not framed. - No doubt, issues are to be framed after the filing of the pleadings by the parties and before the evidence starts. It is also not in dispute that when the defendant is proceeded ex-parte, normally issues are not framed and case is put for ex-parte evidence of the plaintiff. The question is as to whether any advantage or right accrued in favour of the plaintiff by not framing of the issues. The answer has to be in the negative. There is no reason as to why the issues be not framed now, which exercise would be only a reflection of determining as to whether the parties are at variance with each other. It would facilitate the

complete adjudication of the controversies involved and would rather be in the interest of both the parties. Therefore, in the facts of the case, framing of the issues cannot be treated as setting the clock back., Finolex Cables Ltd. v. Finolux Auto Pvt. Ltd. AIR 2007 Del. 268.

Materials from which issues may be framed (Order 14 Rule 3)—The Court may frame the issues from all or any of the following materials:—

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

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

(c) **the contents of documents** produced by either party.

Court may examine witnesses or documents before framing issues (Order 14 Rule 4)—Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not , produced in the suit, it [may adjourn the framing of issues to a day not later than seven days] and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

Power to amend and strike out, issues (Order 14 Rule 5)—(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be

necessary for determining the matters in controversy between the parties shall be so made or framed.

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

Scope- Issue can be framed at any time.The application to frame an additional issue which arises on the basis of the pleadings cannot be disallowed on the ground that the plaintiff has already let in evidence. Rule 5 of Order 14 is clear that the issue can be framed at any time before the passing of the decree. Hari Chand v. Krishan Kumar 1999(3) C.C.C. 67 (P&H).1998 SCC On Line P&H 504

While framing additional issue, a party cannot compel the Court for the same. It is purely discretion of the Court which is to be exercised in a judicial manner. However additional issue should not be framed to convert the nature and character of the suit., Jitta Anji Reddy & Anr. v. Ahmed Ali Khan & Anrs., AIR 1992 NOC 4 (A.P.)

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Hearing of the suit and examination of witnesses

List of witnesses and summons to witnesses.(Order 16Rule 1)—(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 summons to such persons 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 party shows sufficient cause for the omission to mention the name of such witness in the said list.

(4) Subject to the provisions of sub-Rule (2), summonses referred to in this Rule may be obtained by the parties on an application 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 sub-Rule (1).

Section 31 of the C.P.C. provides that "The provisions in Section 27, 28 and 29 shall apply to summons to witnesses to give evidence or to produce documents or other material objects."

Scope- The legal position is that a party who seeks for a prayer to the Court to issue summons to a witness, must reveal to the Court the purpose for which the witness is proposed to be

summoned. Once such an application is filed, it is for the Court to use its discretion to decide whether the summons are to be issued to those witnesses. It needs to be pointed out that the issue of summons is not automatic and in appropriate cases or in cases where objections are raised, the bona fides of the request has to be looked into before passing appropriate orders passed.

"Under Order 16, Rule 1, Civil Procedure Code after issues are settled in a suit the parties have to present in Court a list of their witnesses whom they propose to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in Court. Under the said Rule this step has to be taken not later than fifteen days after issues are settled. This is a whole-some provision in the Code intending to give notice to a party about the witnesses which its adversary is to examine in the case so that it would be in a position to know the nature of evidence it has to meet. Sub-Rule (1) of Order 16 casts an obligation on every party to a proceeding to present a list of witnesses whom it proposes to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in Courts". M/s. Bennett Coleman and Co. Ltd. v. Janki Ballav Patnaik, AIR 1989 Ori 145.

Examination of witness by defendant not named in list of witnesses. The Defendant has a right to examine witness produced by the defendant on the date fixed for hearing even though name of such witness is not indicated in the list of witnesses. Even assuming that provision of Order 16, Rule 1(3) were applicable, a discretion has been vested in the Trial Court to permit examination of witness not furnished in the list.,

Hindustan Aeronautics Ltd., Koraput Div. v. B.N. Das, Electric Trading Co., 2000(2) CCC 17 (Ori.).

Production of witnesses without summons (Order16 Rule 1A) —A Subject to the provisions of sub-Rule (3) of Rule 1, any party to the suit may, without applying for summons under Rule 1, bring any witness to give evidence or to produce documents.

Scope –- Order 16 Rules 1 and 1(A) adumbrate that the witnesses at the trial Court are to be produced for examination by the parties by their filing the list, and omission thereof prohibits them to avail the assistance of the Court to secure their attendance to give evidence or to produce documents on their behalf. It is true that the legislature amended Order 16 Rule 1 and added Rule 1(A) to see that the undue delay should not be caused in the trial of the suit by filing list of witnesses or the documents at belated stage. Thereby, it envisages that on or before the date fixed by the Court for settlement of issues and not later than 15 days after the date on which issues were settled, the parties are to file the list of such witnesses whom they propose to call either to give evidence or to produce documents and they are required to obtain summons to such witnesses for their attendance in the Court. On their failure to do the same, Rule 1(A) says that they may without assistance of the Court bring witnesses to give evidence or to produce documents. In other words, if they fail to obtain the summonses through Court for attendance of witnesses they are at liberty to have the witnesses brought without the assistant of the Court. It would, thus, be seen that the legislature did not put a total prohibition

on the party to produce the witnesses or the production of the documents for proof of the respective case. Nonetheless, when they seek the assistance of the Court, they are enjoined to give reasons as to why they have not filed the application within the time prescribed under Rule 1 of Order 16. Lalitha J. Rai v. Aithappa Rai, 1995(4) SCC 244: AIR 1995 SC 1984

Expenses of witness to be paid into Court on applying for summons.(Order16Rule 2) — (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed which shall not be later than **seven days** from the date of making applications under sub-Rule (4) of Rule 1 pay into Court such a sum of money as appears to the Court to be sufficient to defray the traveling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) Experts.—In determining the amount payable under this Rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

Scope: These provisions are intended to further the ends of justice and the Court while passing order has to be vigilant that the petition has not been filed to delay the trial or cause unnecessary hardship to any witness. To that end, the Court may first be satisfied about the reason for summoning such a witness. Secondly, in appropriate cases it may direct the party to deposit the witness cost and traveling and other expenses before

summoning the witness. Further, when the witness appears the Court need to ensure that the deposited amount is paid to the witness immediately after the recording of evidence.

Summons to produce document.(Order16Rule 6)—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.

Summons given to the party for service.(Order16Rule7A)—(1) 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.

(2) The service of such summons, shall be effected by or on behalf of such party by delivering or tendering to the witness personally a copy thereof signed by the Judge or such officer of the Court as he may appoint in this behalf and sealed with the seal of the Court.

(3) The provisions of Rules 16 and 18 of Order V shall apply to a summons personally served under this Rule as if the person effecting service were a serving officer.

4) If such summons, when tendered, is refused or if the person served refuses to sign and acknowledgment of service or for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in the same manner as a summons to a defendant.

(5) Where a summons is served by a party under this Rule, the party shall not be required to pay the fees otherwise chargeable for the service of summons.]

Procedure where witness fails to comply with summons(Order 16 Rule 10)

(1) Where a person to whom a summon has been issued either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the Court—

(a) shall, if the certificate of the serving officer has not been verified by the affidavit, or if service of the summons has effected by a party or his agent, or

(b) may, if the certificate of the serving officer has been so verified, examine on oath the serving officer or the party or his agent, as the case may be, who has effected service,or cause him to be so examined by any Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a

warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under Rule 12;

Provided that no Court of Small Causes shall make an order for the attachment of immovable property.

Section 32 of the C.P.C.— The Court may compel the attendance of any person to whom a summons has been issued under Section 30 and for that purpose may—

(a) issue a warrant for his arrest;

(b) attach and sell his property;

(c) impose a fine upon him 1 [not exceeding five thousand rupees];

(d) order him to furnish security for his appearance and in default commit him to the civil prison.

Scope -The provisions for such coercive processes in the Rule is to ensure that the summons issued by the Court to enable the parties for redressal of injustice suffered by them is respected and the witnesses comply with the Court's requisition to attend to give evidence or to produce documents according to the summons.

Object of the Rule - The object of this Rule is to enable the Court to help the parties to compel attendance of recalcitrants who, even though served, fail to appear without lawful excuse., Dwarka Prasad v. Rajkunwar Bai, A.I.R. 1976 M.P. 214.

Court may of its own accord summon as witnesses strangers to suit (Order16Rule 14)—Subject to the provisions of this Code

as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary [to examine any person, including a party to the suit] and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

Procedure where witness apprehended cannot give evidence or produce document (Order16Rule 18)—Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and. in default of his giving such bail or security, may order him to be detained in the civil prison.

Consequence of refusal of party to give evidence when called on by Court.(Order16Rule 20)—Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Power to require attendance of prisoners to give evidence.(**Order 16 A Rule 2)** —Where it appears to a Court that the evidence of a person confined or detained in a prison within the State is material in a suit, the Court may make an order requiring the officer in charge of the prison to produce that person before the Court to give evidence:

Provided that, if the distance from the prison to the Court-house is more than twenty-five kilometers, no such order shall be made unless the Court is satisfied that the examination of such person on commission will not be adequate.

Right to begin.**(Order 18 Rule 1)**—The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contents that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Scope - Right to begin is to be determined by Rules of evidence. As a general rule, the party on whom burden of proof rests should begin. Where a suit was filed to declare decree in earlier suit filed for declaration of title, which was decreed on basis of compromise as null & void as it had been obtained by practising fraud, it was held that as the plaintiff raised question of fraud to have been practised on him, it was he who should begin first, as per the provision contained in Order 18, Rule 1, C.P.C., Mirza Niamat Baig v. Sk. Abdul Sayeed, 2009(1) CCC 75 (Ori.)

Where a suit has been filed by the plaintiff for supply of car or in the alternative for refund of the amount with interest and the plea of the applicant/defendant is that the car was delivered to

the plaintiff, in view of the admitted position that against the payment, car had been delivered, burden lies on the defendant to prove delivery. **Order of Trial Court calling defendant to first lead his evidence suffers no illegality**. When the defendant has admitted the fact pleaded by the plaintiff but pleads certain fact onus to prove which is upon him then Trial Court calling defendant to first lead his evidence commits no illegality., **Associate Auto Agencies Automobiles Dealers and Engineers v. M/s. Chhotabhai Jithabhai and Co., 1993(2) C.C.C. 175 (M.P.).**

2**. Statement and production of evidence.(Order 18 Rule 2)—**
(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.
(3) The party beginning may then reply generally on the whole case.
(3A) Any party may address oral arguments in a case, **and shall, before he concludes the oral arguments**, if any, submit if the Court so permits concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record.
(3B) A copy of such written arguments shall be simultaneously furnished to the opposite party.

(3C) No adjournment shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing, considers it necessary to grant such adjournment.

(3D) The Court shall fix such time-limits for the oral arguments by either of the parties in a case, as it thinks fit.]

Scope- Where the plaintiff had been negligent and in spite of repeated opportunities and directions had failed to file affidavits by way of evidence, the Court was fully justified in dismissing the suit as the plaintiff had failed to lead evidence. There was gross negligence and carelessness on the part of the plaintiff. Such negligence, recklessness and repeated failures to comply with Court orders for over one year cannot be condoned., **Manohar Lal Ahuja v. Nand Lal Ahuja, AIR 2008 (NOC) 347 (Del.).**

The object of filing written arguments or fixing time limit of oral arguments is with a view to save time of Court. The adherence to the requirement of these Rules is likely to help in administering fair and speedy justice., Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR 2005 SC 3353

Party to appear before other witnesses(Order18 Rule 3A).— Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage.

Recording of evidence.**(Order18 Rule 4)**—(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court, shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-Rule, consider taking into account such relevant factors as it thinks fit.

(3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within **sixty days** from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this Rule.

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

(8) The provisions of Rules 16, 16A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission under this Rule.

Scope- Order 18, Rule 4 provides that in every case, the examination-in-chief of a witness shall be on affidavit. The Court has already been vested with power to permit affidavits to be filed as evidence as provided in Order 19, Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re-examination in open Court has not been disturbed by Order 18, Rule 4 inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order 18, Rule 4 has been examined and its validity upheld in Salem Advocates Bar Association's case. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further, in Salem Advocates Bar Association's case, it has been held that the trial Court in appropriate cases can permit the examination-in-chief to be recorded in the Court. Proviso to sub-Rule (2) of Rule 4 of Order

18 clearly suggests that the Court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in Court or by the Commissioner appointed by it. The power under Order 18, Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast Rules controlling the discretion of the Court to appoint Commissioner to record cross-examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, serious disputes as to the execution of the will etc. In such cases, as far as possible, the Court may prefer to itself record the cross-examination of the material witnesses. Another contention raised is that when evidence is recorded by the Commissioner, the Court would be deprived of the benefit of watching the demeanour of witness. That may be so but the will of the legislature, which has by amending the Code provided for recording evidence by the Commissioner for saving Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of the witnesses. Further, as noticed above, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the Court. It may also be noted that Order 18, Rule

4,specifically provides that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The Court would have the benefit of the observations if made by the Commissioner.

Rule 4(1) is mandatory and it is not directory. The expression 'shall' used in Order 18, Rule 4 has to be construed as may. It will hardly be permissible to read the word shall in relation to examination before a Court as it is bound to cause absurd results. If the expression shall is construed strictly, then the very discretion given to the Court in this Rule would stand frustrated. The legislative intent in providing for exercise of discretion by giving option to the Court to permit the cross-examination of the witnesses before itself or before the Commissioner appointed by it shall be rendered otiose in effect thus defeating the very object of the legislative amendments. The use of the word 'shall' appearing in sub-Rule (2) is mandatory only to the extent that the cross-examination of a witness whose affidavit has been taken on record in lieu of the examination-in-chief has to be taken; but whether it would be taken before the Court or before the Commissioner appointed by it is a matter of discretion of the Court. There is no occasion for the Court to construe the word shall as mandatory and limited to the extent that cross-examination shall only be conducted before the Court. If that interpretation was to be accepted, it would completely frustrate the very object of the amendment and would bring it at parity with Order 18, Rule 4 of the unamended Code of Civil Procedure, 1908. Such an interpretation thus cannot be accepted. The use

of the word shall is neither a decisive factor nor capable of such a strict construction as this interpretation does not fit in the scheme of the Code. Harish Vithal Kulkarni v. Pradeep Mahadev Sabnis, AIR 2010 Bom.178 (Full Bench).

Parties are entitled to produce documents along with affidavit - Parties are entitled to produce documents along with affidavit, but admissibility of such document is to be decided by Court before documents are being exhibited in evidence & decision cannot be postponed till final disposal of case or any time after documents are exhibited in accordance with Order 13, Rule 4 CPC., Durga Shankar S. Trivedi v. Babubani Bhulabhai Parekh, AIR 2003 Bom. 487**:**

Order 18, Rule 4 sub-Rule (1) provides that in every case examination-in-chief of the witnesses shall be on affidavits and copies thereof shall be supplied to the opposite parties by the party who calls them for evidence. It often happens that the witness may not be under the control of the party who wants to rely upon his evidence and that witness may have to be summoned through Court. Order 16 Rule 1 provides for list of witnesses being filed and summons being issued to them for being present in Court for recording their evidence. Rule l-A, on the other hand, refers to production of witnesses without summons where, any party to the suit may bring any witness to give any evidence or to produce documents. Reading the provisions of Order 16 and Order 18 together, it appears that Order 18 Rule 4(1) will necessarily apply to a case contemplated

by Order 16 Rule l-A, i.e. Where any party to a suit, without applying for summoning under Rule 1 bring any witness to give evidence or produce any document. In such a case, examination-in-chief is not to be recorded in Court but shall be in the form of an affidavit. In cases where the summonses have to be issued under Order 16 Rule 1, the stringent provision of Order 18 Rule 4 may not apply. When summons are issued, the Court can give an option to the witness summoned either to file an affidavit by way of examination- in-chief or to be present in Court for his examination. In appropriate cases, the Court can direct the summoned witness to file an affidavit by way of examination-in-chief. In other words, with regard to the summoned witnesses the principle incorporated in Order 18 Rule 4 can be waived. Whether a witness shall be directed to file affidavit or be required to be present in Court for recording of his evidence is a matter to be decided by the Court in its discretion having regard to the facts of each case. Order 18 Rule 4(2) gives the Court the power to decide as to whether evidence of a witness shall be taken either by the Court or by the Commissioner. Under the sub-Rule 4(2) the Court has the power to direct either all the evidence being recorded in Court or all the evidence being recorded by the Commissioner or the evidence being recorded partly by the Commissioner and partly by the Court. For example, if the plaintiff wants to examine 10 witnesses, then the Court may direct that in respect of five witnesses evidence will be recorded by the Commissioner while in the case of other five witnesses evidence will be recorded in Court. In this connection, Order 18 Rule 4(3) provides that the evidence may be recorded either in

writing or mechanically in the presence of the Judge or the Commissioner. The use of the word "mechanically" indicates that the evidence can be recorded even with the help of the electronic media, audio or audio-visual, and in fact whenever the evidence is recorded by the Commissioner it will be advisable that there should be simultaneously at least an audio recording of the statement of the witnesses so as to obviate any controversy at a later stage., Salem Advocate Bar Association, Tamil Nadu v. Union of India, 2002(8) Supreme 55.

Power of Commissioner to declare a witness hostile- Order 18, Rule 4(4) requires that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments. Order 18, Rule 4(8) stipulates that the provisions of Rules 16, 16-A, 17 and 18 of Order 26, in so far as they are applicable, shall apply to the issue, execution and return of such commission thereunder. The discretion to declare a witness hostile has not been conferred on the Commissioner. Under Section 154 of the Evidence Act, it is the Court which has to grant permission, in its discretion, to a person who calls a witness, to put any question to that witness which might be put in cross-examination by the adverse party. The powers delegated to the Commissioner under Order 26, Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in Court under Section 154 of the Evidence Act to declare a witness hostile. If a situation as to declaring a witness hostile arises before a Commission recording evidence, the concerned party shall have to obtain permission from the Court under Section 154 of the Evidence Act and it is

only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the commission so as to itself record remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party.**,** Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR 2005 SC 3353

Applicants, filing affidavits, are required to appear before Court- The applicants, filing affidavits, are required to appear before the Court. They are required to enter the witness box to testify the contents of their respective affidavits as laid down by the Bombay High Court in the case of F.D.C. Ltd v. Federation of Medical Representatives Association India (FMRAI)., A.I.R. 2003 Bombay 371. The above judgment is approved by the Apex Court in the case of Ameer Trading Corporation v. Shapoorji Data Processing Ltd. (2004) 1 S.C.C. 702, thus, where none of the witness who has sworn an affidavit have entered the witness box, the said affidavits cannot form part of evidence. Thus, they cannot be read in evidence., Bank of India v. Allibhoy Mohammed, AIR 2008 Bom.81**.**

As Per Rule 89 of JCCR - Parties shall file in Court their lists of witnesses who are in attendance to give evidence on their behalf before 11.30 AM.., or in the case of morning sittings before "7.45 A.M." Where a party himself wishes to appear as a witness he shall so appear before any other witness on his behalf has been examined unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage. The omission

to file a hazri within the time fixed shall be no bar to witnesses for any party being examined if presented for examination, but nothing shall be allowed to any witness on account of his expenses for the day's attendance if he is neither entered in the list nor actually examined.

Note 1-This Rule in no way affects the obligation on the part of witnesses to attend punctually at the time for which they are summoned.

As Per Rule 93 of JCCR- Every Presiding Judge shall in the examination of witnesses record in his own handwriting or when recording on a computer by himself or on his dictation by a steno typist and in each deposition the name of the person examined, the name of his or her father and, if a married woman, the name of her husband the nationality-religion, profession and age of the witness and the village, thana and district in which the witness resides and if the witness belongs to Scheduled caste or Scheduled tribe, a statement to that effect. The entry of age shall be the Presiding Judge's own estimate and in his own handwriting.

As Per Rule 94 of JCCR - In every case, examination-in-Chief shall be on affidavit on deposition format and the copy of the same shall be supplied to the other side. Cross examination and re examination of such witness will be recorded either by the Court or it be entrusted to the Commissioner appointed by the Court from the panel approved by the High Court or the Principal District Judge as the Case may be, the proof and admissibility of the document filed and relied upon by the parties along with the affidavit, shall be subject to the orders of the Court.

Note-1:-Even if the examination-in-chief on affidavit has been filed, it shall be at the discretion of the Court to call upon the witness to depose on oath, stating the reason thereof in the order; and to record the deposition in open Court. In such event the deposition so recorded shall be given weight age for the purpose of trial.

Note-2:-Except as provided under Order 26 of Code of Civil Procedure for appointment and recording of evidence by Commissioner, no Court will allow the recording of cross-examination or re-examination of a witness who is present in the Court by the pleader commissioner.

* Where the recording of evidence is likely to take a long time or for any other special ground, the same shall be entrusted to the commissioner vide Rule-7 of Jharkhand High Court Case Flow Management in Sub-Ordinate Court Rules, 2006.

***** Evidence through video conferencing may also be resorted to with recording of audio and visual clips forming part of the record.

Remarks on demeanour of witnesses.(Order18 Rule 12)—The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

Power to examine witness immediately(Order18 Rule 16)—(1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may,

upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner herein before provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

Scope- An application under Order 18 Rule 16 of the Code had been filed stating that the plaintiff was leaving the country shortly and praying therein for recording the statement of the plaintiff considering the urgency. Defendant had raised an objection with regard to the sufficiency of Court fee paid by the plaintiff upon the plaint. However, the Court directed that the statement of plaintiff in the suit may be recorded while observing that it was not proceeding with any other issue. The order was held to be legally sustainable., Samuel H. Joseph & Ors. v. Dr. Johan C. Taylor, 1991(1) C.C.C. 595.

Court may recall and examine witness (Order18 Rule 17)— The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

Powers of Court under this Rule 17 are discretionary and very wide- Order 18 Rule 17 of the Code is not a provision

intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the Court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the Court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions., K.K. Velusamy v. N. Palaanisamy, 2011 (2) CCC 28 (SC).

Application for recalling witnesses when not allowed- Where only ground to recall witnesses for further cross-examination was that earlier counsel representing petitioner did not cross-examine witnesses effectively due to inadvertence on point of adverse possession and there was nothing in the application that some material facts which came to notice of petitioner after cross-examination of witnesses of respondent were required to be put to said witnesses, it was held that effective cross-examination was a very vague term used by the petitioner for recalling witnesses of respondent and, thus, further cross-examination of witnesses already cross-examined cannot be permitted merely on change of counsel with purpose to fill up lacunae left in case., Akash v. Gian Singh, AIR 2010 H.P. 93**.**

Cases in which Court may issue commission to examine witness.(Order26 Rule 1)—Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who

is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it :

Provided that a commission for examination on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

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

Advanced age of a witness can well be construed as a ground of infirmity-Invocation of provisions of Order 26, Rule 1 is not limited only in respect of sick persons as the expression, "sickness or infirmity" makes it absolutely clear that the Court has discretion to issue commission to examine witness who suffers from some sort of infirmity, apart from sickness and, thus, advanced age of a witness can well be construed as a ground of infirmity., Om Prakash Kajaria v. Circular Investment Trust Ltd., AIR 2009 Cal. 66.

Duty of the Court--When a Commissioner is appointed, the Court must take care to fix definite time limits for completion of evidence so that the parties do not exploit the situation by taking easy adjournments before the Local Commissioner or by raising unjustifiable objections and so that they do not also harass the party out of possession or the one who is seeking a decree for money. The parties cannot also be allowed to harass the Local Commissioner by raising objections after objections to delay the evidence. The new solution cannot be allowed to be abused nor become more disadvantageous or illusory. The Court must by

implication therefore, keep track of what is happening before the Local Commissioner., M/s Fashion Linkers & Ors. v. Mrs. Savitri Devi & Anr., 1995 (3) CCC 604 (Del.).

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Production, Impounding and Return of Documents

Original documents to be produced at or before the settlement of issues (Order13 Rule 1) - (1) The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement.

(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.

(3) Nothing in sub-Rule (1) shall apply to documents—

(a) produced for the cross-examination of the witnesses of the other party; or

(b) handed over to a witness merely to refresh his memory.]

Scope-The first hearing for bproduction of documents contemplated in this Rule is not the first hearing duly mentioned in the summons for appearance of the defendant if the suit is a contested one. The scheme of the Code is such that interrogation and discovery, production and inspection of documents should all be complete after a case to be taken upon for hearing of evidence. The word hearing is a comprehensive meaning according to the context. In the context in which they are used, the words 'at the first hearing of the suit' in this Rule, mean that hearing after the pleadings are completed and before the issues are framed under Order 14. Up to that stage, production of documents is permissible without cause being shown, as contemplated by Order13, Rule 2, but thereafter 'good cause

must be shown for late production of documents., Ashoka Marketing Ltd. v. Rathas Kumar, A.I.R. 1966 Cal.

Discretion to permit filing of documents - Bar under this Rule is not absolute. The Court has a discretion to admit those documents into evidence if good cause is shown to the satisfaction of the Court for non-production of those documents only. Ram Nath Singh v. Brij Kishore Singh, A.I.R. 1980 Pat. 160.

Rejection of irrelevant or inadmissible documents.(Order13 Rule 3)—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.

Scope-Rejection of inadmissible documents under Order 13, Rule 3 can be at any stage of suit proceedings. Thus, where a specific plea was raised in written statement itself that promissory note was fabricated by affixing used adhesive stamps and the said objection was found to be factually correct by the Court on verification of document, it was held that the rejection of document even before the commencement of trial, was not improper.**,** Chaganti Ventaka Bhaskar v. C. Chandresekhar Reddy, AIR 2010 (AP)155**.**

Endorsements on documents admitted in evidence.(Order13 Rule 4)—(1) Subject to the provisions of the next following sub-Rule, there shall be endorsed on every document which has 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 initialed 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 initialed by the Judge.**

Scope- This Rule prescribes that there shall be endorsed on every document which has been admitted in evidence in the suit, the number and title of the suit, the name of the person producing the document, the date on which it was produced and a statement of its having been so admitted. The endorsement shall be signed or initialed by the Judge. A document lacking the last requirement cannot be said to be admitted in evidence. A document is either admitted or is merely marked as an exhibit for the purpose of identification subject to the question of its admissibility being decided later on. If the question of its admission in evidence is to be determined under the Registration Act or any other enactment, the document cannot be held to have been admitted at all for the purpose of any other enactment. It is only when a document has been marked as an exhibit in the case and has been used by parties for examination and cross-examination of their witnesses, that Section 36 of The Stamp Act comes into operations. An endorsement stating that the admissibility of the document objected to by the defendant, shall be decided along with the finding on other issues, indicates that the document is not admitted in evidence so as to attract the

provisions of Section 36 of the Stamp Act., Kolli Eranna v. Ballamkonda, A.I.R. 1966 A P 184.

" It is an archaic practice that during the evidence-collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection. But the fallout of the above practice is this: Suppose the trial Court in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or the revisional Court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the appellate Court would be deprived of the benefit of that evidence, because that was not put on record by the trial Court. In such a situation the higher Court may have to send the case back to the trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realized through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.

When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such

objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. However, we make it clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed." Sisir Kumar Sadhu Khan VS Jyotsna Sah, 2010 3 JCR 132; 2010 3 JLJR 434; 2010 0 Supreme(Jhk) 315;

As Per Rule 234 of JCCR - Documents admitted in evidence shall be marked with figures 1, 2, 3, etc., and capital letters A, B, C,etc., accordingly as they are admitted on behalf of the plaintiffs or defendants and separate lists of such documents in Form No. (J) 11 shall be prepared by the Bench Clerk which will be signed by the Presiding Judge. The entries in these lists shall be made day by day and the same shall also be maintained in digital mode.

As Per Rule 235 of JCCR - When there are two or more parties of defendants, the documents of the first party may be marked A-1,B-1, C-1, etc., and those of the second, A-2, B-2, C-2, etc. If on behalf of either of the party digital evidence is filed and the same is taken into evidence thus digital documents shall be marked in case of plaintiff as El-P1, P2, P3. Similarly in cases of defendants the same shall be marked as El-D1, D2, D3.

(a) Where an exhibit forms part of a voluminous document, such account book, Khata and counterfoil receipt book, etc., it should

be clearly indicated by means of a slip of paper pinned to the sheet or page on which it occurs, the exhibit mark being noted on the slip.

(b) When an entry in an account book is admitted in evidence the portion so admitted shall be clearly indicated by enclosing the same in red ink.

As Per Rule 236 of JCCR - When documents are admitted at the instance of the Court and neither party is willing to accept them as evidence on his behalf; they shall be marked as I, II, III. Etc.

As Per Rule 237 of JCCR - .When a number of documents of the same nature are admitted, as for example, a series of rent receipts, the whole series should bear one number or capital letter, a small letter or small number being added beneath the number or letter. and separated from it by a line to distinguish each paper of the series.

As Per Rule 238 of JCCR - Exhibits must not be defaced in any way except in so far as the law permits, that is to say by marking them as Exhibits filed in a case.

As Per Rule 239 of JCCR - .When a document of historical or anti quarian interest is in question the Court should make every possible endeavor to prevent it being defaced by endorsement or exhibit marks or by having the seal of the Court impressed upon it. If the parties do not agree to a photograph copy being substituted for the original, the document may be enclosed in a sealed cover or in a locked or sealed box, the necessary particulars being endorsed outside such box or cover. If every

other means fails measures should be taken for the safe custody of the document pending instructions from higher authorities.

(A). Any party to a suit or proceeding may file photostat copy of any valuable and important document and the original thereof may be produced at the time of evidence. The original document may be returned to the party concerned soon after it has been inspected or put in evidence unless its retention is considered necessary. In case retention of original document is considered necessary by the Court, all measures should be taken by the Court for its safe custody.

As Per Rule 240 of JCCR - When an original document, after being marked for the purpose of identification, is returned, and a copy thereof substituted under the provisions of Order VII, Rule 17, or Order XI 11, Rule 5, Code of Civil Procedure, a note of the return of the original shall be made in the lists referred to in the preceding Rules.

As Per Rule 241 of JCCR -When any public document (not being the record of a suit or of a judicial proceeding) or a document in public custody has been produced in Court in compliance with a summons the Court shall after the document has been inspected or put in evidence, as the case may be, cause it to be returned with the least possible delay to the officer from whose custody it has been produced after the preparation of such copies as the Court may require under Order XIII, Rule 5, clause (2) Civil Procedure Code, unless its detention is considered to be necessary till the delivery of the judgment.

Note- While returning any public document, the Court shall make an endorsement therein near about the exhibit mark and

by a separate order in the order-sheet of the case direct that it shall not be destroyed without previous permission of the Court and the Court shall not accord such permission until the trial is concluded, or in case where appeal lies until sufficient time has elapsed for appeal, or, if an appeal is preferred, until the determination thereof. The Court shall forward to the department concerned a copy of the order and before according permission for destruction, shall satisfy itself that no appeal is pending. The term "appeal" includes a second appeal and an appeal to the Supreme Court.

As Per Rule 242 of JCCR -Should any document or book produced at anytime in the course of the proceeding, present a suspicious appearance or be held by the Court to be forged or fabricated, the Court shall make a note of the fact on the order-sheet of the case and direct therein that it shall be kept in safe custody and shall not be returned to the parties concerned without permission of the Court. The Court shall not accord such permission unless all proceedings connected with such document or book have been completely disposed of. A note in red ink to the above effect shall also be made in the exhibit list as well as on the list with which the document has been filed in Court. A similar note shall be made on a separate piece of paper which shall be attached to document or book concerned.

As Per Rule 243 of JCCR - Where the Court does not make any direction to the contrary unexhibited documents, if not returned earlier, shall, at the conclusion of the trial, be returned to the person producing them or his pleader after he has signed the receipt for the same in the proper column on the list. A pleader,

when required t9 do so, is bound to take back any document produced by his client and to sign the receipt referred to above. [G.L. 3/29.]

As Per Rule 244 of JCCR -(1) A private person, not a party to the suit, producing a document in Court in compliance with a summons, should be required to state in writing the address to which the document is to be returned, if not returned to him personally. If it is desired that the document should be returned to a pleader, a vakalatnama shall be filed along with the document.

(2) Where the document is not tendered or admitted in evidence it shall be returned at once to the person producing it either personally or by registered post.

(3) Where the document is admitted in evidence, a certified copy thereof shall be prepared and placed on the record, if not already there. The original shall then be returned to the person producing it personally or by registered post, or to his pleader unless the genuineness of the documents is in controversy, in which case the original shall, unless the- Court otherwise directs, be returned after the trial is concluded, or, in cases where an appeal lies, after sufficient time has been allowed for appealing, or, if an appeal is preferred, after the determination thereof. The word "appeal" includes a second appeal where a second appeal lies.

(4) (a) In the case of voluminous documents, such as account books or collections of zamindary papers, which cannot conveniently be returned by registered post, the person producing them shall, if they are not returned to him at once, be

informed in due course by registered letter that he is at liberty to take them back, and that his reasonable traveling expense will be furnished.

(b) This procedure shall also be adopted where the person producing the document states in writing at the time of production that the document is of value to him and that he will take it back personally.

(5) In cases where the person producing a document has any Advocate authorised to take back documents on his behalf the document may be returned under the foregoing Rules to such Advocate , unless at the time of production the person producing it states in writing that it should be returned to him personally or by registered post.

(6) (a) Before a document such as is referred to in sub-Rule (1) is called for at the instance of a party to the suit, such party shall deposit a sum sufficient to meet such expenses as are likely to be incurred, including the cost of returning the document by registered post, the cost of preparing a certified copy under sub-Rule (3) and in cases under sub-Rule (4) the traveling expenses both ways of the person producing the document.

(b) In cases under sub-Rule (4) the traveling expenses shall be 'transmitted to the person producing the document along with registered letter therein referred to.

As Per Rule 245 of JCCR - A period of three months from the date of the decree should ordinarily elapse before the documents exhibited in a case are returned to the person who produced them. The Presiding Officers of outlying Courts should see that

exhibits are as far as possible returned before the periodical despatch of the records to the District Record Room.

Note-3 Relating to Electronic evidence

If any evidence is filed in form of electronic evidence which includes computer evidence, digital audio, digital video, cell phones or digital fax machines, the expert opinion with regard to the same will be given by the examiner, as specified by the Central Government by notification in official gazette as mentioned in Section 79-A of the Information Technology Act 2000 (Amended Act -2009).Implication of amended provisions of Indian Evidence Act in Sections 3(a) (b), 17, 22, 34, 35, 39, 47, 59, 65, 67, 73, 81, shall be given effect to.

Note-4 Mode of marking the electronic evidence as mentioned in above

The following mode may be prescribed for marking the e – evidence –

(i)Computer evidence – If the computer itself is produced, the same may be marked as material exhibits and its print out may be marked as 'e' - series

(ii) Digital audio- As 'e'-digital audio series

(iii) Digital Video- As 'e'-digital video series

(iv) Cell phone- As 'e'-cell phone series

(v) Digital fax machine As 'e'-digital fax machine Series**(Rule 94 note 3,4of JCCR)**

Endorsements on copies of admitted entries in books, accounts and records (Order13 Rule 5) - (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891 (XVIII of 1891) where a document admitted in evidence in the suit

is an entry in a letter-book or a shop-book or other account in current use, 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 causing 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.

Endorsements on documents rejected an inadmissible in evidence.(Order13 Rule 6)—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 initialed by the Judge.

Recording of admitted and return of rejected documents.(Order13 Rule 7)—(1) Every documents 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.

Court may order any document to be impounded.(Order13 Rule 8)—Notwithstanding anything contained in Rule 5 or Rule 7 of this Order or in Rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

Scope - Stamping of agreements/deeds is governed by the Indian Stamp Act, 1899 ("the Stamp Act"). If the document is not sufficiently stamped, then by virtue of Section 35 of the Stamp Act there is a bar on 'admitting' such a document in evidence or acting upon it.

By Section 33 of the Indian Stamp Act, 1899, all public officers, with certain exceptions, are required to examine every instrument chargeable with duty which comes before them in the performance of their official functions and to impound any instrument which appear not to be duly stamped. Every Court impounding an instrument must forthwith note it as "impounded," such note being dated and signed with the ordinary full signature of the impounding officer.

Section 35 of the Indian Stamp Act, 1899- Instruments not duly stamped inadmissible in evidence, etc

I. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that—

(a) any such instrument 1[shall], be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of 2[the 3[Government]] or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act.

Section 38 of the Indian Stamp Act, 1899- Instruments impounded, how dealt with

(1) Where the person impounding an instrument under Section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by Section 35 or of duty as provided by Section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

(2) In every other case, the person so impounding an instrument shall send it in original to the Collector.

Section 42 of the Indian Stamp Act, 1899- Endorsement of instruments in which duty has been paid under Section 35, 40 or 41 - (1) When the duty and penalty (if any) leviable in respect of any instrument have been paid under Section 35, Section 40 or Section 41, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, and the name and residence of the person paying them.

(2) Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct:

Provided that—

(a) no instrument which has been admitted in evidence upon payment of duty and a penalty under Section 35, shall be so delivered before the expiration of one month from the date of such impounding, or if the Collector has certified that its further detention is necessary and has not cancelled such certificate;

(b) nothing in this Section shall affect the Code of Civil Procedure, 1882 (14 of 1882), Section 144 clause 3.

Return of admitted documents.(Order13 Rule 9)—(1) Any person, whether a party to the suit or not, desirous of receiving back any documents produced by him in the suit and placed on the record shall, unless the document is impounded under Rule 8, be entitled to receive back the same,—

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

[Provided that a document may be returned at any time earlier then that prescribed by this Rule if the person applying therefor—

(a) delivers to the proper officer for being substituted for the original,—

(i) in the case of a party to the suit, a certified copy, and

(ii) in the case of any other person, an ordinary copy which has been examined, compared and certified in the manner mentioned in sub-Rule (2) of Rule 17 of Order VII, and

(b) undertakes to produce the original, if required to do so:] Provided also that no document shall be returned with, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

Scope- Document contemplated under Rule 9 is original document and not certified copy. - On a plain reading of Order 13, Rule 9, it is indisputably gatherable that original documents can be allowed to be taken away after placing its certified copies on record. It is further contemplated by the Rule that returning of documents without following the procedure under this Rule is a material irregularity in the exercise of jurisdiction. Proviso to Order 13, Rule 9, clearly envisages that original document filed can be returned only after its certified copies delivered to the proper officer for being substituted for the original. The Rule cannot be stretched to mean the return of the document, which itself is a certified copy of the original from the record of the file. The document contemplated under this Order 13, Rule 9 for all intents and purposes is employed as original document and not

the certified copy. The documents sought to be returned by the applicants being not the original and only the certified copies, cannot be returned in terms of Order 13, Rule 9 of the CPC., Des Raj alias Parbhatu and Another v. Raghunath Singh, AIR 2004 J&K 64.

Court may send for papers from its own records or from other Courts.(Order13 Rule 10)— (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this Rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this Rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

Scope - Necessity of affidavit - Where an application is not supported by affidavit as required by Rule 10, the application cannot be rejected on that ground. Sub-Rule (2) of Rule 10 of Order 13 indicates that every application for calling for the records of any other suit or proceedings from any other Court has to be supported by an affidavit showing (i) how the records were

material to the suit in which the application was made, (ii) that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the records for such portion thereof as the appellant requires or that the production of original records were necessary for the purpose of justice., M/s. Apollo Machinery Mart v. Firj Shah Mustt. Rausana Begum & Ors., AIR 1996 Gau. 5:

Provisions as to documents applied to material objects.(Order13 Rule 11)—The provisions therein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

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Argument by the Parties

Order XVIII Rule 3A -(1) Any party may address oral arguments in a case, and shall, before he concludes the oral arguments, if any, submit if the Court so permits concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record.

As Per Rule 96 of JCCR - Arguments should be heard immediately after the evidence closes.

As Per Rule 97 of JCCR - Before close of oral argument, the Court at the request of the parties shall permit them to file their respective concise written argument under distinct heads by supplying the copy of the same to the other side. Such written arguments shall form the part of the record.

b) the Court shall fix such time limit for the oral argument by either parties, as it thinks fit and no adjournment shall be granted for filing written argument, unless for the reasons so recorded by the Court.

Order XVIII Rule 3B-(2) A copy of such written arguments shall be simultaneously furnished to the opposite party.

Order XVIII Rule 3C- (3) No adjournment shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing, considers it necessary to grant such adjournment

Order XVIII Rule 3D -(4) The Court shall fix such time-limits for the oral arguments by either of the parties in a case, as it thinks fit.

Object of filing written arguments or fixing time limit of oral arguments-In Order 18, Rule 2 sub-Rules (3A) to 3(D) have been inserted by Act 22 of 2002. The object of filing written arguments or fixing time limit of oral arguments is with a view to save time of Court. The adherence to the requirement of these Rules is likely to help in administering fair and speedy justice., Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR 2005 SC 3353:

Vidya Devi vs. Prem Prakash (1995) 4 SCC 496

Unless all the necessary ingredients to constitute ouster by adverse possession are set out in the written statement, the plea relating to the title of property in question cannot be set to have been raised.

A question of fact which had not been put forward in the written statement cannot be allowed to be raised later. Such, for example, is a plea of estoppel; of part performance under Section 53A of Transfer of Property Act; a plea that partnership was not registered; or that a contract has been discharged by frustration.

Rama Shanker Singh vs. Shyam Lata Devi 1969 (2) SCR 360

Question – Whether inconsistent pleas can be raised?

Answer – This question has been answered in 2014(11) SCC 316 Praful Manohar Rele vs Smt Krishnabai Narayan Ghosalkar**:**

The case of the plaintiff appellant herein primarily was that the original defendant and even his legal representatives were occupying the suit premises as gratuitous licensees upon termination whereof the plaintiff was entitled to a decree for possession. While the Trial Court found that the defendants were

tenants and not licensees as alleged by the plaintiff the first Appellate Court had recorded a clear finding to the contrary holding that the defendants were indeed occupying the premises as licensees whose license was validly terminated by the plaintiff. Whether or not the defendants were licensees as alleged by the plaintiff was essentially a question of fact and had to be answered on the basis of the evidence on record which the First Appellate Court had reappraised to hold that the defendants were let into the suit property by the plaintiff on humanitarian grounds and as gratuitous licensees. The only question that would fall for determination based on such a plea was whether the plaintiff had made out a case on the grounds permissible under the Rent Control Act. An adjudication on that aspect would become necessary only if the plaintiff did not succeed on the primary case set up by him. The alternative plea would be redundant if the plaintiff's case of the defendants being gratuitous licenses was accepted by the Court.

2009(11) SCC 609 Sarva Shramik Sangh vs Indian Oil Corporation The assumption that there is an absolute bar on inconsistent pleas being taken by a party, is also not sound. What is impermissible is taking of an inconsistent plea by way of amendment thereby denying the other side, the benefit of an admission contained in the earlier pleading. Mutually repugnant and contradictory pleas, destructive of each other may also not be permitted to be urged simultaneously by a plaintiff/petitioner. But when there is no inconsistency in the facts alleged, a party is not prohibited from taking alternative pleas available in law.

Similarly, on the same facts, different or alternative reliefs can also be claimed.

Juggi Lal Kamlapat vs. Pratap Mal Rameshwar 1978 (1) SCC 69

The burden is no doubt on the appellant to prove his case but the parties to the suit are bound by the procedure prescribed in the Code of Civil Procedure. Order VIII of the Civil Procedure Code requires what a written statement should contain. Order VIII, Rule 2, requires that the defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise. Rule 3 requires that it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages. Though the respondent did not question the validity of the delivery order at the first instance he was at liberty to question it when he filed the additional written statement and to raise all grounds of defence to the validity of the delivery order. The failure to question the validity of the delivery order or the ground that it required registration with the Mill or that the possessor was bound to give an undertaking would be failure to comply with the requirements of Order VIII. The pleadings were before the Original Side of the Calcutta High Court and the Courts have recognised that the pleadings of the Original Side of the High Court must be strictly construed. In Badat and Co. v. East India Trading Co., AIR 1964

SC 538, the Supreme Court observed regarding the requirements of the written statement under Order VIII, Rules 4 and 5, as follows :-

"These three Rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written-statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively. but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary." 2009 (2) AIR Bom. R 689 Nago Rao Bhujanga More vs. Premala Bai

In Civil suits, no party can be allowed to take new defence for which necessary foundation is not laid in the pleading and when the other side was not put to notice by any suggestion in the cross-examination. In this case the appellants are not entitled to take new defence for which no foundation was laid in the pleading or during evidence of respondent/plaintiffs
K. Mani vs. Elumalai 2002 (3) CTC 598

In Civil suit pleadings namely plaint and written statement form the basic structure over which the case is built by filing documents and letting oral evidence. In absence of pleadings if any evidence is let in, the other party would be caught unaware and hence evidence let in this regard is inadmissible
National Textile Corporation Ltd. vs Nareshkumar Badrikumar Jagad & Ors., (2011) 12 SCC 695 Pleadings and particular are

necessary to enable the Court to decide the right of the party in the trial. It is settled legal proposition that as a Rule relief not founded in the pleading should not be granted. A decision of a case cannot be based on grounds outside pleadings of the parties. It has been held in 1987 (2) SCC 555 Ramswarup Gupta vs. Vishun Narayan Inter College **"In absence of pleadings, evidence if any produced by the party cannot be considered."** No party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. A new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the Court at any stage of the proceeding

Rule 3-Denial to be specific-- It shall not be sufficient for the Defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit of the truth, except damages.

Rule 4 Evasive denial-- Where a Defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that sum or any part thereof, or else set out how much received.

Rule 5 Specific denial--

1. ***E****very allegation of fact in the plaint , if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability.*

2. *Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce Judgment on the basis of facts contained in the plaint, except as against a person under a disability.*

In a case where written statement is not filed, the Court should be cautious in proceeding under this Rule before passing judgment and it must see that even if the fact set out in the plaint are treated to have been admitted. It is subjective satisfaction of the Court and not blind discretion.

Implied admission : The Hon'ble Supreme Court has held in AIR 1965 SC 364 Mahendra Manilal Nanavati vs Sushila Mahendra Nanavati that under Order 8 Rule 5, the facts if not admitted specifically or by necessary implication or not stated to be not meted in the pleading of the defendant shall be taken to be admitted except as a person under disability. Order 12, Rule 6 of the CPC is enacted to expedite the trial. The doctrine of implied admission can only be invoked when the facts specifically alleged by a party in support of his plea are not denied by the other party. Further, it cannot be invoked where there is express evidence to be contrary.

Admission by one defendant will not be relevant against a co-defendant- Admission by a pleader or an agent or by a party is binding. It has been held in AIR 2003 MP 145 Chetak Constructions Limited vs Om Prakash And Ors that the admissions made by the defendant, in the agreement, affidavits, vouchers and general power of attorney that possession of the suit properly had been handed over to the plaintiff on the date of

execution of the agreement, were held to be admissible against him as substantive piece of evidence *proprio vigor.*

1993 (4) SCC 6 Lohia Properties (p) Ltd vs Atmaram Kumar

Rule 5 provides that every allegation of fact in the plaint, if not denied in the written statement shall be taken to be admitted by the defendant. What this Rule says, is that any allegation of fact must either be denied specifically or by a necessary implication or these should be at least deemed to be a statement that this fact is not admitted.

Gautam Sarup vs Leela Jetly and Ors 2008(7) SCC85

1. An admission made in pleading is not to be treated in the same manner as an admission in a document. An admission made by a party to the *lis* is admissible against him *proprio vigore.*
2. In State of Haryana & Ors. v. M.P. Mohla [(2007) 1 SCC 457] , the Supreme Court stated : "25. The law as regards the effect of an admission is also no longer res integra. Whereas a party may not be permitted to resile from his admission at a subsequent stage of the same proceedings, it is also trite that an admission made contrary to law shall not be binding on the State."
3. A thing admitted in view of Section 58 of the Indian Evidence Act need not be proved. Order VIII Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the Court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to

the provisions of Order XII Rule 6 of the Code of Civil Procedure may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom.

4. A Three Judge Bench of this Court speaking through Ray, CJ in Modi Spinning & Weaving Mills Co. Ltd. & Anr. v. Ladha Ram & Co. [(1976) 4 SCC 320] opined : "10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial Court."

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Judgment and decree

(1) The Court, after the case has been heard, shall pronounce judgment in an open Court, either at once, or as soon thereafter as may be practicable and when the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders: Provided that where the judgment is not pronounced at once, every endeavour shall be made by the Court to pronounce the judgment within **thirty days** from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of the **exceptional and extraordinary** circumstances of the case, the Court shall fix a future day for the pronouncement of the judgment, and such day shall not ordinarily be a day beyond **sixty days** from the date on which the hearing of the case was concluded, and due notice of the day so fixed shall be given to the parties or their pleaders.(**Order XX Rule 1 & Rule 99(5) of JCCR)**

Immediately after the pronouncement of the judgment the Court shall make available its copies to the parties for preferring the appeal on payment of usual charges applicable for obtaining the copy. **(Order XX Rule 6 B)**

(2) In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issue is, sufficient for the decision of the suit. **(Order XX Rule 5)**

Scope- Judges while writing out judgments have to discuss, appreciate and weigh evidence on record in the proper

perspective and in doing so they have to express their opinion on the veracity, conduct and character of a witness as borne out on the material on record. If unnecessary fetters are placed on their language and expression, it may be difficult for, them to properly assess and weigh the evidence on record and give a proper account of the same in their judgments and to express the reasoning for discarding the evidence of some witnesses or preferring one set to another.

Contents of judgment -"Judgment" as defined in Section 2(9) of the Code of Civil Procedure means the statement given by the Judge of the grounds for a decree or order. What a judgment should contain is indicated in Order 20, Rule 4(2). It should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the Court and in what manner. The process of reasoning by which the Court came to the ultimate conclusion and decreed the suit should be reflected clearly in the Judgment., Balraj Teneja v. Sunil Madan, AIR 1999 SC 3381

Contents of a judgment - The contention that provisions of Order 20, Rule 1(2) would apply only in contested cases and not in a case in which the written statement has not been filed not accepted. Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex-parte and is ultimately decided as an ex-parte case, or is a case in which the written statement is not filed and the case is decided under Order 8, Rule 10, the Court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is

resolved. Even if the definition were not contained in Section 2(9) or the contents thereof were not indicated in Order 20, Rule 1(2), C.P .C., the Judgment would still mean the process of reasoning by which a Judge decides a case in favour of one party and against the other. In judicial proceedings, there cannot be arbitrary orders. A Judge cannot merely say "Suit Decreed" or "Suit Dismissed". The whole process of reasoning has to be set out for deciding the case one way or the other. Balraj Teneja v. Sunil Madan, AIR 1999 SC 3381

As Per Rule 98 of JCCR - Judgment in civil cases may be recorded by the stenographers upon the dictation of the presiding officer provided that the Presiding Judge attaches a certificate to the effect that the judgment has been recorded at his dictation and attests each page thereof by his signature.

Note–1: When a Presiding Judge uses a type-writing machine/Computer himself a certificate must be given that this has been done and each page of the record so made shall be attested by his signature.

Note-2: When a Presiding Officer uses a Computer himself in delivering judgment, a certificate must be given at the foot of the judgment that, it has been done on computer by him and each page of the print out so taken out, shall be attested with his signature. In case the digital signatures of the Presiding Officers are available, the judgment / orders and decrees may be digitally signed and certified copies etc. may be issued without actual movement of the records from the Court to the copying Section.

As Per Rule 98 of JCCR - (1) Long judgments must not be recorded on the order-sheet.

(2) Judgments in ex parte cases should state what reliefs in the plaint are granted.

(3) Judgments should state specifically whether any or what interest (including interest *pendent lite*) is allowed.

(a) The Presiding Officer shall put his name and designation at the top of the original judgment.

(b) Name of all the parties with full particulars including their age shall appear in the heading column of the Judgment.

(c) Paragraphs of the judgment shall be break off into shorter one, according to the sequence of thoughts and shall be serially numbered.

(d) The name of all the parties in cause title with full details shall be typed in the judgment and final order in addition to the decree

(4) The last part of judgment shall state in precise -term the relief which has been granted by such judgment.

Contents of decree-

(1) The decree shall agree with the judgment: it shall contain the number of the suit, the names and descriptions of the parties, their registered addresses, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

"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 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;

Section 2(2) of Civil Procedure Code defines "decree" to mean "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". A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest

Court; (ii) when, as regards the Court passing the decree, the same stands completely disposed of. It is in the latter sense the word "decree" is used in S. 2(2) of Civil Procedure Code. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfilment the preliminary decree. Shankar Balwant Lokhande vs Chandrakant Shankar Lokhande, AIR1995 SC 1211, (1995) 3 SCC 413 , 1995 0 Supreme(SC) 389

*The **Lok Adalat** shall proceed and dispose the cases and arrive at a compromise or settlement by following the legal principles, equity and natural justice. Ultimately the Lok-Adalat passes an award, and every such award shall be deemed to be a decree of Civil Court or as the case may be which is final.*

Section 21 of the Legal Services Authorities Act, 1987 reads as follows:-

"21. AWARD OF LOK ADALAT.—2[(1)] Every award of the Lok Adalat shall be deemed to be a decree of a Civil Court or, as the case may be, an order of any other Court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred on it under sub-Section (1) of Sec. 20, the Court fee paid in such cases shall be refunded; in the manner provided under the Court Fees Act, 1870 (7 of 1870)

(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any Court against the award. P. T. Thomas vs. Thomas Job, AIR 2005 SC 3575, (2005) 6 SCC 478, 2005 0 Supreme(SC) 982

Preparation of decree.—

(1) Every endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible and, in any case, within **fifteen days** from the date on which the judgment is pronounced. **(Order XX Rule 6A)**

(2) An appeal may be preferred against the decree without filing a copy of the decree and in such a case the copy made available to the party by the Court shall for the purposes of Rule 1 of Order XLI be treated as the decree. But as soon as the decree is drawn, the judgment shall cease to have the effect of a decree for the purposes of execution or for any other purpose. **(Order XX Rule 6A)**

(3) Where the judgment is pronounced, copies of the judgment shall be made available to the parties immediately after the pronouncement of the judgment for preferring an appeal on payment of such charges as may be specified in the Rule made by the High Court. **(Order XX Rule 6B)**

(4) The decree shall bear the day on which the judgment was pronounced, and, when the judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree. **(Order XX Rule 7)**

Scope- Amendment of decree. — It is true that a decree, whether preliminary or final, is 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. The Court, therefore, may not have a suo motu power to amend a decree but the same would not mean that the Court cannot rectify a

mistake. If a property was subject matter of pleadings and the Court did not frame an issue which it ought to have done, it can, at a later stage, when pointed out, may amend the decree. Thus, property can be added in the list of properties after a preliminary decree is passed in a partition suit and Section 97 which provides for an appeal against preliminary decree, would not be a bar to file an application for amendment of a decree.**,** S. Satnam Singh v. Surender Kaur, AIR 2009 SC 1089.

As Per Rule 100 of JCCR -Decrees of District and Subordinate Judges should ordinarily be drawn up in English. Decrees of Munsifs [Civil Judge (Junior Division)] should also be drawn up in English wherever possible.

As Per Rule 101 of JCCR -Decrees should be drawn up in such a manner that, in order to the understanding and execution of them, it may not be necessary to refer to any other document or paper whatever.

Note 1-Petitions of compromise, maps prepared by the direction of or accepted by the Court and other similar papers necessary to illustrate the terms of the order passed shall be embodied in the decree.

Note 2-The particulars of the claim and the date of institution of the suit shall appear in the decree.

Note 3. Where different valuations are put for purposes of jurisdiction and for payment of Court-fees, both values should be stated in the decree. The amount claimed as mesne profits should be separately shown. In the case of an appellate decree

the valuation as given in the decree of the first Court should also be embodied.

Note 4.-In drawing up decrees interest, if any, allowed by the Court should be clearly-shown and also the period for which and the rate at which interest has been allowed.

As Per Rule 102 of JCCR - The decree should be drawn up as expeditiously as possible and in any case, within 15 days from the date on which the judgment is pronounced, but where the decree is not drawn up within the time aforesaid, the Court shall if requested so to do by a party desirous of appealing against the decree, certify that the decree has not been drawn up and indicate in the certificate the reasons for the delay as required by Order XX, Rule 6A.

As Per Rule 103 of JCCR -Whenever an address has been filed for service by a party under Order VII. Rules 19 and 22, or Order VIII, Rules 11 and 12 of the First Schedule to the Code of Civil Procedure, such address shall be entered in the decree or formal order instead of the address given in the plaint or petition. The following note shall be made in the decree or formal order below the names and addresses of the parties and the note shall be signed by the clerk by whom the decree or formal order is drawn up The addresses given above are the addresses for service filed by the parties with the exception of .....(names to be mentioned) .....who did not appear or omitted to file their addresses.

As Per Rule 104 of JCCR - In drawing up decrees costs are to be very carefully calculated. Where "proportionate costs" are allowed such costs shall bear the same proportion to the total costs as the successful part of the claim bears to the total claim. When "corresponding costs", or "costs according to success" are decreed, the assessment is to be made as if the suit had been originally brought at an amount representing the value of the successful part of the claim.

As Per Rule 105 of JCCR - Without prejudice to the generality of the provisions of the Code of Civil Procedure relating to costs, costs in respect of items specified in Order XXA, Rule 1, C.P C. shall form part of the costs of the case unless otherwise directed by the Court.20

As Per Rule 106 of JCCR - Decrees shall be prepared under the supervision of the Sirestadar of the Court who shall initial the same.

As Per Rule 107 of JCCR - As soon a decree has been drawn up the Court shall cause, a notice to be exhibited on the notice board stating, that such decree has been drawn up and that it may be perused by the parties or their pleaders within three days from the date of posting the notice. The notice shall remain exhibited during this period. At the end of every quarter the notices for the previous quarter will be destroyed.

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As Per Rule 108 of JCCR - When such notice has been posted any party or his Advocate may before the expiry of the time prescribed in the last preceding Rule peruse the decree and either sign it or if it is incorrectly prepared bring the matter to the notice of the Court.

As Per Rule 109 of JCCR - If no such objection is made on or before the date specified in the notice the Judge shall sign the decree giving the date of his signature.

As Per Rule 110 of JCCR -.(i) Decrees or formal orders need not be drawn up in the case of Interlocutory orders made during the course of a suit or execution proceeding.

(ii) Final orders such as those under Order IX, Rules 9 and 13, Order XXI, Rules 2, 58, 91, 92,99, 100, 101, Order XXIII, Rule 1, Order XLI, Rules 19,21,23, Order XLVII, Rule 1, and an order rejecting a plaint; provided where any such holder is capable of execution or affects execution by reason of cost to be paid by one party to the other such costs may be shown in the order-sheet with a short note showing the result of the case and the name of the party by whom such costs are to be paid as well as that of the party who is to receive the same so that the latter, if desirous of executing the order may not be compelled to take a copy of the judgment.

(a) No formal decree/ separate award is required to be prepared in Motor Vehicles Accident Claim Cases. The judgment itself shall contain the detailed particulars viz, (i) name and address of the parties with age, (ii) the detail of amount of compensation with

rate of interest(iii) the cost awarded and other relevant factors, enabling its execution without any further delay.

(b) P.O shall verify before putting his signature on the decree that all the entries are duly and correctly filled up.

As Per Rule 111 of JCCR - In suits for money including suits upon mortgage, in suits for specific movables, in suits for accounts and in suits for arrears of rent no decrees need be drawn up, if:-

(i) Neither party has to recover anything unless the Judge otherwise directs;

(ii) The claim is satisfied after judgment but before the decree is drawn up.

As Per Rule 112 of JCCR - A list of cases in which succession certificates, probates or letters of administration have been prepared shall be exhibited on the notice board in the language of the Court. The certificates, probates or letters of administration shall be delivered to the parties or the pleaders concerned in open Court on the third day after the publication of the list.

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Final Decree Proceeding-

Decree in suit for partition of property or separate possession of a share therein (Order 20 Rule 18):— Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then :—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property but shall direct such partition or separation to be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf in accordance with such declaration and with the provisions of Section 54.

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

Scope - Distinction between Preliminary Decree and final decree -

A preliminary decree declares the rights or shares of parties to the partition. Once the shares have been declared and a further inquiry still remains to be done for actually partitioning the property and, placing the parties in separate possession of

divided property then such inquiry shall be held and pursuant to the result of further inquiry a final decree shall be passed. A preliminary decree is one which declares the right and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree the rights of the parties are finally determined and a decree is passed in accordance with such determination, which is, the final decree. The distinction between preliminary and final decree is this; a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree.

Under Order XX Rule 18 of the CPC, it is not necessary to pass a preliminary decree; the Court may pass a preliminary decree if it is required. If the rights of the parties are finally determined and no further inquiry remains to be held for the purposes of completing the proceedings in partition then there is nothing in law which prevents the Court from passing a final decree in the very instance. Often such are the cases which are based on compromise. Raghubir Sahu v. Ajodhya Sahu & Others, AIR 1945 Patna 482

The distinction between preliminary and final decree: A preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and

conducted pursuant to the directions made in the preliminary decree which inquiry having been conducted and the rights of the parties finally determined a decree incorporating such determination needs to be drawn up which is the final decree.

Under Order XX Rule 18 of the CPC it is not necessary to pass a preliminary decree; the Court may pass a preliminary decree if it is required. If the rights of the parties are finally determined and no further inquiry remains to be held for the purposes of completing the proceedings in partition then there is nothing in law which prevents the Court from passing a final decree in the very first instance. Renu Devi vs Mahendra Singh, AIR 2003 SC 1608

"The definition of 'decree' contained in Section 2(2) read with the provisions contained in Order 20, Rule 18(2) as also Order 26, Rule 14 indicate that a preliminary decree has first to be passed in a partition suit and thereafter a final decree is passed for actual separation of shares in accordance with the proceedings held under Order 26. There are, thus, two stages in a suit for partition. The first stage is reached when the preliminary decree is passed under which the rights of the parties in the property in question are determined and declared. The second stage is the stage when a final decree is passed which concludes the proceedings before the Court and the suit is treated to have come to an end for all practical purposes. Sub-Rule (2) of Rule 18 would indicate that the Court has to pass a preliminary decree where it cannot immediately partition the property in respect of which the suit was filed"., Mool Chand v. Dy. Director, Consolidation, AIR 1995 SC 249

A member of a Joint Hindu Family can file a suit for partition as well as for rendition of accounts. A Preliminary decree can also be passed for partition and for rendition of accounts. A plaintiff can pray for an enquiry into the profits realised by the defendants at the stage of the preparation of the final decree though such prayer had not been made in the plaint, nor such direction has been given in the preliminary decree. It is necessary to demand such an enquiry in order to adjust equities between the parties. It will be within the discretion of the Court to allow such prayer on the facts and circumstances of each case., Indra Deo Prasad Singh v. Sheo Nath Prasad Singh, A.I.R. 1980 Pat. 201 (F.B.)

Limitation for drawing up final Decree - Where in a partition suit, the Court passes decree declaring plaintiffs' share, the decree is preliminary in nature and a final decree proceedings can be initiated at any point of time as no limitation is provided thereof. Kamla Bai Patel v. Vidhyawati Patel, AIR 2009 M.P. 41.

Issuance of commission for partition. - As regards the commissions issued for partition, it must be recognized, that in the ultimate analysis the Commissioner discharges the function of the Court itself. It is only as a matter of convenience, that the work is entrusted to him. Obviously, by treating him as Officer of Court, the Legislature did not subject him to be examined as a witness. Further, the report submitted by a Commissioner is not going to be the final word, on the subject. At the most, he can indicate that the property can be divided and that the shares can be allotted in a particular manner. It is always open to the parties

concerned, to put forward their objections or make suggestions at variance with, what is indicated, in the report of the Commissioner. Ultimately, it is for the Court to pass the final decree, taking into account, the report of the Commissioner, and the objections of the parties. Subjecting the Commissioner to cross-examination as a witness, in such matters, apart from not being provided for under the Law, does not advance the purpose, for which he was appointed. The reason is that, unlike in the case of reporting the physical features, or undertaking scientific investigation, the Commissioner does not vouch for any particular state of affairs. While in the former case, it is a finding based upon observations; in the latter, it is an opinion rendered by him. Further, the former is suggestive and in the latter, the Commissioner is accountable for the findings arrived at by him. There exists a discernable difference between the two, notwithstanding the fact that both are subject to acceptance or rejection, by the Court. It can be said without fear of contradiction, that howsoever well-versed and perfect, a Commissioner may be, he cannot bring about division of properties or allotment of shares with mathematical precision, and to the satisfaction of one and all. Notwithstanding such deficiencies, the report submitted by the Commissioner in the final decree proceedings will constitute valuable material for beginning the exercise of division and allotment. The parties would be free to put forward their contentions, and ultimately it is for the Court, to pass a final decree, in such a way, as to bring about a just and equitable partition of the properties. Further, even if anybody is aggrieved by the partition, he can canvass his

grievance before an Appellate Court. Viewed from any angle, subjecting the Commissioner to cross-examination, would not serve any purpose, in such matters., Damodar Reddy (Died through L.Rs.) v. M. Mohan Reddy, AIR 2007 A.P. 31.

More than one preliminary and final Decrees whether possible— (Yes)

Now it is settled law that there can be more than one preliminary decree and similarly there can be more than one final decree., Indra Deo Prasad Singh v. Sheo Nath Prasad Singh, A.I.R. 1980 Pat. 201 (F.B.)

Unless a final decree is passed in a suit for partition, the Court is empowered to determine the share of the parties again and again in the preliminary decree on account of taking into consideration subsequent events, like death of a co-sharer, etc., Hanumantappa Dyammappa Jadar v. Mallavva & Ors., AIR 1996 Kant. 183:

There is nothing in the Code which prohibits passing of more than one preliminary decree if in the facts and circumstances of a case and in consideration of equity and justice, such a variation is warranted., Kalyan Kumar Basak v. Salil Kumar Basak, AIR 1989 Cal 159

Where after the preliminary decree had been passed and there was modification of shares pursuant to the death of one of the parties, a second preliminary decree can be passed in partition suits by which shares allotted in preliminary decree already passed can be amended. If there is dispute between surviving parties and that dispute is decided, the decision amounts to

decree. So long as final decree has not been passed there can be more than one preliminary decree. Smt. Sumabai v. Basagouda Rama Sankapal, 1998(4) C.C.C. 620 (Kant.).

Commission to make partition of immovable property (Order 26 Rule 13)—Where a preliminary decree for petition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it think fit to make the partition or separation according to the rights as declared in such decree.

Section 54 of C.P.C.- Partition of estate or separation of share.—Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares of such estates.

Shub Karan Bubna v. Sita Saran Bubna, 2009(9) SCC 689

In regard to estates assessed to payment of revenue to the government (agricultural land), the Court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the Court in regard to the shares of various parties and deliver the respective portions to them, in accordance with Section 54 of Code. Such entrustment to the Collector under

law was for two reasons. First is that Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of government in regard to revenue. The second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible. Where the Collector acts in terms of the decree, the matter does not come back to the Court at all. The Court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.

Procedure of Commissioner (Order 26 Rule 14)—(1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

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

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

Expenses of commission to be paid into Court (Order 26 Rule 15)—Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Powers of Commissioners (Order 26 Rule 16)—Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment:

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

Parties to appear before Commissioner (Order 26 Rule 16)—(1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

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

Scope- Objection against final Decree proceedings- Party raising objection cannot be deprived of examining other witnesses to substantiate its objections.

It is true that a decree, whether preliminary or final, is 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. The Court, therefore, may not have a suo motu power to amend a decree but the same would not mean that the Court cannot rectify a mistake. If a property was subject matter of pleadings and the Court did not frame an issue which it ought to have done, it can, at a later stage, when pointed out, may amend the decree. Thus, property can be added in the list of properties after a preliminary decree is passed in a partition suit and Section 97 which provides for an appeal against preliminary decree, would not be a bar to file an application for amendment of a decree. S.Satnam Singh v. Surender Kaur, AIR 2009 SC 1089.

The date of valuation of the properties in a suit for partition - Ordinarily, it has to be the date of the passing of the final decree and not the date of filing of the suit for partition. In a given case, however, there may be exception of this general rule. It is a matter of common knowledge that such suits for partition take considerable time for disposal. There is a big time lag between date of filing of the suit and date of the decision thereof. There is also considerable lapse of time between passing of preliminary decree and passing of final decree. A suit was filed in the year 1948 and preliminary decree proceedings were finalized

in 1971 by decision of the Hon'ble Supreme Court. Thereafter, more than 30 years lapsed the parties are still no way near the final partition. In deciding in 2002, it would be assured if it was to be held that the valuation of 1940 or 1948 should be taken. It is also possible that in a given case, the value of one property may appreciate drastically while not so in the case of other properties or it may even decline and some of the parties may be in possession of those properties. It has been the endeavour of the Courts in such suits to protect, preserve and respect the possession of the parties as far as possible. While so protecting, there has to be equalization of shares which has been recognized in law "by making a provision for payment of owelty." The actual partition is effected by passing of the final decree. The valuation has, thus, to be as on the date of final decree., M. L. Subbaraya Setty (Dead) by LRs. & Ors. v. M. L. Nagappa Setty (Dead) by LRs. and Ors., 2002 (3) Supreme 484.

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CHAPTER II SPEEDY DISPOSAL OF INTERLOCUTORY APPLICATION IN CIVIL CASES

(1) Striking out or Addition of parties-(Order 1 Rule 10(2) Civil Procedure Code)-

Scope: - The power of the Court to join any person necessary for final adjudication to dispute and for effective implementation of the order or decree to be passed, is available under Order I Rule 10, the same has to be exercised judiciously and depending upon the facts and circumstances of each case. Merely because a person approaches the Court with some unsustainable and uncorroborated claim, such a person cannot be allowed to join as party to the suit. If a person wants to be joined as party to the suit, he has to make out a prima facie case about the necessity of his presence for final adjudication of the dispute between the parties to the proceedings and for effective disposal of the case before the Court. In fact, the test for determination for the question relating to the necessity of joining a person or the party to a proceeding is well settled. Unless there is a right to some relief against such person in respect of the matter involved in the proceedings in question on account of independent right in favour of such person but not through the persons already on record, and it would not be possible to pass effective decree in the absence of such person as the party to the proceedings, it is not open for such person to make any inroads in the proceedings. This Rule provided inter alia for adding parties or transposing plaintiff as defendant or defendant as plaintiff for effectually and completely adjudicating the disputes. Even mistake committed by

a party in the array of parties may be rectified by the Court rather it is the duty of the Court to see that parties are properly arrayed. Doctrine that plaintiff is *dominus litus* of suit always subject to basic exception. Exception is whether Court comes to conclusion that presence of party necessary before Court for proper and final determination of matter in controversy. Discretion of Court not dependent upon consent of plaintiff. Merits of claims are of no consequence. Court at this stage not concerned with validity or otherwise of suit but presence of that party if necessary before Court. Court could permit impleadment of such party to avoid prejudice to any of parties to suit. The object of the provisions is to avoid multiplicity of suits and to ensure that the dispute may be finally determined in the presence of all parties interested without delay and expenses.

(Order 1 Rule 10(2) Civil Procedure Code)- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

Scope : The purpose of this provision is to bring before the Court at the same time, all persons interested in the dispute so that the dispute may be finally determined at the same time in the presence of all the parties without the delay, inconvenience and expenses of several actions and trials and inconclusive adjudications. Thus, mere interest of a party in the suits of litigation cannot be a true test for being impleaded. The object of Order 1 Rule 10 is not to change the scope or character of the suit by addition of new parties and to enable them to litigate their own independent claims but simply to hold them to avoid unnecessary litigation which might otherwise become necessary. The provisions of Rule 10(2) confers very wide powers on the Court regarding joining of the parties. Such powers have to be exercised on sound judicial principles keeping in mind all the facts and circumstances of the case. Two considerations must guide judicial discretion while exercising power under this provision. **First** is that the plaintiff is the *dominus litis* and he is best judge of his interest. It is therefore for him to choose his opponent from whom he claims relief and, normally, the Court should not compel him to fight against a person whom he does not want to fight and from whom he does not claim any relief; and **secondly** if he is satisfied that the presence of any person is necessary to effectively and completely adjudicate all the disputes between the parties, irrespective of the wishes of the plaintiff, the Court may exercise power and join a person as party to the suit.

This power can be exercised at any stage of the suit either on the application of the parties or even suo moto**.** Under this Rule, Court can, even at **final hearing** stage, add parties. Court

can add a Government or other authority as a defendant at any stage or the suit.

Where a stranger cannot prove that he was tenant or sub-tenant he cannot be impleaded as party. Gurmit Singh Bhatia Vs Kiran Kant Robinson and Ors 2019(3) JLJR 418 SC

Appellant purchaser who purchased the property during the pendency of the suit filed an application for impleadment as a defendant in the suit. Plaintiffs filed the suit against the vendor - owner of the **suit property for specific performance of agreement to sell**. Even though there was an injunction against the owner restraining him from transferring and alienating the suit property, he executed the sale deed in favour of the appellant. In a suit for specific performance of contract to sell, the *lis* between the vendor and the person in whose favour agreement is executed shall be gone into and it is also not open to the Court to decide whether any other parties have acquired any title or possession over the suit property. It was held that the plaintiff is the *dominus litus* and cannot be forced to add parties against whom he does not want to fight unless there is compulsion of the Rule of law. Udit Narain Singh Malpharia vs Additional Member, Board of Revenue, Bihar and another AIR 1963 SC 786

The one whose presence is necessary for effective adjudication of the dispute is a necessary party and the one in whose absence an effective order can be made, but whose presence is necessary for a complete and final decision on the question involved in the proceeding is a proper party. Vishnu Bhagat & others Vs. Gopi Bhagat and others, 2019 (2) PLJR 133 Pat

Under Order 1 Rule 10, one can be added as a party to a suit if he has interest in the suit property, but cannot be added as co-plaintiff against the wishes of the plaintiff.

In Gurmit Singh Bhatia v .Kiran Kant Robinson and Others, 2019 SCC OnLine SC 912, the Hon'ble Supreme Court has held that if the plaintiff who has filed a suit for specific performance of the contract to sell, even after receiving the notice of claim of title and possession by other persons (not parties to the suit and even not parties to the agreement to sell for which a decree for specific performance is sought) does not want to join them in the pending suit, it is always done at the risk of the plaintiff because he cannot be forced to join the third parties as party-defendants in such suit. The aforesaid observations are made by this Court considering the principle that plaintiff is the dominus litis and cannot be forced to add parties against whom he does not want to fight unless there is a compulsion of the rule of law.

Marirudraiah and Ors vs B.Sarojama and Ors 2009(12) SCC710

Hon'ble Supreme Court has observed that the Courts are not supposed to encourage *pendente-lite* transactions and regularize their conduct by showing equity in their favour.

Bellamy vs. Sabine 1957 DeG and J 566

It would be plainly impossible that any action or suit could be brought to a successful termination, if alienation pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before Judgment or Decree, and would be driven to commence his proceeding de novo, subject again to be defeated by the same course of proceeding.

K.N. Aswathnarayana Setty v. State of Karnataka, (2014) 15 SCC 394 It has been held in the following words-"11. The doctrine of *lis pendens* is based on legal maxim "*ut lite pendente nihil innovetur*" (during a litigation nothing new should be introduced). This doctrine stood embodied in Section 52 of the Transfer of Property Act, 1882. The principle of "lis pendens" is in accordance with the equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. A litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. However, it must be clear that mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The law simply postulates a condition that the alienation will, in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court. The transferee cannot deprive the successful plaintiff of the fruits of the decree if he purchased the property pendente lite. (K. Adivi Naidu v. E. Duruvasulu Naidu, (1995) 6 SCC 150] , [Venkatrao Anantdeo Joshi v. Malatibai, (2003) 1 SCC 722] , [Raj Kumar v. Sardari Lal, (2004) 2 SCC 601] and [Sanjay Verma v. Manik Roy, (2006) 13 SCC 608] .)

Amit Kumar Shaw and Another vs. Farida Khatoon, 2005 (11) SCC 403

A transferee pendente lite cannot claim his addition in the pending suit as of right, so the Court has a discretion to make him a party; he can be added as a proper party only if his interest on the subject matter of the suit is substantial and not just peripheral.

Anokhe Lal vs Radha Mohan Prasad 1996(8) Supreme 75

If it is found that addition of a party would result in de novo trial, the application could not be allowed. Even otherwise the Court should have been very circumspect in dealing with application of third party seeking leave to become party in the suit when the plaintiff was opposed to it. If consequence of such addition would involve a de novo trial the Court should normally have disallowed the application.

Stranger to a contract cannot be added as party. In a suit for specific performance of contract for sale, third parties to the contract are not necessary parties to the suit.

Order 1 Rule 10(2) empowers the Court to implead any person as party suo moto, who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to effectually and effectively to adjudicate all the questions involved in the suit.

Razia Begum vs Shabjadi Anwar Begum, AIR 1958 SC 886 is the leading case which has laid down the principles for exercising power under this provision as under:

1. The question of addition of parties under Rule 10 of Order 1 of the Code is generally not one of initial jurisdiction of the

Court, but of Judicial discretion which has to be exercised in view of all the facts and circumstance of a case; but in some cases, it may raise controversy regarding the power of the Court, in contradistinction to the inherent jurisdiction of the Court;

2. In a suit relating to property, in order that a person may be added as a party, he should have direct interest as distinguished from commercial interest in the subject-matter of the litigation;
3. Where the subject-matter of litigation is declaration as regards status or legal character, the rule of present or direct interest may be relaxed to in a suitable case where the Court is of the opinion that by adding that party, it will be in a better position to completely and effectually adjudicate upon the controversy.

No party can be added or substituted as plaintiff without his consent. It is the settled law that it is open to the Court to add any such person as necessary party in the suit to enable the Court to effectively adjudicate the question involved in the suit. For exercising power under this Rule the Court has to come to a finding that the party is necessary or proper party to a suit.

Smt. Motijharo Devi vs. Saroj Singh 2017 (4) PLJR 125

Code of Civil Procedure, 1908- Order I, Rule 10(2) – A suit was filed for declaration of title over suit land wherein the petitioner filed application under Rule 10 (2) for impleadment as defendant taking plea that she has got easementary right to use the suit land. It has been held that the petitioner has her independent cause of action against plaintiff on the basis of her claim of

easementary right and, therefore, she cannot be made party in the suit. It has been further held that the plea that petitioner should be impleaded as party to avoid multiplicity of litigation cannot be sustained as the object of Order 1, Rule 10(2) is not to avoid multiplicity of litigation though the same may be a desirable consequence of the provision and the order rejecting prayer of petitioner upheld.

Whose presence before the Court may be necessary? A person may be added as a defendant to a suit though no relief may be claimed against him, provided his presence is necessary for a complete and final decision of the questions involved in the suit. Such a person is called proper party as distinguished from a necessary party. The inquiry contemplated under Order 1 Rule 10 (2) is very narrow and is referable only to the cause of action as projected by the plaintiff. A third party also cannot be added as co-plaintiff without the consent of the original plaintiff except when the original plaintiff in a representative capacity wants to abandon the cause by withdrawing the suit and such a withdrawal is likely to affect that third party also.

Explaining the difference between the necessary party and a proper party, in ***Gonsalo De Filomena Luis, etc Versus Inacio Piedade Hildeberte Fernandes and others, etc 1976 SCC OnLine GDD 14 : AIR 1977 GDD 4*** it has been observed : "A necessary party is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court". If a necessary party is not impleaded the suit itself is liable to be dismissed. A proper party is party, who though not a necessary party, is a person whose presence would

enable the Court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be person in who in favour of or against whom the decree is to be made.

A necessary party is a person who has an interest in the subject matter involved in the suit and who could be affected by the decision. A party should be considered a necessary party if these two conditions are fulfilled.

a) There must be a right to some relief against party not joined, i.e. no decree can be passed without affecting the rights of the absentee part.
b) The presence of the absent party should be required to effectively adjudicate upon and settle all questions in dispute.

In a partition suit, a person who is not at all interested in the result of the suit and who is not entitled to any share or interest in the suit property on the plaint is not a necessary or proper party in the case.

Parties cannot be added to introduce a new cause of action – Parties cannot be added so as to alter the nature of the suit

Example : In a suit for rent, party should not be added so as to change it to suit for title, though such a question might incidently be investigated, nor should a person to whom the tenant have sublet the premises be impleaded in a suit for ejectment by the landlord Importers and Manufacturers Ltd. v. Pheroze Framroze Taraporewala, 1953 SCR 226 : AIR 1953 SC 73

A suit for specific performance of an agreement of sale cannot be converted at the instance of the stranger to the agreement into

one of title. Formal addition of parties and consequential amendment of plaint does not however alter the nature of the suit.

In a proceeding for invocation of bank guarantee the Principal debtor shall not be a necessary party.

In a suit filed for specific performance of contract against the vendor and subsequent purchaser and the vendor dies but his heirs are not impleaded, in such a case, the suit cannot proceed only against the subsequent purchaser and shall accordingly abate.

Where the Court directed joining of the state to do substantial justice, notice under Section 80 was not necessary.-- Chairman and Anr vs Mahadeo Prasad and Ors AIR 1990 NOC 49(Pat)

Improper addition of plaintiff or defendant - Order 1 Rule 10 (2) does not enable a Court to override the effect of Order 2 Rule 3. If any person who ought to have been joined as plaintiff does not consent to join as plaintiff, he may be made a defendant in the suit.

Transposing defendant as plaintiff -

The Court has power under sub-Rule 2 to transfer a defendant to the category of plaintiff. This can be done suo-motu or on the application of any of the defendants. In the case of difference between co-plaintiff the proper course is to be make an order that the name of one of them be struck out as plaintiff and added as defendant.

Example – In a suit for specific performance between the purchaser of the property and the builder the owner of the

property is neither necessary nor proper party to the suit (Anil Kumar vs. Gyan Deo and sons AIR 1995 Del 43 : 1994 SCC OnLine Del 118)

In a suit for specific performance of agreement the plot has been leased out by the municipality in favour of the original lessee, but the plot was developed and building constructed on it by a company. After the purchaser entered into an agreement, the original lessee transferred his right, title and interest in the land and building in favour of the company. The purchaser also entered into an agreement with the company. Under this circumstance, it was held that suit would not fail if the original lessee, who was the original defendant is dropped from the array of parties.

In a suit for specific performance of contract, where the defendant died and his legal representatives were prima facie found to be the co-owners of the property and had semblance of title and were not merely busy body or interlopers. It was held that they were entitled to file defense by way of additional written statement (Sumati Bai vs. Paras Finance Company AIR 2007 SC 3166)

Partition Suit-- In a suit for partition all persons who have interest in the subject matter of the suit are necessary parties. A partition suit is not complete without necessary parties to the suit. This proposition of law is elementary.

Limitation Act Section 21

Section 21 of the Limitation Act, 1963 provides amongst other things that when, after the institution of a suit, a party is added as a plaintiff or defendant, the date of addition is to be considered as regards that party as the date of the institution of the suit. The date of addition is the date of the application for impleading the new party and not the date of the order thereon. However, if the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit as regards such plaintiff or defendant be deemed to have been instituted on any earlier date. This provision of law has been held to relate only to the addition of parties under sub-Rule (2) and not under sub-Rule (1).The result is that a party may be substituted or added under sub-Rule (1) even after the period of limitation. It has been held under this Section, that where necessary parties are not joined within the period of limitation, the suit must be dismissed. Necessary parties means parties necessary to the constitution of the suit that is, persons whose joinder is necessary to enable the Court to award such relief as may be given in the suit as framed.

Order 1 Rule 10 does not deal with substitution of legal representatives of a deceased.

Order 1 Rule 10(2) covers two types of cases: (a) of a party who ought to have been joined but not joined and is a necessary party, and (b) of a party without whose presence the question involved in the case can not be completely decided. The former is a necessary party and the later is a proper party and in either of the case Order 1 Rule 1)(2) is attracted.

AIR 1970 Patna 1 Ram Niranjan Das vs. Loknath Mandal & others**.**

A co-owner alone can institute a suit for recovery of possession of land held by him along with other persons against a trespasser who dispossessed all the co-owners, and can obtain a decree for recovery of possession of the entire area, the judgment of the suit, however, not affecting the rights of the other co-owners which would remain intact. AIR 1951 PAT 315 has been overruled.

2016 (3) JBCJ 651 HC – Sambhu Sharan Singh vs. Sushma Baliase**-** Order 1 Rule 10 Civil Procedure Code and Section 52 of the Transfer of Property Act – In a suit for Specific Performance of a contract a purchaser normally should be impleaded. A transferee pendente lite can be added as party if his interest in the subject matter of the suit is substantial and not just peripheral.

2010 (3) J.C.R 525 (Jhr) Jamila Bibi vs. Hasmuddin Ansari:- Order 1 Rule 10 C.P.C**:-** Impleadment sought in partition suit as defendant being grandchildren of the recorded tenant refused. It has been held that the Court below committed error in rejecting the application.

2009 (4) J.C.R. 231 (Jhr) Sarita Kataruka vs. Jai Kishor Nath Sahdeo**:-** Order 1 Rule 10 C.P.C. - Suit Property being used for commercial activities – Persons seeking impleadment is also share-holder in the disputed premises along with the original plaintiffs as well as with original defendants.- Joining a party defendant is necessary for the passing of effective decree in the suit.- Order of refusal quashed.

Biru Sao vs Manoj Kr Soni 2009(1) JLJR 45 **Order 22 Rule 10 , Order 1Rule 10,**

Section 52 of the TP Act – The petition for impleadment under Order 1 Rule 10 read with Order 22 Rule 10 was rejected by the impugned order of the Court below. It has been held that the transferee cannot prosecute the suit on the same cause of action regarding non-payment of rent for the period prior to the transfer of the suit property. Similarly transferee cannot prosecute suit on ground of personal necessity taken by the transferor. However where the cause of action was not personal to the original plaintiff, transferee can step into the shoes of the transferor for instance where the eviction is filed on the ground of damages to the suit property.

Zubaida Khatoon vs Nabee Hasan 2004(1) SCC191

Referring to the above case law the Hon'ble Supreme Court in Sunil Gupta vs Kiran Girhotra 2007(8) SCC 506 held that transferee pendente lite cannot be impleaded as a party without leave of the Court.

Whether intervener is a necessary or a proper party in the suit for eviction filed by the petitioner—Petitioner filed suit for eviction of defendants on ground of default in payment of rent-- Counter-Claim of defendant that sale is null and void-- Application filed by the intervener that suit scheduled property originally allotted to her father who died leaving behind her an her brother--- Claim of the intervener that she had half share in the property need not be adjudicated in the eviction suit. Defendant was tenant under the plaintiff or not can be decided in the eviction suit.

Pankajbhai Rameshbhai Zalavadiya v. Jethabhai Kalabhai Zalavadiya, (2017) 9 SCC 700

18. In the matter on hand, since the purchaser of the suit property i.e. Defendant 7 has expired prior to the filing of the suit, his legal representatives ought to have been arrayed as parties in the suit while presenting the plaint. As such impleadment was not made at the time of filing of the plaint in view of the fact that the plaintiff did not know about the death of the purchaser, he cannot be non-suited merely because of his ignorance of the said fact. To do justice between the parties and as the legal representatives of the purchaser of the suit property are necessary parties, they have to be impleaded under Order 1 Rule 10 of the Code, inasmuch as the application under Order 22 Rule 4 of the Code was not maintainable.

A bare reading of this provision namely, second part of Order 1 Rule 10 sub-Rule (2) of the Civil Procedure Code would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are - (1) there must be a

right to some relief against such party in respect of the controversies involved in the proceedings (2) no effective decree can be passed in the absence of such party. Kasturi vs Uyyamperumal, AIR 2005 SC 2813, 2005 6 SCC 733, 2005 3 Supreme 574

Nasim Khan and others vs The State of Jharkhand (then Bihar), represented by the Deputy Commissioner, 2014 SCC OnLine Jhar 1541 It is well-settled that the plaintiff in a suit being 'dominus litis' chooses the persons against whom he wishes to litigate. The plaintiff cannot be compelled to sue a person against whom he does not seek any relief. However, there is exception to this general rule and under Order 1 Rule 10(2) C.P.C., the Court has power to add any person who has been found to be a necessary party or a proper party. However, Order 1 Rule 10(2) C.P.C. does not give an absolute right to any party to be impleaded as a party but it only invests a discretion in the Court to add a party at any stage of the proceeding.

In "*Udit Narain Singh Malpaharia* v. *Addl. Menher, Board of Revenue, Bihar*, reported in "AIR 1963 SC 786", the Hon'ble Supreme Court has held that a necessary party is one without whom, no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision of the the question involved in the proceeding.

In case of non-joinder of a party, it is to be decided whether it is fatal or not. Non-joinder of necessary party makes a suit fatal when no trial can be made in absence of the party, who has not

been joined by plaintiff. It depends on the facts and circumstances of the case. In a suit for declaration and permanent injunction if a person is not made a party, the decree is not binding upon him. But the decision will not be invalid in that regard. Taher Ali Khan v. Abdul Hakim and Ors., AIR 2006 Cal 124:

In a suit for eviction of the tenant from two premises out of which one premises was in possession of the tenant and in the other he was running business in partnership though lease-deed was signed by the tenant, the partnership firm was not necessary parties and suit for eviction against the tenant regarding both premises was maintainable. Even if the defendant petitioner has been carrying on any business under the name and style of M/s Indrapuri along with the other two lady parties, who even on the petitioners own admission in his evidence were sleeping partners, the suit cannot be said to be bad for non-impleading M/s. Indrapuri as a party thereto. Thus M/s. Indrapuri was neither a necessary party nor a proper party and in this view of the matter, the question of the suit being hit by the proviso to Order 1, Rule 9 of the Code does not arise. Padam Singh Jain v M/s Chandra Brothers & Ors., AIR 1990 Pat 95.

Keshwar Mahto v. Govind Mahto, 2003 (1) CCC 333 (Jharkhand). It has been held that the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons. Object of Order, 1, Rule 10 is to bring before Court all persons who are parties to dispute relating to

issue in a position to effectually and completely adjudicate upon and settle all questions involved in suit.

Order 1, Rule 10, sub-clauses (1) and (2) place no restriction either on period within which such application is required to be filed or as to person filing it. Only requisite while allowing such application is that Court should be satisfied that such impleadment was essential for effective and complete adjudication of all questions involved in suit. Sita Devi v. Shamsher Prasad Gupta, AIR 2010 Sik.8.

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2- Striking out & Amendment of Pleadings

Striking out pleadings, (Order 6 Rule 16)—The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading:

(a) which may be unnecessary, scandalous, frivolous or vexatious, or

(b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or

(c) which is otherwise an abuse of the process of the Court.

Scope : In an election petition, necessary averment of facts constituting an appeal on the ground of 'his religion' to vote or to refrain from voting would be material facts within the meaning of Clause (a) of sub-Section (1) of Section 83 of the Act. If such material facts are missing, they cannot be supplied later on, after the expiry of period of limitation for filing the election petition and the plea being deficient, can be directed to be struck down under Order VI Rule 16 of the Code of Civil Procedure, 1908 and if such plea be the sole ground of filing an election petition, the petition itself can be rejected as not disclosing a cause of action under Clause (a) of Rule 11 of Order VII of the Code, Harmohinder Singh Pradhan v. Ranjeet Singh Talwandi, 2005 SC 2379 : 2005 (5) SCC 46**;** Sardar Harcharan Singh Brar v. Sukh Darshan Singh, AIR 2005 SC 22.

Expunction of remarks - The Court has inherent powers to expunge any matter from the petition or affidavit under Order 6,

Rule 16, J.B. Patnaik v. Benett Coleman and Co. Ltd. & Anr., AIR 1990 Ori. 107.

Normally, a Court cannot direct or dictate the parties as to what their pleading should be and how they should prepare their pleadings. If the parties do not violate any statutory provision, they have the freedom to make appropriate averments and raise arguable issues. The Court can strike off the pleadings only if it is satisfied that the same are unnecessary, scandalous, frivolous or vexatious or tend to prejudice, embarrass or delay the fair trial of the suit or the Court is satisfied that suit is an abuse of the process of the Court. Since the striking off pleadings has serious adverse impact on the rights of the concerned party, the power to do so has to be exercised with great care and circumspection. Abdul Razak (D) Through L. Rs. vs Mangesh Rajaram Wagle 2010 2 AIR(Bom)(R) 587, 2010 0 Supreme(SC) 24

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(III) Amendment of Pleadings (Order 6 Rule 17 Civil Procedure Code)

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 such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial. **(Order 6 Rule 17)**

Scope : It is now well settled by various decisions of the Hon'ble Supreme Court as well as those by the High Courts that the Courts should be liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side or on the ground that the prayer for amendment was not a bona fide one. In this connection, the observation of the Privy Council in Ma Shwe Mya v. Mating Mo Hnaung, (1920-21) 48 IA 214 : AIR 1922 PC 249 : (1922) 24 BOMLR 682 may be taken note of. The Privy Council observed : "All Rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should

always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit.", Usha Balashaheb Swami v. Kiran Appasao Swami, 2007(5)SCC 602 SC.

Order 6 Rule 17 of the Code of Civil Procedure deals with amendment of pleadings which provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. A bare perusal of this provision, it is pellucid that Order 6 Rule 17 of the Code of Civil Procedure consists of two parts. The first part is that the Court may at any stage of the proceedings allow either party to amend his pleadings and the second part is that such amendment shall be made for the purpose of determining the real controversies raised between the parties. Therefore, in view of the provisions made under Order 6 Rule 17 of the Civil Procedure Code it cannot be doubted that wide power and unfettered discretion has been conferred on the Court to allow amendment of the pleadings to a party in such manner and on such terms as it appears to the Court just and proper. While dealing with the prayer for amendment, it would also be necessary to keep in mind that the Court shall allow amendment of pleadings if it finds that delay in disposal of Suit can be avoided and that the suit can be disposed of expeditiously. By the Code of Civil Procedure (Amendment) Act,

2002 a proviso has been added to Order 6 Rule 17 which restricts the Courts from permitting an amendment to be allowed in the pleadings either of the parties, if at the time of filing an application for amendment, the trial has already commenced. However, Court may allow amendment if it is satisfied that in spite of due diligence, the party could not have raised the matter before the commencement of trial. Baldev Singh v. Manohar Singh, 2006(93) AIR 2832 SC

An amendment would generally not be disallowed except where a time-barred claim is sought to be introduced, there too it would be one of the factors for consideration or where it changes the nature of the suit itself or it is mala fide or the other party cannot be placed in the same position had the plaint been originally filed correctly, that is to say, the other side has lost sight of a valid defence by subsequent amendment Punjab National Bank v. Indian Bank, AIR 2003 SC 2284

Amendment of plaint when not permissible -Respondent No.1 (plaintiff) has filed the suit for partition of the suit land and for consequential reliefs against the other respondents. In the said suit, respondent No.1 filed an application for amendment of the plaint. The Trial Court rejected the said application. The High Court allowed the Special Civil Application and while setting aside the order of the Trial Court allowed the amendment application. It has been held – "In our view, the Trial Court was right in rejecting the application. This we say for more than one reason. First, it was wholly belated; Second, respondent

No.1(plaintiff) filed the application for amendment of the plaint when the trial in the suit was almost over and the case was fixed for final arguments; and Third, the suit could still be decided even without there being any necessity to seek any amendment in the plaint. In our view, amendment in the plaint was not really required for determination of the issues in the suit. Vijay Hathising Shah vs Gitaben Parshottamdas Mukhi, AIR 2019 SC 1119, 2019 5 SCC 360

In this case suit was filed in the year 1993 and at that point of time, Defendant Nos. 4 to 6 were not made parties to the suit. Plaintiff Nos. 1 to 5 and Defendants Nos. 1 to 3 were the only parties. They had filed a joint memorandum for the dismissal of the suit on 22.04.1993, which was within one or two months of the filing of the suit. The compromise petition came to be rightly dismissed by the High Court in RFA No. 297/1994. In the compromise petition, curiously, it was noted that the joint family properties were divided by metes and bounds in the year 1972. If the partition had really taken place in the year 1972 and was acted upon as per the Panchayat Parikath, then Plaintiff Nos. 1 to 5 would not have filed a suit for partition and separate possession in the year 1993. Be that as it may, it is clear from records that the suit was being prolonged on one pretext or the other by the Plaintiff Nos. 1 to 5 and ultimately, the application for amendment of the plaint came to be filed on 01.09.2008. By that time, the evidence of both the parties had been recorded and the matter was listed for final hearing before the Trial Court. If there indeed was a partition of the joint family properties earlier,

nothing prevented Plaintiff Nos. 1 to 5 from making the necessary application for the amendment of the plaint earlier. So also, nothing prevented them from making the necessary averment in the plaint itself, inasmuch as the suit was filed in the year 1993. Even according to Plaintiff Nos. 1 to 5, they came to know about the compromise in the year 1993 itself. Thus, there is no explanation by them as to why they did not file the application for amendment till the year 2008, given that the suit had been filed in 1993. Though, even when Plaintiff Nos. 1 to 5 came to know about the partition deed dated 18.05.1972 (Panchayat Parikath) on 22.04.1993, they kept quiet without filing an application for amendment of the plaint within a reasonable time. On the contrary, they proceeded to cross examine PW1 thoroughly and took more than five years' time to get the examination of PW2 completed, and only thereafter filed an application seeking amendment of the plaint on 01.09.2008, that too when the suit was posted for final arguments. As mentioned supra, the suit itself is for partition and separate possession. Now, by virtue of the application for amendment of pleadings, Plaintiff Nos. 1 to 5 want to plead that the partition had already taken place in the year 1972 and they are not interested to pursue the suit. Per contra, Plaintiff No. 6/Respondent No.1 herein wants to continue the proceedings in the suit for partition on the ground that the partition had not taken place at all. Having regard to the totality of the facts and circumstances of the case, we are of the considered opinion that the application for amendment of the plaint is not only belated but also not bonafide, and if allowed, would change the nature and character of the suit. If the

application for amendment is allowed, the same would lead to a travesty of justice, inasmuch as the Court would be allowing Plaintiff Nos. 1 to 5 to withdraw their admission made in the plaint that the partition had not taken place earlier. Hence, to grant permission for amendment of the plaint at this stage would cause serious prejudice to Plaintiff No. 6/Respondent No. 1 herein. M. Revanna vs Anjanamma (Dead) By Lrs, AIR 2019 SC 940, 2019 4 SCC 332

To sum up the legal position—(1) The power to allow amendment is wide and hence the Court should not adopt hyper technical approach but on the other hand liberal approach should be general rule particularly in cases were the other side can be compensated with costs.

(2) The general rule is that the party is not allowed to set up new case or new cause of action.

(3) Technicalities of law should not be permitted to hamper the administration of justice between the parties and amendments are allowed in the pleadings to avoid multiplicity of litigation.

(4) Courts cannot go into the truth or falsity of the proposed amendments sought for at the time of considering the application for amendment.

(5) All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the

suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken.

(6) All reliefs ancillary to main relief and reliefs, which are in the nature of additional reliefs should be allowed as general rule.

(7) Even if a party or its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed but however the party who is put to inconvenience should be suitable paid. The Court has to only see that the error is not incapable of being rectified so long as remedial steps do not justifiably injure rights accrued.

(8) The delay in filing petition for amendment should be properly compensated by cost and the error or mistake, if not fraudulent should not be made a ground for rejecting the application for amendment of plaint or written statement.

Mode of Amendment—A pleading may be amended by written alterations in a copy of the document which has been served, and by additions on paper to be interleaved with it if necessary. However, where the amendments are so numerous or of such nature or length that to make written alterations of the document so as to give effect to them would make it difficult or inconvenient to read, a fresh document must be prepared incorporating the amendments. If such extensive amendment is required to a writ it must be reissued. An amended writ or pleading must be

endorsed with a statement that it has been amended, specifying the date on which it was amended, the name of the Judge, master or registrar by whom any order authorizing the amendment was made and the date of the order or, if no such order was made, the number of the Rule in pursuance of which the amendment was made. The practice is to indicate any amendment in a different ink or type from the original, and the colour of the first amendment is usually red.

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(IV) Substitution of Legal Representative (Order 22 Rule 3&4 C.P.C.)

Procedure in case of death of one of several plaintiffs or of sole plaintiff, (Order 22 Rule 3)—(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives the Court on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub Rule(1), the suit shall abate as far as the deceased plaintiff is concerned, and, or the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

Scope : The purpose and object of Order 22, Rule 3 of the Code is to allow legal representatives to carry on proceedings in the suit. Any order under Order 22, Rule 3 does not confer any right of heirship upon the legal representative. In case of any dispute as to whether a person is entitled to be impleaded as a legal representative, a Court is required to decide the matter under Order 22, Rule 5 of the Code by adopting and following a summary procedure. In-depth inquiry is not required to be held under Order 22, Rule 5 and an order passed in the said Section does not operate as res judicata. Order 22, Rule 10 of the Code on the other hand deals with transfer, *inter vivos* by the plaintiff

during the pendency of the suit. It operates in cases where the plaintiff has assigned his rights, title and interest and the same has devolved upon another person during the pendency of the suit. Order 22, Rule 10 of the Code does not apply where a person claims his right as a legal representative. An assignee as successor in interest is not a legal representative under Order 22, Rule 3 read with Section 2(11) of the Code but a person on whom the interest has devolved within the meaning of Order 22, Rule 10 of the Code. The last few words of Rule 3(1) are more significant than eloquent. The words "and shall proceed with the suit" etc mean that the Court shall proceed with the suit after the legal representatives are brought on record. The CPC while directing that death shall not cause automatic abatement also directs that the Court shall not proceed with the suit without bringing the deceased's legal representatives as parties before the Court. This Rule is enacted in recognition of the necessity for the parties to be present before the Court in an adversary system of justice. Order 22 further contemplates the bringing in of these parties within a statutory fixed time. Till then the suit is kept alive by Order 22.

If the application under this Rule has been made in time, and if it is not finally disposed of, it cannot be said that the proceedings abated after the lapse of the prescribed period from the death of the party. If no order is passed on the application, the proceedings would be pending till it is passed and the Court would have to proceed after bringing the legal representatives on record which is a duty cast upon it under this Rule., Ratanlal

Hanumanbax Sharma and Ors. vs Narendra Manilal Shah and Anr., A.I.R. 1980 Bom. 135

When a suit is brought by or against a person in a **representative capacity** and there is a devolution of the interest of the representative, the Rule that has to be applied is Order 22, Rule 10 and not Rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason. Order 22, Rule 10 is not confined to devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office. In such a case the successor to the head of the mutt or to the manager of the temple may be substituted as a party under this Rule. The word 'interest' which is mentioned in this Rule means interest in the property i.e., the subject-matter of the suit and the interest is the interest of the person who was the party to the suit. Thus, where the subject-matter of the suit was the interest of 'S' in the Dera and its properties and it devolved upon 'D' by virtue of his election as Mahant subsequent to the death of 'S' and, as it was in a representative capacity that 'S' was sued and as it was in the same representative capacity that the appeal was sought to be continued against 'D', Order 22, Rule 10 will apply., Shri Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass (deceased) through his Chela Shiam Dass, AIR 1975 SC 2159

Once a **preliminary decree has been passed**, there is no necessity to make an application under this Rule to implead the legal representatives of the deceased plaintiff and there is no time

limit to implead such representative. An order under Section 151 allowing the legal representatives to be impleaded in place of the deceased plaintiff is sufficient., Krishan Lal v. Nathi Lal, A.I.R. 1971 Del. 308.

Who may file application under this Rule – The words employed in this Rule, namely "on an application made in this behalf' clearly point out that any person may file such an application. Thus, a person who purports to be a legal representative of the deceased plaintiff or appellant may file an application for bringing on record the legal representatives of the deceased plaintiff or appellant, although he may be found not to be real legal representatives of the deceased plaintiff, and even then the names of the real representatives of deceased plaintiff may be brought on record if their names have been brought to the notice of the Court. Ram Charan Lal v. State, A.I.R. 1980 Raj. 96

Effect of bona fide mistake in not substituting all heirs In a case of death of a party to a suit or appeal, even if any heir of the deceased is left out of the record, and the plaintiff or appellant does not bring him on record in the bona fide belief that others being on record the only heirs, the competence of the suit or appeal will not be effected. It is immaterial whether no steps have been taken within the time allowed. Central Bank of India Ltd. v. Kala Prasad, 1968 B.L.J.R. 494

Limitation for substitution Application for impleading of Legal Representatives of the deceased is governed by Article 120 of Limitation Act, 1963 and not by Article 137. Therefore, the time of limitation is 90 days from the date of death of the deceased.**,** Molu & Ors. v. Soran & Ors., AIR 1993 P&H 81**:**

Bar of limitation not applicable in execution of Decrees On the death of decree holder, pending execution proceeding, proceeding will not abate and when application for bringing L.Rs., there was no question of application of bar of limitation. The provisions of Rules 3, 4, 8 do not apply to proceedings in execution of a decree. This doctrine has been given legislative sanction by an express provision made in Rule 12 in these words: "nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order". This however, does not imply that legal representatives of a deceased decree should not be brought on record nor that proceedings in execution could continue despite the death of decree holder without any representation of the estate on record. Legal representatives of the deceased decree holder should no doubt come on record to continue the proceedings but the penalty imposed on the legal representatives of the deceased plaintiff under Rule 3 namely, that the suit shall abate where no application is made within the time limited by law for this purpose does not apply to proceedings in execution by virtue of the said Rule 12 A portion the bar of limitation cannot be invoked in respect of the an application for bringing on record of legal representatives of a deceased decree-holder in proceedings in execution of decree. Smt. Thakuri Bai (through L.Rs.) v. Laxmi Chand & Ors., AIR 1990 Del. 217

Order 22 Rule 4 - Procedure in case of death of one of several defendants or of sole defendant.—(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole-surviving defendant dies and the right to sue survives the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-Rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as it is has been pronounced before death took place.

(5) Where—

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under

this Rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has in consequence abated; and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 to 1963), for setting aside the abatement, and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved.**(Order 22 Rule 4)**

Scope : Order 22, Rule 4 lays down that where within the time limited by law, no application is made to implead the legal representatives of a deceased defendant, the suit shall abate as against a deceased defendant. This Rule does not provide that by the omission to implead the legal representative of a defendant, the suit will abate as a whole. What was the interest of the deceased defendant in the case, whether he represented the entire interest or only a specific part are facts that would depend on the circumstances of each case. If the interests of the co-defendants are separate, as in case of co-owners, the suit will abate only as regards the particular interest of the deceased party. (Masilamani Nadar v. Kuttiamma (1960 Ker LJ 936)

In the case Sant Singh v. Gulab Singh (AIR 1928 Lah 573) it has been held that under Order 22 Rule 4(3) read with Order 22, Rule 11 Civil Procedure Code where no application is made to implead the legal representative of the deceased respondent, the appeal shall abate as against the deceased respondent. That, so far as

the statute is concerned, the appeal abates only qua the deceased respondent, but the question whether the partial abatement leads to an abatement of the appeal in its entirety depends upon general principles. If the case is of such a nature that the absence of the legal representative of the deceased respondent prevents the Court from hearing the appeal as against the other respondents, then the appeal abates in toto. Otherwise, the abatement takes place only in respect of the interest of the respondent who has died. The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same suit with respect to the same subject-matter. The Court cannot be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to conflicting decrees, then there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties. It was further held in the said judgment that a distinction must be made between the cases in which there is specification of shares or interests, and those in which there is no specification of interests. That in cases where there is a specification of share or interest, the appeal cannot abate as a whole. That in such cases, the appeal abates only in respect of the interest of the deceased respondent and not as a whole. To the same effect is the ratio of the judgment of the Supreme Court in the case of Sardar Amarjit Singh Kalra v. Pramod Gupta ((2003) 3 SCC 272) in which it has

been held that existence of a joint right as distinguished from tenancy-in-common alone is not the criterion but the joint character of the decree de hors relationship of the parties inter se and the frame of the appeal will take colour from the nature of the decree challenged. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice. A careful reading of Order 22 Civil Procedure Code would support the view that the said provisions were devised to ensure continuation and culmination in an effective adjudication. It was further observed that the mere fact that a khata was a joint khata was not relevant for deciding the question of abatement under Order 22, as long as each of the appellants had their own independent, distinct and separate shares in the property. It was held that wherever the plaintiffs are found to have distinct, separate and independent rights of their own, joined together for the sake of convenience in a single suit, the decree passed by the Court is to be viewed in substance as the combination of several decrees in favour of one or the other party and not as a joint decree. The question as to whether the decree is joint and in-severable or joint and severable has to be decided, for the purposes of abatement, with reference to the fact as to whether the decree passed in the proceedings vis-a-vis the remaining parties would suffer the vice of inconsistent decrees or conflicting decrees. A decree can be said to be inconsistent or contradictory with another decree only when two decrees are incapable of enforcement and that enforcement of one would negate the enforcement of the other. Shahazada Bi v. Halimabi (since dead) by her LRs., AIR 2004 SC 3942 : 2004 (7) SCC 354.

Pleas available to Legal Representatives- Under sub-clause (ii) of Rule 4 of Order 22, Civil Procedure Code any person so made a party as a legal representative of the deceased, respondent was entitled to make any defence appropriate to his character as legal representative of the deceased-respondent. In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the Court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title. Jagdish Chander Chatterjee v. Shri Kishan, 1972 (2) SCC 461 : AIR 1972 SC 2526

Karta does not represent interest of deceased coparcener The Karta of a joint Hindu family does not represent the interest of a male coparcener whose death has occurred after the Hindu Succession Act came into force. The legal representatives of the deceased coparcener must be brought on record. Bhanwarilal v. Bhulibai, A.I.R. 1972 Raj. 203.

Where in a suit for declaration that execution sale was illegal, the defendant died during pendency of suit, his widow and daughter were not brought on record, Held that the entire suit abated. Surya Kant Jha v. Lakshmi Kant Jha, A.I.R. 1980 Pat. 285

It is well settled that no specific order of abatement of proceedings is envisaged in one or the other provisions of Order 22, of the Civil Procedure Code and the abatement takes place automatically upon an eventually and by passage of time and it is not necessary to pass a formal order for that purpose. If the parties to the proceedings die in the trial Court or in the appellate Court and the right to sue survives and if no substitution is made and the heirs and legal representatives are not brought on the record within the time the case would result in the abatement of the proceedings. If the death takes place in the trial Court the suit abates. If the death takes place during the appellate Court the appeal abates but it will have no impact on the judgment and decree under appeal. The judgment under appeal becomes final. Hari Narain Singh & ors. v. Jabit Singh & Ors., AIR 1992 Pat. 148: 1992 (2) BLJR 1110

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(V) Abatement of suit (Order 22 Rule 3,4&9 Civil Procedure Code)

No abatement on death of proforma respondent

If exemption, which is provided under **Order 22, Rule 4(4)** is obtained from the Court before the delivery of the judgment, in that case, it would be open to the Court to exempt the plaintiff from bringing on record the heirs and legal representatives of the defendant even if, the defendant had died during the pendency of the suit as if the judgment was pronounced by treating that the defendant was alive notwithstanding the death of such defendant and shall have the same force and effect as if it was pronounced before the death had taken place. The Court is empowered to exempt a plaintiff from the necessity of substituting the heirs and legal representatives of any such defendant who has failed to file a written statement or who, having filed it, had failed to appear and contest the suit at the time of hearing of the same, but such an exemption can only be granted before the judgment is pronounced and in that case only, it can be taken against the said defendant notwithstanding the death of such defendant and such a decree shall have the same force and effect as it was pronounced before the death had taken place. T. Gnanavel v. T. S. Kanagaraj AIR 2009 SC 2367

The suit does not abate under Order 22, Rules 1, 3 or 4 Civil Procedure Code, after a preliminary decree is passed. Any party can apply to have it enforced. Siddovatam Mohan Reddy v. P. Chinna Swamy & others, (1992) 2 ALT 737.

It is Order 22, Rule 3(2) that provides for abatement of the suit. However, the operation of Order 22, Rule 3(2) is postponed till the very end of period of limitation prescribed by law for bringing the legal representatives. Till then the suit is kept alive by reason of Order 22, Rule 1. V. Appalanaidu v. P. Demudmma, A.I.R. 1982 A.P. 281:

Obligation of the Court to Determine proper representative

As a legal position, it cannot be disputed that normally, an enquiry under Order 22, Rule 5, Civil Procedure Code as to whether a person is legal representative of deceased party is of a summary nature and findings therein cannot amount to res judicata, however, that legal position is true only in respect of those parties, who set up a rival claim against the legatee. But such finding would be final and operate as res judicata as regards that suit and cannot be re-agitated., Dashrath Rao Kate v. Brij Mohan Srivastava, AIR 2010 SC 897

Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the Court should consider it and decide whether the person named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the Court, the persons claming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the Court and such legal representative is brought on record, it can be said that

the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject matter of the suit, vis-à-vis other rival claimants to the estate of the deceased., Jaladi Suguna (Dead) through L.Rs. v. Satya Sai Central Trust, AIR 2008 SC 2866.

Death of the plaintiff after the argument in appeal were over and the judgment was reserved. In such a case, it was held that the judgment may be pronounced notwithstanding the death of the plaintiff and in that event there will be no abatement. The judgment could be pronounced in such circumstances as if the judgment was pronounced before the death., N.P. Thirugnanam by L.Rs. v. Dr. R. Jagan Mohan Rao & Ors. AIR 1996 SC 116

A specific order is necessary under Order 22, Rule 9 Civil Procedure Code for setting aside abatement Order 22, Rule 11 read with Order 22, Rule 4 makes it obligatory to seek substitution of the heirs and legal representatives of deceased respondent if the right to sue survives. Such substitution has to be sought within the time prescribed by law of limitation. If no such substitution is sought the appeal will abate. Sub-Rule (2) of Rule 9 of Order 22 enables the party who is under an obligation to seek substitution to apply for an order to set aside the abatement and if it is proved that he was prevented by any sufficient cause from continuing the suit which would include an

appeal, the Court shall set aside the abatement. Now where an application for setting aside an abatement is made but the Court having not been satisfied that the party seeking setting aside of abatement was prevented by sufficient cause from continuing the appeal, the Court may decline to set aside the abatement. Then the net result would be that the appeal would stand disposed of as having abated. It may be mentioned that no specific order for abatement of a proceeding under one or the other provision of order 22 is envisaged: the abatement takes place on its own force by passage of time. In fact, a specific order is necessary under Order 22, Rule 9 Civil Procedure Code for setting aside the abatement. When an appeal is disposed of having abated and thereafter an application is made for setting aside abatement of appeal, an order refusing to set aside abatement is appealable as an order under Order 40, Rule 1 (k)Civil Procedure Code. There being a specific provision conferring a right of appeal one can resort to the same. Madan Naik (dead) by Legal Representatives v. Mst. Hansubala Devi, AIR 1983 SC 676

If no application is made for impleading the legal representatives of the deceased plaintiff or appellant or defendant or respondent within ninety days, the consequence is that the suit or the appeal would abate. The plaintiff or appellant may apply for setting aside the abatement within sixty days from the date of abatement, as provided under Article 121 of the Limitation Act. If an application for setting aside the abatement is made within 150 days of the date of death, there is no need to file an application under Section 5 of the Limitation Act to condone the delay, as no delay

as such occurs in view of Articles 120 and 121 of the Limitation Act. Delay occurs on the expiry of 150 days from the date of death. If applications for impleading the legal representatives and for setting aside the abatement are filed after 150 days of the date of death, it is necessary to explain the delay in filing the application for setting aside the abatement. It is not the delay in filing the application for impleading that is to be explained by the applicant seeking to set aside the abatement. On the other hand, it is the delay in filing the application for setting aside the abatement that is to be explained. The words "the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963, for setting aside the abatement and also for the admission of that application under Sec. 5 of that Act" in clause (b) of sub-Rule (5) of Rule 4 of Order XXII of the Code of Civil Procedure would fortify this conclusion. Sankaran (D) by L.Rs. v. Devaki Amma (D) by L.Rs., AIR 2007 (NOC) 611 (Ker.)

Prevented by sufficient cause – Even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. Once a valuable right, has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Once the legislature has enacted the

provisions of Order 22, with particular reference to Rule 9 and the provisions of the Limitation Act are applied to the entertainment of such an application, all these provisions have to be given their true and correct meaning and must be applied wherever called for. To say that the Court should take a very liberal approach and interpret these provision (Order 22, Rule 9 of the Civil Procedure Code and Section 5 of the Limitation Act) in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all these provisions redundant and inoperative. Balwant Sing (Dead) v. Jagdish Singh, AIR 2010 SC 3043

Commencement of limitation – An application to implead the legal representatives of the deceased defendant, in a suit or of the deceased respondent, in an appeal is governed by Article 120 of the Limitation Act. The period of limitation, commences to run from the date of death of not from the date of knowledge. The abatement is automatic and no separate order is required to be passed. Sub-Rule (3) or Rule 4 of Order 22, in clear terms lays down that where within the time limited by law, no application is made under sub-Rule (1), the suit shall abate as against the deceased defendants (s). By virtue of Rule 11, Order 22, of the Code, this provision is also equally applicable in case of appellant and consequently, if within the time limited by law, no application is made under sub-Rule (1), the appeal shall abate against the deceased respondent. Bala Ram & Ors. v. State of Himachal Pradesh & Ors., AIR 1994 H.P. 5

Order 22 Rule 5 - Determination of question as to legal representative — Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.

When a dispute is raised as to who are the Legal Representatives of the deceased party, it is the duty of Court to decide it and it cannot postpone it. Order of the trial Court that all the persons claiming to be the Legal Representatives can be impleaded without prejudice to their respective contentions is illegal and liable to be set aside. Gangupati Savitramma & Anr. v. Katuri Ramadevi & Ors., 1991 (2) C.C.C. 623 (A.P.).

Order 22 Rule 9-Effect of abatement or dismissal—(l) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing

the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of Section 5 of the 1 Indian Limitation Act, 1877 (15 of 1877) shall apply to applications under sub-Rule (2).

Explanation.—Nothing in this Rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.

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(VI) Withdrawal of suit or abandonment of part of claim (Order 23 Rule 1)

(1) 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 Rule 1 to 14 of Order XXXII extend, neither the suit nor part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-Rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader by a certificate of the pleader to the effect that abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied:

(a) that a suit must fail by reasons 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 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.

(4) Where the plaintiff:

(a) abandons any suit or part of the claim under sub-Rule (1), or

(b) withdraws from as suit or part of a claim without the permission referred to in sub-Rule (3) he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(5) Nothing in this Rule shall be deemed to authorize the Court to permit one of several plaintiff to abandon a suit or part of a claim under sub-Rule (1) or to withdraw, under sub-Rule (3), any suit or part of a claim, without the consent of the other plaintiff.

Scope- The right to withdraw a suit or to abandon the whole or a part of claim is not absolute. Such right cannot be exercised to abuse the process of the Court or play fraud upon the party as well as upon the Court. Therefore, it is necessary that if a person wants to approach the Court again, he must seek liberty of the Court to file a fresh petition. Even the Court cannot grant a permission to withdraw a petition straightaway, as it has to consider and examine as to whether any right has accrued in favour of any other person.

Order XXIII, Rule 1 of the Code does not confer an unbridled power upon the Court to grant permission to withdraw the petition, with liberty to file afresh, on the same cause of action; it can do so only on the limited grounds mentioned in the provision of Order XXIII, Rule 1 of the Code, and they are, when the Court is satisfied that the suit must fail by reason of some formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the same subject matter, and that too, on such term as the Court thinks fit. The grounds for granting a party permission to file a fresh suit, including a formal defect,

i.e., in the form or procedure not affecting the merit of the case, such as also of statutory notice, under Section 80 of the Code, mis-joinder of the parties or cause of action, non-payment of proper Court -fee or stamp fee, failure to disclose cause of action, mistake in not seeking proper relief, improper or erroneous valuation of the subject matter of the suit, absence of territorial jurisdiction of the Code or defect in prayer clause etc. Non-joinder of a necessary party, omission to substitute heirs etc may also be considered in this respect, or where the suit was found to be premature, or it had become infructuous, or where relief could not be, and where the relief even if granted, could not be executed, may fall within the ambit of sufficient ground mentioned in that provision.

Order 23 Rule 1**,** provides that a plaintiff can withdraw a suit or abandon a part of his claim unconditionally. It creates a right in favour of the plaintiff to withdraw the suit, at any time, after its institution. Once the suit is withdrawn or any part of the suit is abandoned against all or any of the defendants unconditionally, the plaintiff cannot bring a fresh suit on the same cause of action unless leave of the Court is obtained as provided by Order 23 Rule 1(3)(b). In other words, a plaintiff cannot, while unconditionally abandoning a suit or abandoning a part of his claim, reserve to himself the right to bring a fresh suit on the same cause of action. Hulas Rai Baij Nath v. K.P Bass & Co. AIR 1968 SC 111

The question is if the suit has already been decreed or, for that matter, dismissed and a decree has been passed determining the rights of the parties to the suit, which is under challenge in an appeal, can the decree be destroyed by making an application for dismissing the suit as not pressed or unconditionally withdrawing the suit at the appellate stage?

It was held by the Hon'ble Supreme Court that every suit, if it is not withdrawn or abandoned, ultimately results in a decree as defined in Section 2(2) of the Code of Civil Procedure. Once the matter in controversy has received judicial determination, the suit results in a decree either in favour of the plaintiff or in favour of the defendant. What is essential is that the matter must have been finally decided so that it becomes conclusive as between the parties to the suit in respect of the subject-matter of the suit with reference to which relief is sought. It is at this stage that the rights of the parties are crystallised and unless the decree is reversed, recalled, modified or set aside, the parties cannot be divested of their rights under the decree. Now, the decree can be recalled, reversed or set aside either by the Court which had passed it as in review, or by the appellate or revisional Court. Since withdrawal of suit at the appellate stage, if allowed, would have the effect of destroying or nullifying the decree affecting thereby rights of the parties which came to be vested under the decree, it cannot be allowed as a matter of course but has to be allowed rarely only when a strong case is made out. It is for this reason that the proceedings either in appeal or in revision have to be allowed to have a full trial on merits. In view

of the above discussion, it comes out that where a decree passed by the trial Court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. R. Rathinavel Chettiar v. V. Sivaraman 1999 (4) SCC 89.

GRANT OF PERMISSION FOR WITHDRAWAL IS TO BE EXERCISED WITH CAUTION AND CIRCUMSPECTION - No doubt, the grant of leave envisaged in sub-Rule (3) of Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-Rule (3) in which two alternatives are provided; first where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied 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. Clause (b) of sub-Rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a

fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order 23, Rule 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or Courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate Court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order 23, Rule 1(3) CPC for exercise of the discretionary power in permitting the withdrawal of the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower Courts and inordinate delay in disposal of the cases**.** K.S. Bhoopathy v. Kokila, AIR 2000 SC 2132

EFFECT OF NON-PAYMENT OF COST-Where a suit is withdrawn with permission to file fresh suit on condition of payment of cost awarded by Court, the fresh suit will not be tenable if cost is not paid. Wasudeo Bakaram Karve v. Ram Dayal Puna Bisne, (1972) 2 Bom. L.R. 677.

WITHDRAWAL OF SUIT WITHOUT CONDITION-If the suit is withdrawn unconditionally, then the permission of the Court is not necessary. Nathu v. State, A.I.R. 1972 Guj. 35.

Where the plaintiff withdraws the former suit for recovery of amount advanced without permission of Court, he is precluded from instituting a fresh suit of recovery in respect of same subject matter under Order 23, Rule 4 C.P.C. and against the same defendant. This Rule is mandatory**.** Narayan Jethanand, since deceased by his heir and Legal Representatives v. Asapuri Vijay Saw Mill, 1995 (4) CCC 295 (Guj.): AIR 1995 Guj. 194.

WITHDRAWAL OF APPLICATION TO WITHDRAW SUIT-If any plaintiff can withdraw a suit at any time after the institution of the suit, he can equally well withdraw his application to withdraw the suit under this Rule. Thomas George v. Shakariah Joseph, 1973 Ker. L.T. 131: (1972) Ker. L.J. 124.

MEANING OF FORMAL DEFECT-The formal defect referred to in this Rule can only mean a defect of form and not a defect affecting merits of the case. If it is a defect of form and not a defect which affects the merits of the case, then only the case would fall under the provisions of this sub-Rule. Kurji Jinabhai Katecha v. Ambalal Kanjbhai Patel, AIR 1972 Guj. 63

Where the plaintiffs application to amend the plaint was rejected, he filed application to withdraw suit, setting that failure to plead certain matters was a defect in the plaint and that leave should be granted to withdraw with liberty to file a fresh suit, it was held

that such defect could not come within any of the categories of "formal defect" within this Rule and permission could not be granted., V. Narayanappa v. Narayanappa, A.I.R.1971 Mys. 334

Withdrawal of suit filed in representative capacity - The Courts have consistently held, that a suit filed in representative capacity also represents persons besides the plaintiff, and that an order of withdrawal must not be obtained by such a plaintiff without consulting the category of people that he represents. The Court therefore, must not normally grant permission to withdraw unilaterally, rather the plaintiff should be advised to obtain the consent of the other persons in writing, even by way of effecting substituted service by publication, and in the event that no objection is raised, the Court may pass such an order. If the Court passes such an order of withdrawal, knowing that it is dealing with a suit in a representative capacity, without the persons being represented by the plaintiffs being made aware of the same, the said order would be an unjustified order. Such order therefore, is without jurisdiction. Bhagwati Developers Private Ltd. v. The Peerless General Finance Investment Co. Ltd. & Ors., AIR 2013 SC 1690).

Court can accept application under Rule 3 or reject it in toto but cannot split up prayer to grant one relief and refuse other relief.—The plaintiff had instituted a suit against the defendant for a permanent prohibitory injunction restraining them from transferring the property in question. The plaintiff alleged that he is owner of the property in question on the basis

of inheritance. During the pendency of the suit, the plaintiff came to know about the existence of the sale deed, which is alleged to have been issued by his father, in his favour, and, therefore he moved an application for the withdrawal of the suit with a liberty to file a fresh suit bringing this fact about the execution of the sale deed in the subsequent suit. This application was partly allowed by the trial Court. The trial Court permitted the plaintiff to withdraw the suit but did not grant any liberty to the petitioner to file a fresh suit on the ground that there was no formal defect in the suit filed by the plaintiff. It was held that the order of the trial Court was erroneous and was liable to be set aside. The trial Court had only considered the clause (a) of sub clause 3 of Order 23 of the Code of Civil Procedure and has not considered clause (b). The plaintiff had given the reasons for the withdrawal of the suit and on that basis, sought a liberty to file a fresh suit. The ground raised by plaintiff had not been considered by the trial Court under sub clause (b) of Clause 3 of Order 23. Further, the trial Court could not split the prayer in two parts. The relief claimed by the plaintiff was a composite relief, namely, withdrawal of the suit with a liberty to file a fresh suit. This relief cannot be split up by the trial Court in two parts. The application has to be allowed in toto or has to be rejected in toto. The Court has no jurisdiction to split up the relief in two parts unless the plaintiff gives his consent to that effect. Jai Prakash v. Rajendra Prasad, AIR 2007 Allahabad 112.

Limitation —In any fresh suit instituted on permission granted under last preceding Rule, the plaintiff shall be bound by law of

limitation in the same manner as if the first suit had not been instituted.

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(VII) Transposition of defendants as plaintiffs (Order 23 Rule 1A)

When transposition of defendants as plaintiffs may be permitted (Order 23 Rule 1A)—Where a suit is withdrawn or abandoned by a plaintiff under Rule 1, and a defendant applies to be transposed as a plaintiff under Rule 10 of Order 1, the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.

Scope- Where a defendant's interest run parallel to that of plaintiff or is common, his interest should not be allowed to be prejudiced by subsequent action of plaintiff in withdrawing or abandoning his case. Such a defendant can get him transposed as plaintiff. Law does not countenance a defendant who is not a performa defendant or a defendant whose interest is not common to that of plaintiff to be transposed as a plaintiff to continue suit against erstwhile plaintiff.

"Though Courts lean against multiplicity of suits and, therefore, the provision of transposition is made only to avoid another suit. Courts wouldn't permit such transposition just to give a chance to a litigant to avoid filing a suit or permit him to take advantage of the suit filed by his adversary against him claiming a relief against him by becoming a plaintiff and trying to bring out the averments and relief's which are contrary to those claimed by the original plaintiff." Jethi Ben v. Maniben, A.I.R.1983 Guj 194.

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(VIII) Compromise of Suit (Order 23 Rule 3)

Where it is proved to the satisfaction of the Court a suit has been adjusted wholly or in part by any lawful agreement or compromise, Ins. in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance there with so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit;

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question, but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded thinks fit to grant such adjournment.

Explanation— An agreement of compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this Rule.

Bar to suit (Order 23 Rule 3)—No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

Scope- Following condition must be satisfied before the Court passes a consent decree in the suit on the basis of compromise between the parties.

(I) There must be an agreement or compromise between the parties.
(ii) It must be in writing and must be signed by the parties to the suit.
(iii) Such agreement or compromise must be lawful.
(iv) It must be recorded by the Court.
(v) A compromise or consent decree must have been passed by the Court.

Under this Rule, Court must be satisfied that there has been a lawful compromise. Under this Rule, an agreement or compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful. Under the amended Rule 3 the Court can pass a decree in terms of the agreement even though it includes matters to forming the subject matter of the suit provided that such extraneous matters relate to the parties to the suit. Kiran v. Ram Prakash, A.I.R. 1980 Delhi 99**:**
A compromise decree is not a decision of the Court, nor can it be said that a decision of the Court was implicit in it. It is the acceptance by the Court of something to which the parties agreed. Such a decree cannot operate as res judicata. (Pulavarthi Venkata Subba Raoand vs Valluri Jagannadha Rao & Ors, AIR 1967 SC 591.
A consent decree (Compromise decree) does not stand on a higher footing than a contract between the parties. The Court always has the jurisdiction to set aside a consent decree upon any ground which will invalidate an agreement between the parties. In the absence of any such ground, the consent decree is binding

on the parties. (Ganganand Singh and Ors. v. Rameshwar Singh Bahadur and Anr. AIR 1927 Pat 271

Once parties consented to settlement arrived at between them before mediator, further consent for getting compromise or adjustment of suit recorded within meaning of, Rule 3 is not necessary. — Once the parties consented to the settlement arrived at between them before the mediator, further consent for getting the compromise or adjustment of the suit recorded within the meaning of Order 23, Rule 3 CPC is not necessary. When once there is no consent to the terms of compromise or settlement or adjustment by one of the parties to the suit, no compromise can be recorded by invoking the provisions of Order 23, Rule 3 CPC. Patibanda Soma Sundara Rao v. Chilakamarthi Mohana Rao, AIR 2008 (NOC) 54 (A.P.)

Procedure where properties outside suit mentioned in compromise-petition

In such a case the proper course for the Court is to recite the compromise as a whole in the decree or in the form of a schedule to the decree for the purpose of reference, but to restrict the operative portion of the decree to the subject matter which relates to the suit. Bhaja Govind Maitab v. Janki Devi, A.I.R. 1980 Ori 107: (1979) 47 Cut L.T. 210.

Consent order in a Guardians and Ward matter— Legal requirements :

In a case where a minor is affected, it may be possible for the Court in a given set of circumstances not to pass a decree in terms of the consent terms if the Court comes to the conclusion

that the consent terms would not be for the welfare of the minor although the matter is not free from doubt. Manjula v. Dilip Jyoti Prakash, A.I.R.1980 Bom. 235**:**

Mode of execution- A decree has to be executed as a whole, the non-compliance with the term of it by the decree-holder precludes him from executing that part of it against the judgment debtor. Chen Shan Ling v. Nand Kishore Jhajharia, A.I.R. 1972 S.C. 726

If any of the parties later on assails the compromise as invalid on account of exercise of fraud, coercion, misrepresentation etc. and pleads that the compromise/agreement was unlawful and involuntary, such a compromise cannot be challenged by a separate suit in view of the clear bar created by Rule 3-A of Order 23. **In such case Order 7, Rule 10 cannot be applied** and Court cannot be called upon to return plaint. Shanti Devi vs Gian Chand, AIR 2008 (NOC) 367 (P. & H.)**.**

When the plaintiff had cleverly drafted the plaint to give a look or impression of being a title suit seeking declaration of right, title and possession over the suit land, with a disguised main relief of setting aside compromise decree, it was the duty of the Court below to nip it in the bud at the first hearing by examining the averments of plaint in light of prayer in a coherent manner. The Court by **applying the provisions of Order 7, Rule 11** was required to ensure that a frivolous suit is rejected at the very outset by rejecting the plaint as a whole.**,** Pratap Mistry & Ors. etc v. Sitaram Mistry, AIR 2010 Pat. 104**.**

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(IX) Power of Court to issue commissions (Order 26 Sec.75 to 78 & Rule138 to 153 of JCCR))

Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

(a) to examine any person;

(b) to make a local investigation;

(c) to examine or adjust accounts; or

(d) to make a partition;

(e) to hold a scientific, technical, or expert investigation;

(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;

(g) to perform any ministerial act.

Rule 138 of JCCR Courts must issue commissions with promptitude and Principal District Judge should at the time of their periodical inspections satisfy themselves that this is done. Before issuing a commission the Court shall-

(a) call on the party at whose instance the commission is issued to supply an abstract of the pleadings and issues for the use of the Commissioner;

(b) after consulting the parties, make an estimate of the probable duration of the examination of each witness. When the estimate is exceeded, the Court should enquirer into the cause of delay and disallow any charges of the Commissioner which it finds to be unreasonable.

Rule 139 of JCCR - In issuing a commission the Court shall fix a date allowing sufficient time for its return after execution. It

must be clearly understood that the commission is to be returned by the date fixed.

Rule 140 of JCCR - If for any reason the Commissioner finds that the date fixed is likely to be exceeded, he should obtain an extension of time before proceeding with the execution of the commission or its further execution as the case may be.

Rule 141 of JCCR - If a commission is to issue to a Pleader Commissioner, the commission shall be transmitted together with the fee, to the Court in which the Commissioner is practicing as an Advocate, and, when such Court is the High Court, to the Registrar.

Note - Fees transmitted to the Registrar shall be remitted by money order payable to the Accountant of the Registrar's Office.

Rule 142 of JCCR - The Court or officer receiving a commission issued to a Pleader Commissioner shall immediately deliver it to him unless he refuses to act.

Rule 146 of JCCR - A Commissioner for examination of a witness shall ordinarily give previous notice of the time and place of such examination to the witnesses and to the parties - or their advocates and it shall be their duty to attend at such time and place. In fixing the time and place the Commissioner shall have due regard for the convenience of the witnesses particularly in the case of those whose attendance is ordinarily excused, such as, pardanashin ladies, persons unable to be removed from their houses owing to old age, sickness, or other bodily infirmity, or persons of rank exempted by an order under Section 133, Civil Procedure Code, from personal attendance in Court.

Rule 147 of JCCR - The responsibility of ordering an inquiry under Order XXVI, Rule 9 of the Code of Civil Procedure rests entirely with the Court before which the suit is pending. Such Court may order such inquiry when it deems a local investigation to be necessary or proper for the purpose of elucidating the matters in dispute, or of ascertaining the amount of any mesne profits or damages or annual net profits. The Court is, therefore, to consider, when it is moved to order and such inquiry, whether the nature of the case calls for that particular mode of inquiry, whether the application has been made at a proper stage of the proceedings, Whether the importance of the case warrants that expense being imposed upon the parties, and whether such inquiry may not be attended with a delay which will counterbalance the advantage to be derived from it.

Rule 148 of JCCR - When the commission is for a local inquiry a proceeding in Form No. (J) 27 or, where it is more suitable. In Form No. (J) 28 shall be drawn up giving the points which require elucidation or ascertainment in that particular way, leaving to be substantiated by the parties by evidence at the trial those points which conveniently can ought to be so substantiated. A copy of such proceeding shall be forwarded to the Commissioner.

Rule 149 of JCCR - When in any suit or proceeding a local investigation for any of the purposes specified in Order XXVI, Rules 9 and 13, Civil Procedure Code, or any other local investigation under the said Code, requiring knowledge of surveying for the purpose of effecting a delivery of possession, or for any other purpose is deemed necessary, the Court shall before issuing a commission apply to the Principal District Judge for his

instructions regarding the particular person whose services are available for that duty and shall issue a commission in accordance with his nomination. The application shall contain a statement of the nature of the work, the value of the suit or subject-matter, the time which it is estimated the commission will take to execute and the cost including proposed fee (which should be inclusive wherever possible) and travelling allowance, if any.

Rule 150 of JCCR - When a commission, order or writ, issued by a Civil Court under the code of Civil Procedure,1908, is of such a nature as to require that the person executing it should have some knowledge of surveying, it should, so far as possible, be issued only to **a person whose name is entered in a list to be maintained by each Principal District Judge or persons qualified to execute such Commissions**. The qualifications for entry in this list shall be as follows :-

(i) the holding of certificate of a proficiency in surveying granted in accordance with the Rules framed by the Government of Bihar and promulgated with the Bihar Government notification no. B/PSE-01/56-758-J., dated the 10th February, 1956, published at page 673 in Part II of the Bihar Gazette, dated the 22nd February, 1956;

(ii) the possession of an equivalent or higher qualification. This shall include the passing of the following examinations; Bachelor of Civil Engineering ;Intermediate Civil Engineering; the examination for Overseers of the Public Works Department (but not that for sub-overseers); Subordinate Engineer's Examination;

(iii) the satisfactory execution of survey commissions for the Civil Courts in the judgeship during a period of not less than ten years before the date of notification of these Rules. Provided that a Civil Court is not precluded from issuing a commissions to salaried Amins in judgeships in which they still exist.

As between persons included in the aforesaid list, preference should ordinarily be given to those who are advocates, except in those special cases in which an expert knowledge of survey may be more important than a knowledge of law.

Rule 151 of JCCR - Whenever transmission by post is necessary for the issue of a commission whether to a Court or to an advocate, the papers are to be sent and returned by registered post and the cost of doing this should be realised from the parties.

Rule 153 of JCCR - When the work of a Commissioner is completed he shall submit, with the report, his diary showing how he was occupied during the enquiry.

Scope - Sections 75 to 78 deal with the powers of the Court to issue commissions and detailed provisions have been made in Order 26 of the Code with respect thereto. The power of the court to issue commission is discretionary and can be exercised by the Court for doing complete justice between the parties. It can be exercised by the either on application by a party to the suit or of its own motion.

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Commissions to make local investigations (Order 26 Rule 9)-

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

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

Procedure of Commissioner(Order 26 Rule 10) - (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

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

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

(Order 26 Rule 10-A to 10-C)-By the Amendment Act of 1976, Rules 10-A to 10-C have been inserted to provide for issue of commissions for scientific investigation, sale of movable property or performance of ministerial act. Ministerial work means not the office work of the Court but work like accounting, calculation and other work of a like nature which Courts are not likely to take up without unnecessary waste of time.

The Court may, in any suit, issue a commission to such a person as it thinks fit directing him to make local investigation and to report thereon for the purpose of (a) elucidating or clarifying any matter in dispute, or (b) ascertaining the market value off any property on the amount of any mesne profits or damages or annual net profits.

Commission to examine or adjust accounts (Order 26 Rule 11)-In any suit in which an examination or adjustment of the accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

Court to give Commissioner necessary instructions (Order 26 Rule 12)--(1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he

may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

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

Expenses of commission to be paid into Court (Order 26 Rule 15)—Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Powers of Commissioners (Order 26 Rule 16)- Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment—

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

Question objected to before the commissioner (Order 26 Rule 16A) (1) Where any question put to a witness is objected to by a party or his pleader in proceedings before a commissioner appointed under this order, the commissioner shall take down

the question, answer, objection, and the name of the party or as the case may be the pleader so objecting.

Provided that the commissioner shall not take down the answer to a question which is objected to on the ground of privilege but may continue with the examination of the witness, leaving the party to get the question of privilege decided by the Court, and where, the Court decides that there is no question of privilege the witness may be recalled by the commissioner and examined by him or the witness may be examined by the Court with regard to the question which was objected to on the ground of privilege.

(2) No answer taken down under sub Rule (1) shall be read as evidence in the suit except by the order of the Court.

Attendance and examination of witnesses before Commissioner (Order 26 Rule 17)- (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of India, and for the purposes of this Rule the Commissioner shall be deemed to be a Civil Court: Provided that when the Commissioner is not a Judge of a Civil Court, he shall not be competent to impose penalties; but such penalties may be imposed on the application of such Commissioner by the Court by which the commission was issued.

(2) A Commissioner may apply to any Court (not being a High Court) within the limits of whose jurisdiction a witness resides for

the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

Parties to appear before Commissioner (Order 26 Rule 18) - (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

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

Court to fix a time for return of commission (Order 26 Rule 18B)- The Court issuing a commission shall fix a date on or before which the commission shall be returned to it after execution, and the date so fixed shall not be extended except where the Court, for reasons to be recorded, is satisfied that there is sufficient cause for extending the date.

Scope- Object of appointment of Local Commissioner is not to collect evidence but to obtain evidence, which from its very nature, can only be gathered on the spot. Report is merely to assist Court and is not binding on Court. The Court can decide case on evidence after setting aside report of Commissioner. Gian Chand Khatana v. Inderjit Chahdha, AIR 2003 HP 49

Belated applications for commission : The application had been filed three weeks after the trial had reached the stage of finality and the case was fixed for arguments. It was held that it is necessary that all applications of this type even if they are bona fide and genuine, have to be filed at a proper point of time in the proceedings. This is very necessary also from the point of view of the stage of the proceedings because, the learned trial

Judge is perfectly right when he pointed out that if this application were to be entertained, even assuming that was the position, it would mean that the trial which has reached the argument stage, would get dilated, evidence will have to be reopened and all the procedures from that stage onwards would again have to be recommenced. The law does not permit such ill-timed applications which would only have the effect of disrupting the trial and dilating the proceedings. The Courts have been virtually struggling to ensure that civil proceedings are heard and disposed of within a reasonable time and applications of this type only disrupt the proceedings and dilate them. B.S. Nazir Hassan Khan v. Aswathanarayana Rao & Ors., AIR 2004 Kant. 92.

Discretion to declare a witness hostile has not been conferred on the Commissioner - Order 18, Rule 4(4) requires that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments. Order 18, Rule 4(8) stipulates that the provisions of Rules 16, 16-A, 17 and 18 of Order 26, in so far as they are applicable, shall apply to the issue, execution and return of such commission thereunder. The discretion to declare a witness hostile has not been conferred on the Commissioner. Under Section 154 of the Evidence Act, it is the Court which has to grant permission, in its discretion, to a person who calls a witness, to put any question to that witness which might be put in cross-examination by the adverse party. The powers delegated to the Commissioner under Order 26, Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in Court under Section 154 of the Evidence Act to declare

a witness hostile. If a situation as to declaring a witness hostile arises before a Commission recording evidence, the concerned party shall have to obtain permission from the Court under Section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the commission so as to itself record remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party. Salem Advocate Bar Association, Tamil Nadu v. Union of India, (2005) 6 SCC 344 : AIR 2005 SC 3353

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(X) Arrest and Attachment before Judgment –

Arrest before judgment - **Where defendant may be called upon to furnish security for appearance (Order 38 Rule 1)**— Where at any stage of a suit, other than a suit of the nature referred to in Section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(i) has absconded or left the local limits of the jurisdiction of the Court, or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave 1 [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 plaintiff's

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

Procedure where defendant fails to furnish security or find fresh security (Order 38 Rule 4)—Where the defendant fails to comply with any order under Rule 2 or Rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied:

Provided that no person shall be detained in prison under this Rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees :

Provided also that no person shall be detained in prison under this Rule after he has complied with such order.

Attachment Before Judgment:

Where defendant may be called upon to furnish security for production of property. (Order 38 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.

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

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

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

Mode of making attachment (Order 38 Rule 7)—Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Provisions applicable to attachment (Order 38 Rule 11A)—(1) The provisions of this Code applicable to an attachment made in execution of a decree shall, so for as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of Rule 11.

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

Agricultural produce not attachable before judgment (Order 38 Rule 12)—Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural

produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

Scope - PRECONDITION FOR ATTACHMENT - The necessity for orders under Order 38, Rule 5 of the Code, arises almost daily among the litigants. The Supreme Court as well as the High Courts have interpreted the provisions of Order 38, Rules 5 and 6 of the Code, in a series of judgments. Form perusal of all the authorities the following guiding principles can be deduced:

(1) An order under Order 38, Rules 5 and 6 can only be issued, if circumstances exist to the satisfaction of the Court.

(2) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court.

(3) The Court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the defendants would not be prejudiced.

(4) Affidavit in support of the contention should not be vague.

(5) Mere allegation of selling the property is not sufficient.

(6) The object of attachment must be to prevent future transfer.

(7) Alienation cannot be interfered in the absence of allegation of fraud.

(8) There must be additional circumstances to show that transfer was with the intention to defeat claim of the plaintiff.

(9) Insolvent or financial embarrassment of the defendant are relevant factor.

(10) Mere closure of business is not sufficient.

(11) Removal of properties outside the jurisdiction of the Court must be proved.

(12) Sale of property at a gross under value is not permissible.

Order 38 CPC has two important components, in the context of protecting the interests of the plaintiff, in a suit for recovery of amounts. The first is covered by Rule 1 thereof, which enables the plaintiff to seek the arrest of the defendant, and the second is covered by Rule 5, which provides for attachment of the property held by the defendant, before judgment. In an application filed under Rule 1, the plaintiff has to satisfy the Court that the defendant has absconded the local limits of the jurisdiction of the Court; or is about to dispose of, or remove from the local limits of jurisdiction, any property, or is likely to do so; with the object of defeating the decree that may be passed against him. In the other contingency, the satisfaction is only, as to disposal, or removal of the property, from the jurisdiction of the Court. The nature of steps to be taken by the Court substantially varies, in relation to the applications that may be filed, under Rule 1 on the one hand and Rule 5, on the other, of Order 38 CPC. In the former, on being prima facie satisfied about the contents of the affidavit, or otherwise, the Court may, straight away, issue warrant of arrest for the production of the defendant, before the Court, so that he may be required to furnish security, for his appearance. In case of attachment before judgment, the Court is under obligation to give an opportunity to the defendant, either to furnish security in a sum, or to produce the property, at the disposal of the Court, or to appear and show-cause as to why he should not be required to furnish such security. Once the defendant appears in either case, and explains, the Court is under obligation to pass a reasoned

order, in support of its conclusion. Vemulapalli Ravichandra v Mattampalli Srinivasa Rao, AIR 2007 A.P. 306.

The purpose of securing appearance of defendant is to secure the claim of the plaintiff himself and that is why the proviso to Order 38, Rule 1 provides that to avoid the execution of arrest warrant, the defendant can pay to the officer entrusted with the execution of the warrant any sum specified in the warrant. The said proviso does not mean that the Court itself cannot direct the deposit of entire sum to the extent of claim of the plaintiff while issuing the warrant under Order 38, Rule 1 itself. More so when the application under Order 38, Rule 5 filed by the plaintiff was also pending before the Court and the said application was also disposed of by the Court by the same order, no water-tight compartment can be taken between these two applications, particularly, when the Court was faced with the situation that during the process of service of summons, the defendant had already alienated the suit property. This might have naturally raised a suspicion in the mind of the Court that unless the claim of the plaintiff is sufficiently secured, the decree may remain unsatisfied. Thus, in order to secure the claim of the plaintiff, if the Court has directed deposit of security to the full extent of claim of the plaintiff, no valid exception can be taken to the same. Shyam Sunder Soni vs. Mithu Lal, AIR 2010 Raj. 77.

DISTINCTION BETWEEN ATTACHMENTS BEFORE JUDGMENT UNDER ORDER 38 RULE 5 AND THOSE IN EXECUTION-

There is a distinction between attachments before judgment under Order 38, Rule 5 and those in execution. Attachments

before judgment are issued with the objective of preserving the property belonging to the defendant concerned so that in the event of a positive decree being passed in favour of the plaintiff, he will be able to proceed against that property for securing the fruits of the decree. While issuing such attachments, the Court only ensures that the defendant does not dispose of the property pending suit. On the contrary, attachment in execution is a step in execution and such attachments are often readily granted and such attachments are not liable to be lifted on furnishing security. M. K. Govindankutty Menon v. Reena, AIR 2007 Kerala 254

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(XI) Temporary Injunctions (Order 39 Rules 2&3)

Cases in which temporary injunction may be granted (Order 39 Rule 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

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

(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition 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.

Injunction to restrain repetition or continuance of breach(Order 39 Rule 2)—(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of

contract or injury of a like kind arising out of the same contract or relating to the same property or right.

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

Scope- The prayer clause for injunction is governed by proof of facts by affidavit or otherwise. It is not obligatory on the part of the party, at this stage, to prove the documents in accordance with the rules of the Indian Evidence Act. The party to the suit may file various documents, for consideration of prayer of temporary injunction under Order 39, Rule 1 and 2 of the Code. The Court, at the first instance, is required to consider such prayer in view of the provision laid down under Order 39, Rules 1 and 2 of the Code. If fact alleged by the plaintiff is supported by an affidavit or otherwise, meaning thereby some documents, the Court has to record an opinion in respect of the existence of prima facie case, balance of convenience and irreparable loss to the party concerned. It is not the stage at which Court can exercise power of impounding the document.

The main considerations which ought to weigh with the Court hearing the application or petition for grant of injunction are as under:

(i) Extent of damages being an adequate remedy;

(ii) Protect the plaintiff's interest for violation of his rights though however, having regard to the injury that may, be suffered by the defendants by reason therefor;

(iii) The Court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others;

(iv) No fixed Rules or notions ought to be had in the matter of grant of injunction but on facts and circumstances of each case, the relief being kept flexible.

(v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the party's case;

(vi) Balance of convenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) It is also to be seen whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise.,

While considering an application for grant of injunction, the Court will not only take into consideration the basic elements in relation thereto, viz., existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties. Grant of injunction is an equitable relief. A person, who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The Court will not interfere only because the property is a very valuable one. However, grant or refusal of injunction has serious consequence depending upon the nature thereof. The Courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of

mind on the part of the Courts is imperative. Contentions raised by the parties must be determined objectively. Mandali Ranganna v. T. Ramachandra, AIR 2008 SC 2291.

In order to obtain an order of injunction, the party who seeks for grant of such injunction has to prove that he has made out a prima facie case to go for trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if injunction is not granted. But it is equally well settled that when a party fails to prove prima facie case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the Court to grant injunction in his favour even if he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted., Kashi Math Samsthan & Anr v. Srimad Sudhindra Thirtha Swamy, AIR 2010 SC 296:

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(XII) Ex-parte injunctions (Order 39 Rule 3)

Before granting injunction, Court to direct notice to opposite party (Order 39 Rule 3)—The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party:

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

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

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

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant, relies, and

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

Rule 160 Of JCCR- The power under Order XXXIX, Rule 3 of the Code of Civil Procedure, to issue an ex-parte injunction should be exercised with the greatest care. The issue of an injunction on the application of one party and without previously giving to the person affected by it an opportunity of contesting the propriety of

its issuing, is a deviation from the ordinary course of justice, which nothing but the existence of imminent danger to property if it be not granted, can justify. The Court should, if possible, always require notice, however short, to be given to the opposite party.

Rule 161 Of JCCR- An application for an ex-parte injunction should not ordinarily be granted unless it is made promptly.

Rule 162 Of JCCR- Every application for an injunction must be supported by affidavit. All material facts must be fully and fairly stated to the Court and there must be no concealment or misrepresentation of any material fact. If any time it appears to the Court that an ex-parte injunction was obtained by such misstatement or suppression of material facts as to lead the Court to grant the injunction, the injunction shall be dissolved unless for the reasons to be recorded Court considers that it is not necessary so to do in the interest of justice. The plaintiff cannot be heard to say that he was not aware of the importance of the facts so mis-stated or concealed or that he had forgotten them.

Rule 163 Of JCCR- An affidavit in support of an ex-parte injunction should always state the precise time at which the plaintiff or the person acting for him became aware of the threatened injury. It must also show either that notice to the defendant would be mischievous or that the matter is so urgent that the injury threatened would, if notice were served on the defendant, be experienced before the injunction could be obtained. The case of irremedial mischief impending must be made out. Mere allegation of irrepairable injury will not be

sufficient. The facts on which the allegations are founded must be set forth clearly and specifically in the affidavit.

Rule 164 Of JCCR- The notice to be given should be for the shortest possible time. The Presiding Judge must take particular care to arrange for prompt service of a copy of the plaint, a copy of the application for injunction together with copy of affidavit filed in support of the application and copies of documents on which the applicant relies upon the opposite party and to bring the matter to hearing as early as possible.

Rule 165 Of JCCR- If the opposite party evades service of notice or makes unreasonable delay in showing cause, the Court may find it necessary to make an appropriate order of injunction. On the other hand, an interim injunction should be dissolved if the plaintiff makes willful default in depositing the process fee, causing the service of notice on the opposite party or otherwise prosecuting the matter with diligence.

Rule 166 Of JCCR- When an ex-parte injunction has been granted the Court shall make an endeavor to finally dispose of the application within thirty days from the date, on which the ex-parte injunction was granted, and where it is unable so to do it shall record its reasons for such inability.

Rule 167 Of JCCR- When an interlocutory injunction or an interim restrain order applied for, the Court may require the plaintiff, as a condition of interference in his favour to enter into an undertaking to abide by any order of the Court may make as to damages, or in some cases it may require the defendant to enter into terms as a condition of withholding an interlocutory injunction.

Rule 168 Of JCCR- When an injunction is granted the greatest care should be taken to state exactly and very clearly what it permits and what it prohibits. When a series of acts of different kinds are sought to be restrained, the order granting an ex-parte injunction should embrace only the acts regarding which such an order is really needed.

Rule 169 Of JCCR- Dissolution of an ex-parte injunction on the ground of mis-statement or concealment of material facts will not operate as a bar to a fresh application for another injunction on the merits.

Scope- As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the Court in the grant of ex parte injunction are:

(a) Whether irreparable or serious mischief will ensue to the plaintiff.

(b) Whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve.

(c) The Court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented.

(d) The Court will consider whether the plaintiff had acquiesced for some time and in such circumstances it will not grant ex parte injunction.

(e) The Court would expect a party applying for ex parte injunction to show utmost good faith in making the application.

(f) Even if granted, the ex parte injunction would be for a limited period of time.

(g) General principles like prima facie case, balance of convenience and irreparable lose would also be considered by the Court. Union of India v. Era Educational Trust, AIR 2000 SC 1573:

Order 39, Rule 3 of Code of Civil Procedure provides that where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay. M/s Ashok Prakashan v. Sunil Kumar, AIR 2006 All. 284:

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

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(XIII) Disobedience or breach of injunction (Order 39 Rule 2A)

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

(2) No attachment made under this Rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto.

Scope- Rule 431(xiii) of JCCR provides that Proceedings under Order XXXIX Rule 2(a) be registered as a Miscellaneous Judicial cases.

Application for disobedience will not lapse on disposal of the main case. Kishore Chandra Jagadev Ray v. Puri Municipality & Anr., AIR 1988 Ori. 284:

In case of disobedience of injunction order, the Courts are competent enough to issue appropriate direction to District Administration/Police authorities to ensure compliance of its

order. Sree Ram v. State of Uttar Pradesh & Ors., AIR 2011 All. 72.

An application would be maintainable only in case of violation of an order of injunction passed under Rules 1 or 2. The power under the provision is punitive in nature, akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. The person complaining of disobedience or breach has, therefore, to clearly make out beyond any doubt that there was an injunction or order directing the person against whom the application is made, to do or desist from doing some specific thing or act and that there was disobedience or breach of such order. The Court cannot construe the order in regard to which disobedience/breach is alleged, as creating an obligation to do something which is not mentioned in the 'order', on surmises suspicions and inferences. The power under Rule 2A should be exercised with great caution and responsibility. Food Corporation of India v. Sukh Deo Prasad, 2009(2) CCC 197 (SC).

Provisions of Order 39, Rule 2A of the Code are quasi criminal in nature and since a person violating the injunction order passed by the Civil Court or otherwise disregarding the same is liable to be detained in civil prison, therefore the aforesaid violation or disregarding of injunction order has to be proved beyond all reasonable doubts by the person complaining of such violation. The standard of proof required in such a case would no doubt, be as is required in a criminal case since the said act of the violator itself entails his detention in civil imprisonment. Lakhbir Singh v. Harpinder Singh, AIR 2004 P&H 126

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(XIV) Appointment of Receivers(Order 40 Rule 1)—

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

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver; and

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

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

Scope-Order 40 Rule 1 of the Code of Civil Procedure expressly provides for the appointment of a receiver over a property whether before or after the decree and the Court may by an order confer on the receiver all powers of realisation, management, protection, preservation and improvement of the property. Order 40 Rule 1(d) specifically provides for realisation and the words "or such of those powers as the Court thinks fit" appearing in Order 40 Rule 1(d) ought to be interpreted in a manner so as to give full

effect to the legislative intent in the matter of conferment of powers by the Court to, preserve and maintain the property through the appointment of a receiver. Needless to record here that there is existing a power which is totally unfettered in terms of the provisions of the statute. Law Courts, however, in the matter of appointment of a receiver through a long catena of cases, imposed a self-imposed restriction to the use of discretion in a manner which is in consonance with the concept of justice and to meet the need of the situation - "unfettered" does not and cannot mean unbridled or unrestrictive powers and though exercise of discretion is of the widest possible amplitude, but the same has to be exercised in a manner with care, caution and restraint so as to subserve the ends of justice. The law Courts are entrusted with this power under Order 40 Rule 1 so as to bring about a feeling of securedness and to do complete justice between the parties. The language of Order 40 thus being of the widest possible import, any restriction as regards the power of the Court to direct a receiver to effect a sale of immovable property prior to the decree does not and cannot arise. Order 40 Rule 1 and various sub-Rules there under unmistakably depict that the Court has unfettered powers in the event the Court feels that the sale of property would be just and convenient having due regard to the situation of the matter. The pronouncement of the Full Bench as regards creation of an embargo in regard thereto seems to be rather too wide. The Court must consider whether special interference with the possession of the defendant is required or not and in the event the Court comes to such a conclusion that there is likelihood of the immovable property in

question being dissipated or some such occurrences as is detailed more fully hereinafter or party initiating the action suffering irreparable loss, unless the Court gives appropriate protection, there should not be any hesitation in directing the sale of immovable property. Industrial Credit and Investment Corporation of India Ltd. v. Karnataka Ball Bearings Corpn. Ltd., AIR 1999 SC 3438:

Under Order 40, Rule 1, a receiver is an officer or representative of the Court and he functions under its directions. The Court may, for the purpose of enabling the receiver to take possession and administer the property, by order, remove any person from the possession or custody of the property. Sub-r. (2) of Rule 1 of the Order limits that power in the case of a person who is not a party to the suit, if the plaintiff has not a present right to remove him. But when a person is a party to the suit, the Court can direct the receiver to remove him from the possession of the property even if the plaintiff has not a present right to remove him. Hiralal Patni v. Loonkaram Sethiya, AIR 1962 SC 21

Remuneration (Order 40 R 2)—The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

Duties (Order 40 R 3)—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.

Enforcement of receiver's duties (Order 40 R 4)—Where a receiver—

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs, or

(c) occasions loss to the property by his 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.

When Collector may be appointed receiver (Order 40 R 5)——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.

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Chapter III

EXECUTION OF DECREE AND ORDERS

The expression "execution" simply means the process for enforcing or giving effect to the judgment of the Court. The principles governing execution of decree and orders are dealt with in Sections 36 to 74 and Order 21 of the Civil Procedure Code and Rule113 to 137 of JCCR.

The classification of Order 21 is as follows-

(I) Applications for execution

(II) Stay of executions.

(III)Mode of executions.

- **Decree for the payment of money**
- **Decree related to Specific movable property**
- **Decree for specific performance for restitution of conjugal rights or for an injunction executed.**
- **Decree for execution of document, or endorsement of negotiable instrument**
- **Decree for execution of Immovable Property**

(IV)Adjudication of the claims and objections between the parties to the suit (Sec.47 of C.P.C.)

(V)Resistance to delivery of possession (Order 21 Rules 97 to 106)

(I) Application for execution

Application for execution can be made by

- The decree holder himself.
- His legal representative if the decree holder is dead.
- Any person claiming under the decree holder.
- Transferee of Decree holder who has given notice to transferor and judgment debtor.

Application for Execution of decree **can be made only against** the judgment debtor if he is alive or against legal representatives of judgment debtor.

A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

The decree of a Court against which no appeal has been made shall be executed and Where a decree is reversed, modified on appeal, the only decree capable of the execution is the appellate decree.

After the decree holder files an application for execution of decree, the **executing Court can implement execution** Subject to such conditions and limitations as may be prescribed-

(a) by delivery of any property specifically decreed;

(b) by attachment and sale or by the sale without attachment of any property;

(c) by arrest and detention in prison for such period not exceeding the period specified in Section 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

Order 21 Rule 10 of C.P.C. Provides that —Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions herein before contained to another Court then to such Court or to the proper officer thereof.

Written application(Order 21 Rule 11)—Save as otherwise provided by sub-Rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely :—

(a) the number of the suit;

(b) the names of the parties;

(c) the date of the decree;

(d) whether any appeal has been preferred from the decree;

(e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has

been made between the parties subsequently to the decree;

(f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;

(g) the amount with, interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;

(h) the amount of the costs (if any) awarded;

(i) the name of the person against whom execution of the decree is sought; and

(j) the mode in which the assistance of the Court is required whether,—

(i) by the delivery of any property specifically decreed;

(ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-Rule(2) may require the **applicant to produce a certified copy of the decree**.

Scope- Jurisdiction - Under Order 21 Rule 10 of CPC, an application for execution should be made to the Court "which passed the decree". Therefore, the value of the property sold at the execution is more than Rs. 25,000 does not take away the jurisdiction of the trial Court. The Court held that the value of the property sold in execution is not relevant to determine the jurisdiction of the execution Court. Desh Bandhu Gupta v. N. L. Anand and Rajinder Singh, 1994 (1) SCC 131. In Banwar Lal v. Prem Lata, (1990) 1 SCC 353

Decree passed by the Civil Court relating to the building which was exempted from the provisions of Central Provincial Bear Letting of House and rent Control Order, 1949 by notification. Subsequently the exemption notification set aside by the Court. Held, the decree already passed will not be affected and would

remain executable. Vide notification, certain area was exempted from operation of the Rent Act and therefore, eviction decree against the tenant was passed by the Civil Court. However, later on the notification, exempting certain categories of building was struck down being violative of Article 14. When the decree was sought to be executed, the same was objected by the tenant. The objections of the tenant, held not tenable. The jurisdiction of the Court will have to be decided on the date of decree and at that time the exemption notification was enforced and therefore, the said decree remained unaffected by the notification having been struck down, Rangao Rao v. Kamal Kant, 1995 Supp.(l) SCC 271:

RES JUDICATA IN EXECUTION PROCEEDINGS- Essential conditions are that the previous order must be between the two parties and the matter should be heard and decided by the Court. Execution application of the decree for possession filed against sub-tenant, was dismissed on the ground that he was not party to the suit in which decree was passed. Subsequent application for execution of the decree against the tenant, will not be barred. Ameena Amma v. Sundaram Pillai, (1994) 1 SCC 743.

Defective execution application- Decree-holder to be given an opportunity to remove the defect. Order of dismissal only if defect not removed. M/s. T.A. Darbar and Company and Ors. v. Union Bank of India, AIR 1994 Bom. 217.

COURT FEE FOR RESTITUTION APPLICATION- Application for restitution under Section 144, C.P.C. is an application for

execution of the decree. The first Appellate Court has jurisdiction to hear the appeal arising from the order passed under Section 144, C.P.C. As the application for restitution under Section 144, C.P.C. is an application for execution of the decree, no ad velorem Court-fee is required on the value of the suit land or mesne profits except the required Court-fee for the purpose of execution of decree or order. Ramesh Ch. Deb v. Barindra Kr. Chakraborthy, AIR 1997 Gau. 24

Limitation - Application filed about 12 years after passing of decree against the debtor under Presidency Towns Insolvency Act. The decree signed by the judge 10 years after passing of the decree. Nothing was on the record that application made within prescribed limitation. Therefore, the application was not maintainable, In Re: National Small Industries Ltd., AIR 2000 Cal. 167.

The execution petition filed in the executing Court to execute the decree passed by the High Court, was pending. The Supreme Court had stayed the said execution proceedings pending disposal of the Civil Appeal. After the disposal of the appeal, there was no impediment or bar to continue the execution proceedings on the application moved by the appellants to proceed with the execution. Krishna Gopal Chawla & Ors. v. State of U.P. & Anr., 2001 (7) Supreme 511.

Application for execution by Joint decree-holders (Order 21 Rule 15)

(1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this Rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

Scope- When a decree is passed in favour of a joint family, the same has to be treated as a decree in favour of all the members of the joint family in which event it becomes a joint decree. Where a joint decree for actual possession of immovable property is passed and one of the coparceners assigns or transfers his interest in the subject-matter of the decree in favour of the judgment-debtor, the decree gets extinguished to the extent of the interest so assigned and execution could lie only to the extent of remaining part of the decree. In case where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. It is no doubt true that the purchaser of the undivided interest of a coparcener in an immovable property cannot claim to be in joint possession of that property with all the other

coparceners. However, in case where he is already in possession of the property cannot claim to be in joint possession of the property, unless the rights are appropriately ascertained, he cannot be deprived of the possession thereof for a joint decree-holder can seek for execution of a decree in the whole and not in part of the property. A joint decree can be executed as a whole since it is not divisible and it can be executed in part only where the shares of the decree-holders are defined or those shares can be predicted or the shares of the decree-holders and dispute between joint decree-holders is foreign to the provisions of Section 47 CPC. Order 21, Rule 15 enables a joint decree-holder to execute a decree in its entirety but if whole of the decree cannot be executed, this provision cannot be of any avail. In that event also, the decree-holder will have to work out his rights in an appropriate suit for partition and obtain necessary relief thereto. Jagdish Dutt v. Dharam Pal, AIR 1999 SC 1694.

When decree is passed in favour of three brothers jointly it can be executed in favour of any of the brother for the benefit of all of them. It is true that under the Hindu Succession Act interest of the heirs are specific but land remained joint. Thus, all the three brothers who were sons of original plaintiff have equal interest in the land which have remained joint. Land is thus, joint property of the three brothers even though it may not be joint family property. Once a decree is in favour of the three brothers jointly in respect of a piece of land where each one has equal interest, there is no scope for separate execution by each brother in respect of recovery of possession of land. Accordingly, any of the brothers in whose favour decree is executed can execute the

decree for benefit of all under Order 21, Rule 15, C.P.C. Sanyasi Padhy & Ors. v. Divakara Rao, AIR 1993 Ori. 46.

Where decree had been passed in favour of more than one plaintiffs and application for execution filed by one of the decree-holder, the application was held to be maintainable. The contention that one of the decree-holders was not competent to file the execution application was rejected. **Sri Kant. v. Banasraj Singh, AIR 1986 All 5: 1985 All CJ 329.**

Right of survivor of decree-holder to execute decree-Where two decree-holders joined in execution application, one of them died, the surviving decree holder can execute the decree on his own behalf and on behalf of legal representatives of the deceased decree-holder. Section 214 of the Succession Act is not attracted in such a case. M.L. Sreedharan v. Pattieri Kumaran, A.I.R. 1981 Ker. 51

Non-applicability of the Rule - Where the firm has been dissolved, the authority of partner to give a valid discharge on behalf of the firm clashes with the dissolutions of the firm and he can, therefore no longer maintain the execution application in his name alone. All the partners of the dissolved firm ought to have been joined in making the execution application so as to give the judgment-debtor an effective and complete discharge as provided in Section 47 of the partnership act. Kalloo v. Board of Revenue, A.I.R. 1983 All. 272.

Application for execution by transferee of decree(Order 21 Rule 16)—Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-

holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

Explanation. —Nothing in this Rule shall affect the provisions of Section 146 and a transferee of rights in the property, which is the subject-matter of the suit, may apply for execution of the decree without a separate assignment of the decree as required by this Rule.

Scope- A suit for specific performance was decreed by 1st appellate Court. During pendency of appeal, plaintiff-appellant had died and legal representatives as also assignee-appellant were brought on record. High Court set aside the decree in second appeal. Legal representatives of plaintiff did not take any step to challenge judgment of High Court. However, the appellant-assignee took appeal to Supreme Court. As regards locus standi of appellant to file appeal, the Supreme Court found that no such objection had been raised before the High Court despite liberty, hence, it could not be raised before the Supreme

Court. The Supreme Court decreed the suit. It was not open to Executing Court to consider question whether there was a valid assignment in favour of the appellant once appeal filed by appellant had been allowed by Supreme Court. Saraswati Devi Gupta v. Sudha Rani 2006 (1) SCC 725.

Transferee of the right in the property can file application for execution of the decree. The explanation to Rule 16 permits the transferee to apply for execution of the decree without separate assignment. When once a person steps into the shoes of the decree-holder and becomes the holder of the decree, he is entitled to take all the incidental applications including the one under Order 21, Rule 97, C.P.C**.,** Gnanasundraram & Anr. v. Murugesa Naicker, AIR 1989 Mad. 343.

Procedure on receiving application for execution of decree (Order 21 Rule 17)—(1) On receiving an application for the execution of a decree as provided by Rule 11, sub-Rule (2), the Court shall ascertain whether such of the requirements of Rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court shall allow the defect to be remedied then and there or within a time to be fixed by it.

(1-A) If the defect is not so remedied, the Court shall, reject the application

Provided that where, in the opinion of the Court, there is some inaccuracy as to the amount referred to in clauses (g) and (h) of sub-Rule (2) of Rule 11, the Court shall, instead of rejecting the application, decide provisionally (without prejudice to the right of

the parties to have the amount finally decided in the course of the proceedings) the amount and make an order for the execution of the decree for the amount so provisionally decided.

(2) Where an application is amended under the provisions of sub-Rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this Rule shall be signed or initialed by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application:

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

Scope-It is no doubt correct that the rules of procedure are handmaids of justice and ordinarily the provisions of Order 21, Rule 17 are to be interpreted liberally and an amendment to the execution application should be permitted. It is further not disputed that an amendment when permitted dates back to the original filing of the application. The facts of the present case, however, do not warrant the liberal approach indicated by us. The execution application was filed in the Court on May 8, 1974 under the signatures of a dead person and as such there was no application in the eyes of law before the Court. No notice of the said application was given to the appellant and warrant of

possession was issued on the same date. The order which was passed in violation of the Rules of natural justice was void and was rightly set aside by the High Court. It was only after the remand of the case by the high Court that the appellant got an opportunity of filing objections before the executing Court which he did on Aug. 13, 1981. Even on the date when the appellant filed objections before the executing Court the execution-application bore the signatures of late r and no other person had signed or verified the same. It is thus obvious that even in the year 1981 when the executing Court took notice of the execution-application after remand from the high Court there was no signed application before the said Court on behalf of the decree- holders. No attempt, not even a prayer, was made before the executing Court for the amendment of the application. It was only on Sept. 29, 1984 after the dismissal of appellant's objections that the executing Court suo motu permitted the amendment of the application. The procedure, on the face of it was violative of the provisions of Rules 11 And 17 of the CPC, Jiwani v. Rajmata Basantika Devi, AIR 1994 SC 1286.

Schedule of property sought to be delivered which were not incorporated in the execution petition. Held, amendment can be allowed by the Court, Ravindran & Anr. v. Dandayudhan & Ors., AIR 1988 Ker. 32

Affidavit by judgment-debtor disclosing some property, filed after filing of execution application. Amendment sought to specify the particulars of the property. Held, in the circumstances of the case amendment and consequent prayer can be allowed. Rajendra

Prasad Agarwalla & Ors. v. Allahabad Bank & Ors., AIR 1987 Cal. 262.

Section 39 does not authorise the Court to execute the decree outside its jurisdiction but it does not dilute the other provisions giving such power on compliance with the conditions stipulated in those provisions. Thus, the provisions, such as, Order 21, Rule 3 or Order 21, Rule 48 which provide differently, would not be affected by Section 39(4) of the Code. Salem Advocate Bar Association, T.N. vs. Union of India 2005 (6) S.C.C. 344. There cannot be any dispute over the proposition that the Court which passed the decree is entitled to execute the decree. This is clear from Section 38 of the Code which provides that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 42 of the Code indicates that the transferee Court to which the decree is transferred for execution will have the same powers in executing that decree as if it had been passed by itself. A decree could be executed by the Court which passed the decree so long as it is confined to the assets within its own jurisdiction or as authorised by Order 21, Rule 3 or Order 21, Rule 48 of the Code or the judgment debtor is within its jurisdiction, if it is a decree for personal obedience by the judgment debtor. But when the property sought to be proceeded against, is outside the jurisdiction of the Court which passed the decree acting as the executing Court, there was a conflict of views earlier, some Courts taking the view that the Court which passed the decree and which is approached for execution cannot proceed with execution but could only transmit

the decree to the Court having jurisdiction over the property and some other Courts taking the view that it is a matter of discretion for the executing Court and it could either proceed with the execution or send the decree for execution to another Court. But this conflict was set at rest by Amendment Act 22 of 2002 with effect from 1.7.2002, by adopting the position that if the execution is sought to be proceeded against any person or property outside the local limits of the jurisdiction of the executing Court, nothing in Section 39 of the Code shall be deemed to authorise the Court to proceed with the execution. In the light of this, it may not be possible to accept the contention that it is a matter of discretion for the Court either to proceed with the execution of the decree or to transfer it for execution to the Court within the jurisdiction of which the property is situate, Mohit Bhargava v. Bharat Bhushan Bhargava, 2007 (4) SCC 795.

Notice to show cause against execution in certain cases(Order 21 Rule 22)—(1) Where an application for execution is made—

(a) more than two years after the date of the decree, or

(b) against the legal representative of a party to the decree or where an application is made for execution of a decree filed under the provisions of Section 44A, or

(c) against the assignee or receiver in insolvency, where the party to the decree has been adjudged to be an insolvent,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show

cause, on a date to be fixed, why the decree should not be executed against him

Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution if the application is made within two years from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-Rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

Procedure after issue of notice(Order 21 Rule 23)—(1) Where the person to whom notice is issued under Rule 22 does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

Scope - The idea of issuing of notice under Order 21 Rule 22 is to ascertain whether the averments as to the amount being claimed in the execution application are true or incorrect. Besides, even if

the amount was due, the judgment-debtor could have paid it and he was deprived of this opportunity to clear off dues, if any, under the decree. It is only after the service of notice under Order 21 Rule 22 of the Code and failure of the judgment-debtor to pay the decretal amount, as claimed, that the decree-holder takes recourse to proceedings under Order 21 Rule 54 of the Code. It will be noticed that sub-Rule (1) of Rule 54 of Order 21 of the Code contemplates an order of prohibition to be served on the judgment-debtor from transferring or charging the property in any way first if the property sought to be sold is immovable property. This is for the benefit of the decree-holder. Even at this stage if the judgment-debtor had notice of attachment, he could pay the balance decretal amount and thereafter attachment would either not be effected and if already effected would be vacated. Sub-Rule (1-A) contemplates that this order shall also require the judgment-debtor to attend Court on a specified date, to take notice of the date to be fixed for settling the terms of the proclamation of sale provided under Rule 66 of Order 21 of the Code. Satyanarain Bajoria v. Amnarain Tibrewal, AIR 1994 SC 1583

Dispensing with the notice under Order 21, Rule 22(1) can be resorted to only if the Court considered that issue of such notice would cause unreasonable delay or would defeat the ends of justice. But dispensing with the notice cannot be axiomatic since there is nothing on record to show that the Executing Court satisfied that issuance of notice causes unreasonable delay or would defect the ends of justice. Therefore, the order straight away issuing delivery warrant for delivery of the property without

following the mandatory procedure suffers from illegality in exercise of its jurisdiction and is liable to be set aside, M. Sheelamma v. B. Alibert S/o Anthony, AIR 2006 A.P. 209

Order 21, Rule 22 culminates in end of one stage before attachment of the property can take place in furtherance of execution of decree. The proceedings under Order 21, Rule 23 can only be taken if the executing Court either finds that after issuing notice, under Section 21, Rule 21, the judgment-debtor has not raised any objection or if such objection has been raised, the same has been decided by the executing Court. Sub-Rule (1) as well as sub-Rule (2) under Order 21, Rule 22, operates simultaneously on the same field. Sub-Rule (1) operates when no objection is filed. Then the Court proceeds and clears the way for going to the next stage of the proceedings namely attachment of the property and if the Court finds objections on record then it decides the objections in the first instance and thereafter clears the way for taking up the matter for attachment of the property if the objections have been overruled. Whether the order is made under sub-Rule (1) or sub-Rule (2), it has the effect of determining the preliminary stage before the attachment process is set in motion. In this background, the order of the Court to proceed with attachment on finding that no objection has been raised also operates as an order deciding the preliminary stage of the execution proceedings and operates as if the judgment-debtor has no objection to file. If thereafter, the judgment-debtor wants to raise an objection in the same proceedings in the absence of any modification of order passed under Order 21, Rule 22 sub-Rule (1) or (2), he has to take recourse to get rid of the order by

way of appeal. There is no dispute and it has not been agitated that the order for proceeding by the judgment under Order 21, Rule 22 amounts to a decree under Section 47 of CPC and it is appealable as a decree i.e. to say it is not an appeal against the interim order but an appeal against the decree which is provided against the final order. It means that at the different stages of the execution orders passed by the executing Court have attained finality unless they are set aside by way of appeal before the higher forum. Otherwise they bind the parties at the subsequent stage of the execution proceedings so that the smooth progress of execution is not jeopardised and the stage which reached the finality by dint of various orders of the Order 21 operates as res judicata for the subsequent stage of the proceedings. Since the order passed at different stage itself operates as a decree and is appealable as such, the same cannot be challenged in appeal against subsequent orders also, because appeal against an order passed under Order 21, Rule 22 does not amount to appeal against order at initial stage, but amounts to a decree finally determining the question. That is why no appeal against orders made under Order 21 has been provided under Order 43. In this background, where a judgment-debtor has an opportunity to raise an objection which he could have raised but failed to take and allowed the preliminary stage to come to an end for taking up the matter to the next stage for attachment of property and sale of the property under Order 21, Rule 23 which fell within the above principle, the judgment-debtor thereafter cannot raise such objections subsequently and revert back to earlier stage of proceedings unless the order resulting in termination of

preliminary stage which amounts to a decree is appealed against and order is set aside or modified. The principles of res judicata not only apply in respect of separate proceedings but the general principles also apply at the subsequent stage of the same proceedings also and the same Court is precluded to go into that question again which has been decided or deemed to have been decided by it at an early stage. Barkat Ali v. Badri Narain (d) by LRs, AIR 2008 SC 1272:

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(II) Stay of executions

When Court may stay execution(Order 21 Rule 26)—(1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Power to require security from, or impose conditions upon, judgment-debtor.—Before making an order to stay execution, or for the restitution of property or the discharge of the judgment-debtor, the Court shall require such security from, or impose such condition upon, the judgment-debtor as it thinks fit.

Stay of execution pending suit between decree-holder and judgment-debtors(Order 21 Rule 29)—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 to security or otherwise, 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.

Scope- Rule 26(1) only relates to granting of limited stay of execution by execution Court and for only specific purpose as to enable the judgment-debtor to apply for stay order from the appellate Court or from the trial Court which passed the decree for suitable orders. Kum. R. Komala v. Mohammed Iqbal, AIR 1999 Kant, 337

A perusal of or. 21, R. 29, would reveal that there should be simultaneously two proceedings in one Court. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the instance of the judgment-debtor against the decree-holder. It is not enough that there is a suit pending by the judgment-debtor it is further necessary that the suit must be against the holder of a decree of such Court. The words “such Court” are important. “Such Court” means in the context of that Rule the Court in which the suit is pending. In other words, the suit must be one not only pending in that Court but also one against the holder of a decree of that Court. It is true that in appropriate cases a Court may grant an injunction against a party not to prosecute a proceeding in some other Court. But ordinarily Courts, unless they exercise appellate or revisional jurisdiction, do not have the power to stop proceedings in other Courts by an order directed to such Courts. For the specific provisions of law are necessary.

Rule 29 clearly shows that the power of the Court to stay execution before it flows directly from the fact that the execution is at the instance of the decree-holder whose decree had been passed by that Court only. If the decree in execution was not passed by it, it had no jurisdiction to stay the execution. Shaukat Hussain alias Ali Akram v. Smt. Bhuneshwari Devi (d) by LRs. AIR 1973 SC 528

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(III)Mode of executions

Decree for payment of money(Order 21 Rule 30)—Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

Scope - Where mode of recovery had been prescribed by Court granting decree, Executing Court cannot alter same.— Where though in the money decree, the mode of recovery had been prescribed by the Court granting decree, the Executing Court altered the manner of recovery of decretal amount, it was held that order of the Executing Court was erroneous and was not sustainable**.** Radhey Shyam Gupta v. Punjab National Bank, AIR 2009 SC 930.

Option to apply under Order 21, Rule 30, for execution of a decree simultaneously against both persons and property of judgment-debtor is subject to exercise by Court of judicial discretion vested in it under Order 21, Rule 21—Although, ordinarily the decree holder has an option to choose any particular mode for execution of his money decree, it will not be correct to say that the Court has absolutely no discretion to place any limitation as to the mode in which the decree is to be executed. The option to apply under Order 21, Rule 30, CPC for execution of a decree simultaneously against both the persons and the property of the judgment-debtor is subject to exercise by the Court of judicial discretion vested in it under Order 21, Rule

21, CPC. Mahadeo Prasad Singh v. Ram Lochan, AIR 1981 SC 416

Decree-holder does not have liberty or facility to divide liability among judgment-debtors and choose to recover part thereof from individual judgment-debtors— The concept of joint and several liability implies that the decree-holder can choose to proceed against all or any of the persons so held liable and, the discharge of the liability by one, would, ensure to the benefit of all others. Conversely, the satisfaction reported by the decree-holder in respect of one of the judgment-debtors must hold good for the others also. It is impermissible to divide the liability between such judgment-debtors. The liabilities under decree would subsist against all, till it is discharged but if one of them is discharged completely, rest of them stand on the same footing. The decree-holder does not have the liberty or the facility to divide the liability among the judgment-debtors and choose to recover part thereof from the individual judgment-debtors. Damera Narsimha Reddy v. Syed Ibrahim, AIR 2005 A.P. 482

EXECUTION BY MORE THAN ONE METHOD - Composite money decree being both personal against all the defendants including guarantor as well as mortgaged decree without limitation of execution. If the composite decree is a decree which is both a personal decree as well as mortgage decree, without any limitation on its execution, the decree holder, in principle cannot be forced to first exhaust the remedy by way of execution of mortgaged decree alone and hold that only if the amount recovered is insufficient, he can be permitted to take recourse to

execution of the personal decree. State Bank of India v. M/s. Indexpart Registered & Ors., AIR 1992 SC 1740.

Decree for specific movable property(Order 21 Rule 31)—(1) Where the decree is for any specific movable, or for any share in a specific movable, it may be executed by the seizure, if practicable, of the movable or share,and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-Rule (1) has remained in force for 3 three months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-

holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of three months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease .

Scope - NATURE OF PROCEEDINGS - Direction to break open the lock would be a formal order and procedural one to give effect to the decree which had become final. Therefore, it was not a case

to be decided, nor a decree at all. Revision against such order is not maintainable. Order to break open the lock, cannot be a decree at all. The wordings used in any case decided ordering break open is certainly not a case to be decided and it is not a decree at all. It is only a formal procedural order to give effect to a decree for possession already passed and which decree has become final. So long as the decree remains, the executing Court to bound to direct delivery of possession and if the judgment debtor thinks that he can avoid delivery of possession by putting a lock over the premises, it is like trying to hide from the sun within the umbrella. The Court cannot see method being adopted to nullify the decree passed and nullify the delivery warrant. Smt. Appiamma v. Lawrance D'Souza, AIR 2000 Kant. 246.

Decree for specific performance for restitution of conjugal rights, or for an injunction (Order 21 Rule 32)—(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the

detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-Rule (1) or sub-Rule (2) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Explanation.—For the removal doubts, it is hereby declared that the expression "the act required to be done" covers prohibitory as well as mandatory injunctions.

Scope – No doubt the wording as framed in Order 21 Rule 32(1) would indicate that in enforcement of the decree for injunction a

judgment-debtor can either be put in civil prison or his property can be attached or both the said courses can be resorted to. But sub-Rule (5) of Rule 32 shows that the Court need not resort to either of the above two courses and instead the Court can direct the judgment-debtor to perform the act required in the decree or the Court can get the said act done through some other person appointed by the Court at the cost of the judgment-debtor. Thus, in execution of a decree the Court can resort to a threefold operation against disobedience of the judgment-debtor in order to compel him to perform the act. But once the decree is enforced, the judgment-debtor is free from the tentacles of Rule 32. A reading of that Rule shows that the whole operation is for enforcement of the decree. If the injunction or direction was subsequently set aside or if it is satisfied, the utility of Rule 22 gets dissolved. But the position under Rule 2-A of Order 39 is different. Even if the injunction order was subsequently set aside, the disobedience does not get erased. It may be a different matter that the rigour of such disobedience may be toned down if the order is subsequently set aside. For what purpose is the property to be attached in the case of disobedience of the order of injunction? Sub-Rule (2) provides that if the disobedience or breach continues beyond one year from the date of attachment, the Court is empowered to sell the property under attachment and compensate the affected party from such sale proceeds. In other words, attachment will continue only till the breach continues or the disobedience persists subject to a limit of a one-year period. If the disobedience ceases to continue in the meanwhile, the attachment also would cease. Thus, even under

Order 39 Rule 2-A, the attachment is a mode to compel the opposite party to obey the order of injunction. But detaining the disobedient party in civil prison is a mode of punishment for his being guilty of such disobedience. Samee Khan v. Bindu Khan, AIR 1998 SC 2765

A suit for mandatory injunction seeking direction against a licensee to vacate the premises is maintainable in cases where the licence has been terminated and suit for possession is not required to be filed because the licensee after termination of his licence looses all rights, title or interest over the suit property. Such decrees are executable under Order 21, Rule 32. Gurucharan Singh and Anr. v. Gurudwara Shri Singh Sabha (Regd.), AIR 2004 P&H 270.

Application filed by the J.D. challenging executability of the decree was rejected. It was found that while passing the decree, the Court directed the J.D. to leave possession within two months failing which the D.H. will be entitled to get possession through the Court. Therefore, execution will be maintainable. In execution of a decree the Court can resort to a three fold operation against disobedience of the judgment debtor in order to compel him to perform the act. But once the decree is enforced, the judgment-debtor is free from the tentacles of Rule 32. A reading of that Rule shows that the whole operation is for enforcement of the decree. If the injunction or direction was subsequently set aside or if it is satisfied the utility of Rule 32 gets dissolved. In view of what has been decided by different High Courts and the Apex Court, it is clear that in execution of the decree the Court can resort to a three fold operation against

disobedience of the judgment debtor in order to compel him to perform the act. Two of the remedies are provided for in Order 21, Rule 32, sub-Rule (1) and the third remedy is provided in Order 21, Rule 32, sub-Rule (5) of the Civil Procedure Code. Nilamani alias Niranjan Biswal v. Krishna Kumar Kamani, 2006 (4) CCC 246 (Ori.): AIR 2006 Ori 182

ORDER FOR DETENTION IN CIVIL PRISON-Where the judgment debtor violates a decree for permanent injunction; the Court is competent to order his detention in civil prison. V.S. Alwar Ayyangar v. Guruswamy Thewar, A.I.R. 1981 Mad. 354.

Judgment debtor can be sent to civil prison not by way of punishment but only for enforcement of decree when decree has been wilfully disobeyed. State of Assam v. Subrata Kar, 2004(4) CCC 135 (Gau.).

Decree for execution of document, or endorsement of negotiable instrument—(Order 21 Rule 34)---(1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this Rule may be in the following form, namely :—

"C. D., Judge of the Court of,(or as the case may be), for A. B., in a suit by E. F against A. B.",

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) (a) Where the registration of the document is required under any law for the time being in force, the Court, or such officer of the Court as may be authorized in this behalf by the Court, shall cause the document to be registered in accordance with such law.

(b) Where the registration of the document is not so, required, but the decree-holder desires it to be registered, the Court may make such order as it thinks fit.

(c) Where the Court makes any order for the registration of any document, it may make such order as it thinks fit as to the expenses of registration.

Scope - **SERVICE OF DRAFT SALE-DEED**- Order 21 Rule 34 provides the procedure for execution of documents pursuant to a decree. Where a decree is for the execution of document the decree-holder may prepare a draft of the document in d

accordance with the terms of the decree and deliver the same to the Court. Thereupon, the Court shall cause the draft to be served on the judgment-debtor together with a notice requiring his objections, if any, to be made out within time as the Court fixes in this behalf. Where the judgment-debtor objects to the draft, his objections shall be stated in writing and then determined. The draft shall be approved or altered consistently with the finding arrived at by the Court. In the present case the plaintiff decree-holders pointed out that the defendant judgment-debtors were aware of the contents of the draft sale deed. The fact remains that the draft sale deed accompanied by a notice requiring objections to be made by a judgment-debtor as provided by sub-Rule (2) of Rule 34 of Order 21 CPC was not caused to be served by the Court. The record also reveals the judgment-debtors repeatedly insisting, may be dogmatically, on draft sale deed being delivered to them enabling objections being filed. There is no determination by the executing Court that the immovable property as delineated and demonstrated in the map accompanying the draft sale deed was the property forming the subject-matter of the agreement to sell and the decree. Inasmuch as the possession is yet to be taken by the plaintiff decree-holders, this aspect can still be taken care. When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the Court record caused by overlooking of provisions contained in Order 7, Rule 3 and Order 20, Rule 3 CPC is capable of being cured. After all a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 CPC depending on the facts

and circumstances of each case - which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under Section 152 CPC by the Court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent Court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission. In the facts and circumstances of the present case, it would be more appropriate to invoke Section 47 CPC. Pratibha Singh v. Shanti Devi Prasad. AIR 2003 SC 643.

Decree for immovable property (Order 21 Rule 35)—(1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building on enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any

woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

Decree for delivery of immovable property when in occupancy of tenant(Order 21 Rule 36)—Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

Scope- Decree for delivery of immovable property- Land in dispute consisting of consolidation holding and pre-empted holdings capable of being extricated from conglomerated holding. Held, relief of actual possession cannot be denied. This fact can be however left to the Executing Court, held further that the petitioner can claim actual possession including symbolic possession. Harnek Singh v. Harbux Singh, AIR 1990 SC 1978

The construction put up by the defendant/judgment-debtor whether before or after filing of the suit, is liable to be removed if there is a prayer for possession. When there is a decree for delivery for vacant possession which would mean and include, delivery after removing all the structures or anything in the suit property and therefore, the plaintiff/decree holder is entitled to take delivery of possession after removal of any manner of

construction or structures in the suit property. Kannu Gounder v. Natesa Gounder, AIR 2005 Mad. 31

Where physical possession of the entire property not given to the D.H. in the execution and the process server giving report about the fact that there was lock in the room and J.D. refused to handover the possession. The decree therefore executed piecemeal and possession given of part of immovable property. Therefore fresh warrant of possession can be issued. LRs of Ram Kumar v. LRs. of Gulam Rasool, AIR 1999 Raj. 308

Execution of decree for possession, taking objection that he was entitled to protection under Rent Act. It was found that the objection was raised by him in the Trial Court and was rejected. Therefore, the same objection cannot be allowed to be raised during the execution proceedings. P.V Jose v. Kanickammal (dead) by LRs, AIR 2000 S.C. 2688

POLICE AID FOR REMOVAL OF ENCROACHMENT- Though O. 21 C.P.C. does not contain any provision, for granting police aid but as the executing Court is conferred with power to order such measures, as are needed, to ensure that decree is executed and specific power is conferred to remove obstructions, even if offered by third parties, it cannot be said that executing Court lacked competence, in ordering police protection. Bandi Prasada Rao & Anr. v. P. Hari Kesavulu AIR 2007 A.P. 125.

Power of the Executing Court to provide police help for removal of persons from the property in question. Police help can be provided after making enquiry and not only on the basis of record. Indira Transport v. Rattan Lal, AIR 1998 Del. 2.

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Arrest and Detention in the Civil Prison

Discretionary power to permit judgment debtor to show cause against detention in prison (Order 21 Rule 37)—(1) Notwithstanding anything in these Rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment debtor who is liable to be arrested in pursuance of the application, **the Court shall instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court** on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that with the object or effect of delaying the execution of the decree, the judgment debtor is likely to abscond or leave the local limits of jurisdiction of the Court.

(2) Where appearance is not made in obedience to the notice, the Court shall if the decree holder so requires, issue a warrant for the arrest of the judgment debtor.

Proceedings on appearance of judgment-debtor in obedience to notice or after arrest (Order 21 Rule 40)—(1)When a judgment-debtor appears before the Court in obedience to a notice issued under Rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution and shall then give the judgment-debtor

an opportunity of showing cause why he should not be committed to the civil prison.

(2) Pending the conclusion of the inquiry under sub-Rule (1) the Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required.

(3) Upon the conclusion of the inquiry under sub-Rule (1) the Court may, subject to the provisions of Section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment-debtor released under this Rule may be re-arrested.

(5) When the Court does not make an order of detention under sub-Rule (3) it shall disallow the application and, if the judgment-debtor is under arrest, direct his release.

Scope – Order 21 Rule 39 C.P.C. provides that No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the

time of his arrest until he can be brought before the Court. Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under Section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

Section 57 of C.P.C.—The State Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

Section 58 of C.P.C. provides the period of detention- (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding five thousand rupees, for a period not exceeding three months, and,

(b) where the decree is for the payment of a sum of money exceeding two thousand rupees, but not exceeding five thousand rupees, for a period not exceeding six weeks.

(1A) For the removal of doubts, it is hereby declared that no order for detention of the judgment-debtor in civil prison in execution of a decree for the payment of money shall be made, where the total amount of the decree does not exceed two thousand rupees.

(2) A judgment-debtor released from detention under this Section shall not merely by reason of his release 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.

Section 56 of C.P.C. - Prohibition of arrest or detention of women in execution of decree for money.—Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

Section 55 of C.P.C. provides that-(1) A judgment-debtor may be arrested in execution of a decree at, any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the State Government may appoint for the detention of persons ordered by the Courts of such district to be detained:

Provided, firstly that, for the purpose of making an arrest under this Section, no dwelling-house shall be entered after sunset and before sunrise:

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found:

Provided, thirdly that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for

her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest:

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The State Government may, by notification in the Official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the State Government in this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he may be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the

security to be realized or commit him to the civil prison in execution of the decree.

In Jolly George Varghese v. Bank of Cocin, AIR 1980 SC 470 the Hon'ble Supreme Court has clearly laid down as follows:"As long as there is no dishonesty and mala fide on the part of the judgment debtor to discharge his obligation committing him to civil person would amount to violation of Article 11 of the International Covenant on Civil and Political Rights and Article 21 of the Constitution of India. Therefore, it is the decree holder, who has to demonstrate that the judgment debtor has wilfully with the mala fide intention to deprive the benefit of the decree, is refusing to pay the decretal amount, in spite of having sufficient means to pay.

OPPORTUNITY OF HEARING-Where decree passed for payment of money and application filed by the DH for his detention in the civil prison. The Court before detaining the JD must consider the matter after giving opportunity of hearing, Mukh Ram & Anr. v. Hardeep Singh, AIR 1987 Raj 1:

Rule 40 is a mandatory provision- The decree holder filed an affidavit stating that the judgment-debtor has got means and based on that statement, the executing Court ordered arrest warrant, the petitioner was brought before the Court under arrest. When such a person is brought before the Court under arrest it has to follow the procedure prescribed under Order 21, Rule 40 of the CPC. The mere fact that the Court below has ordered warrant relying on an affidavit filed by the decree holder alone is not a ground to hold that thereafter the Court need not consider the plea of no means as held by the executing Court.

Order 21, Rule 40 is a mandatory provision. Rule 40 of 21 prescribes the procedure to be followed when the judgment-debtor appears before the Court in obedience of a notice under Rule 37 or brought under arrest. M.V. Raju v. The Manager, Indian Overseas Bank, AIR 2006 Ker. 379

As per Order 21, Rule 37, the executing Court shall, instead of issuing warrant of arrest of judgment debtor, issue a notice calling upon him to appear before the Court and require him to show cause as to why he should not be committed to Civil prison, when judgment-debtor appears before the Court, the Court shall hear the judgment-debtor. As per Order 21, Rule 37(1), it is obligatory on the part of Court to issue a notice instead of ordering arrest straightaway and call upon the judgment debtor to explain as to why he should not be sent to civil prison. In the same way, Order 21, Rule 40 is not only procedural but also mandatory. S. Ismail v. Agraseni Chit Funds (P) Ltd., AIR 2005 AP 33:

Merely because judgment-debtor is salaried employee, it cannot be said that amount can only be realised by attaching his salary and not by means of his arrest and detention in civil prison. Patnana Venkataramana v. Vungatla Appa Rao AIR 2010 A.P.230.

Order of arrest on the ground of simple default in payment of decretal amount is not justified. It must be proved that JD was having enough funds to pay and was purposely evading or delaying to pay the decretal amounts, Kal Ram Alagappan v. Rajaguru and Co., AIR 1985 Mad 353

FIDUCIARY OBLIGATION TO PAY LOAN-Contentions of inability to pay the amount. Subsequent order of arrest of surety in execution of the decree will not be illegal. The word "fiduciary capacity of account" occurring in clause (c) to Section 51 only makes it clear that a person having duty created by his undertaking to act primarily for interest benefit in matters connected with such undertaking as fiduciary obligations. It is also commonly understood that whenever a person stands surety and only on the basis of such surety the lender parts with be money. But for such confidence and reliance on the surety the transaction would not have been even come through. Such a person to whom the money was advanced cannot later on plead that he is a person having no means. Framers of the Code has thought of and incorporated the words "fiduciary capacity of account" in sub-clause (c) to proviso to Section 51 to make the provisions clear. Shankareppa, Major v. The Thunhabhadra Grameena Bank, Mudagal & Anr., AIR 2000 Kant. 326.

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Attachment of property

Examination of judgment-debtor as to his property (Order 21 Rule 41)— (1) Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

(a) the judgment-debtor, or

(b)where the judgment-debtor is a corporation] any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

(2) Where a decree for the payment of money has remained unsatisfied for a period of thirty days, the Court may, on the application of the decree-holder and without prejudice to its power under sub-Rule (1), by order require the judgment-debtor or where the judgment-debtor is a corporation, any officer thereof, to make an affidavit stating the particulars of the assets of the judgment-debtor.

(3) In case of disobedience of any order made under sub-Rule (2), the Court making the order, or any Court to which the proceeding is transferred, may direct that the person disobeying the order be detained in the civil prison for a term not exceeding three months unless before the expiry of such term the Court directs his release.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined (Order 21 Rule 42)—Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Scope - Object of invoking provision of Order 21, Rule 41 is to get necessary information related to properties of judgment-debtor so as to realise debt without difficulty. The disclosure of assets of judgment-debtor which is within special knowledge of judgment-debtor is a preliminary step towards execution of decree The provision is intended only to aid execution and not one of modes of execution. Thus, scope of Order 21 Rule 41 cannot be restricted only to case of sale and attachment of property, State Bank of India v/s M. K. Raveendran, AIR 2010 Ker. 20.

Where a decree is transferred for execution, transferring Court can exercise jurisdiction to examine the judgment debtor about his property even after transfer of execution. The main question to be decided is whether, after a decree is transmitted for execution to another Court, the Court passing jurisdiction in respect of the decree. An application for examination of a judgment debtor is strictly not an application for execution. The different modes of execution for a money decree have been set out in Rule 30 of Order 21 of the Code of Civil Procedure. The modes of execution laid down is by attachment and sale of his property, or by the civil imprisonment of the judgment debtor or by both. The examination of a judgment debtor is not indicated

as a mode of execution of a money decree. Shew Kumar Nopany v. Grindlays Bank Limited, AIR 1986 Cal. 328

Attachment of movable property(Order 21 Rule 43 to 53)

Attachment of movable property, other than agricultural produce, in possession of judgment-debtor (Order 21 Rule 43)—Where the property to be attached is movable property other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

Scope – Order 21 Rule 43A (1) provides that where the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the proviso to Rule 43, he may, at the instance of the judgment-debtor or of the decree holder or of any other person claiming to be interested in such property, leave it in the village or place where it has been attached, in the custody of any respectable person who is called "custodian".

The object of Section 60 CPC is that certain items which are necessary for sustaining of human beings have been deleted from the list of the items which are made attachable. The purpose is that the labourers who do hard work and earn wages should not be denied the basic needs to sustain themselves or the agriculturists who have to use agricultural implements should

not be prevented from continuing their agricultural operations or the women who have to use certain ornaments as custody should not feel insult to mingle with their relatives or move in the society. Therefore, the Legislature with oblique motive seems to have excluded certain items from the attachable items. In view of the same, it is clear that the wages of labourers or domestic servants are not attachable, **Guguloth Babu Rao & Ors. v/s Suraksha Chit Funds & Anr., AIR 2011 (NOC) 153 (A.P.).**

Attachment of agricultural produce (Order 21 Rule 44)— Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

Scope - Order 21 Rule 45 provides that -(1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the

purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do, all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been served from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this Rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

Where the J.D. claims to be agriculturist or labourer, he has to show that what is his main source of income. Unless he shows that his main source of income was from agriculture, he cannot take benefit of relevant provisions of Section 60(1)(c), Neelavva v. Kareppa Bapu Bandigani and Anr., AIR 1986 Kant. 224.

Attachment of share in movables (Order 21 Rule 47)—Where the property to be attached consists of the share or interest of the judgment-debtor in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

Attachment of salary or allowances of servant of the Government or railway company or local authority (Order 21 Rule 48)—(1) Where the property to be attached is the salary or allowances of a servant of the Government or of a servant of a railway company or local authority or of a servant of a corporation engaged in any trade or industry which is established by a Central, Provincial or State Act, or a Government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956)] the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of Section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and upon notice of the order to such officer as the appropriate Government may by notification in the Official Gazette appoint in this behalf,—

(a) where such salary or allowances are to be disbursed within the local limits to which this Code for the time being extends, the officer or other person whose duty it is to disburse the same shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be;

(b) where such salary or allowances are to be disbursed beyond the said limits, the officer or other person within those limits whose duty it is to instruct the disbursing authority regarding the amount of the salary or allowances to be disbursed shall remit to the Court the amount due under the order, or the monthly instalments, as the case may be, and shall direct the disbursing authority to reduce the aggregate of the amounts from time to time to be disbursed by the aggregate of the amounts from time to time remitted to the Court.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the appropriate Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this Rule, unless it is returned in accordance with the provisions of sub-Rule(2) shall, without further notice or other process, bind the appropriate Government or the railway company or local authority or corporation of Government company, as the case may be, while the judgement-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits, if he is in

receipt of any salary or allowances payable out of the Consolidated Fund of India or the Consolidated Fund of the State or the funds of a railway company or local authority or corporation or Government company in India; and the appropriate Government or the railway company or local authority or corporation or Government company, as the case may be, shall be liable for any sum paid in contravention of this Rule.

Explanation. —In this Rule, "appropriate Government" means, —

(i) as respects any person in the service of the Central Government, or any servant of a railway administration or of a cantonment authority or of the port authority of a major port, or any servant of a corporation engaged in any trade or industry which is established by a Central Act, or any servant of a Government company in which any part of the share capital is held by the Central Government or by more than one State Governments or partly by the Central Government and partly by one or more State Governments, the Central Government;

(ii) As respects any other servant of the Government, or a servant of any other local or other authority, or any servant of a corporation engaged in any trade or industry which is established by a Provincial or State act, or a servant of any other Government company, the State Government

Attachment of salary or allowances of private employees (Order 21 Rule 48A)—(1) Where the property to be attached is the salary or allowances of an employee other than an employee to whom Rule 48 applies, the Court, where the disbursing officer of the employee is within the local limits of the Court's

jurisdiction, may order that the amount shall, subject to the provision of Section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and upon notice of the order to such disbursing officer, such disbursing officer shall remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

(2) Where the attachable portion of such salary or allowances is already being withheld or remitted to the Court in pursuance of a previous and unsatisfied order of attachment, the disbursing officer shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this Rule, unless it is returned in accordance with the provisions of sub-Rule (2), shall, without further notice or other process, bind the employer while the judgment-debtors, is within the local limits to which this Code for the time being extends and while he is beyond those-limits, if he is in receipt of salary or allowances payable out of the funds of an employer in any part of India, and the employer shall be liable for any sum paid in contravention of this Rule.

Scope-After completion of 24 months of continuous attachment of salary of judgment debtor, again attachment of salary for second time, in very same decree would not be permissible, and would be finally exempted from attachment. Shaik Noorjahan v/s M. Rajeswari, AIR 2010 A.P. 207.

It is clear from the relevant provisions of Section 60(g) and also Section 13 of Payment of Gratuity Act that the gratuity payable

under the Act to an employee in any factory or mine etc., shall not be liable for attachment in execution of any decree. G. Narayana Rao v. V.R. Nagamani, 1995(2) BC 596.

Execution of decree against firm (Order 21 Rule 50) —

(1) Where a decree has been passed against a firm, execution may be granted—(a) against any property of the partnership;
(b) against any person who has appeared in his own name under Rule 6 or Rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;
(c) against any person who has been individually served as a partner with a summons and has failed to appear;
Provided that nothing in this sub-Rule shall be deemed to limit or otherwise affect the provisions of Section 30 of the Indian Partnership Act, 1932.
(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-Rule (1), clauses (b) and (c), as being a partner in the firm, he may, apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.
(3) Where the liability of any person has been tried and determined under sub-Rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not lease, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

(5) Nothing in this Rule shall apply to a decree passed against a Hindu Undivided Family by virtue of the provisions of Rule 10 of Order XXX.

The execution under this Rule (Order 21 Rule 50) can only be granted where a decree has been passed against a firm. A decree against the firm must perforce be in the firm's name under this Rule, execution may be granted against the partnership property. It may be granted against the partners, in which case the decree holder may proceed against the separate property of the partners. In the case of Sahu Rajeshwar Rao v. I.T.O., AIR 1969 SC 667 the Court ruled that the liability of the partner of the firm is joint and several and it is open to a creditor of the firm to recover the debt of the firm from any one or more of the partners. In a decree against partnership firm, each partner is personally liable except the minor whose liability is limited to his assets in the partnership, Ashutosh v. State of Rajasthan and Others, AIR 2005 SC 3434:

Attachment of property in custody of Court or public officer (Order 21 Rule 52)—Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued:

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

Attachment of immovable property

Attachment of immovable property (Order 21 Rule 54)—(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer of charge

(1A) The order shall also require the judgment-debtor to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon, a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.

Scope - Each stage of the sale is governed by the provisions of the Code. Under the provisions of Order 21, Rule 54 and Order 21, Rule 66, at each stage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served upon the person whose property is being sold in execution of the

decree, and any property which is sold, without notice to the person whose property is being sold, is a nullity, and all actions pursuant thereto are liable to be struck down/quashed, M/s. Mahakal Automobiles v. Kishan Swaroop Sharma, AIR 2008 SC 2061.

The purpose of attachment under Rule 54 is to make the judgment-debtor aware that attachment has been effected and that he should not make any transfer or encumber the property thereafter. It is in the interest of the decree-holder to have the notice of attachment served personally on the judgment-debtor. Nevertheless the sale is not void, though the omission to serve the copy of the order of attachment is an irregularity. Since no encumbrance thereafter was created on the attached property, non-service of the copy of the order of attachment on the judgment-debtor does not render the sale invalid, Desh Bandhu Gupta v. N.L. Anand and Rajinder Singh, 1994 (1) SCC 131.

Determination of attachment (Order 21 Rule 57)—(1) Where any property has been attached in execution of a decree and the Court, for any reason, passes an order dismissing the application for the execution of the decree, the Court shall direct whether the attachment shall continue or cease and shall also indicate the period upto which such attachment shall continue or the date on which such attachment shall cease.

(2) If the Court omits to give such direction, the attachment shall be deemed to have ceased.

Scope- **Adjudication of claims to or objections to attachment of property** —Order 21 Rule 58 provided that -(1) Where any claim is preferred to, or any objection is made to the attachment

of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained :

Provided that no such, claim or objection shall be entertained—

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) *All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this Rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.*

(3) Upon the determination of the questions referred to in sub-Rule (2), the Court shall, in accordance with such determination—

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this Rule, order made thereon shall have the same force

and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-Rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such - suit, if any, an order so refusing to entertain the claim or objection shall be conclusive.

Scope - In a case Tavvala Veeraswami v. Pulim Ramanna, AIR 1935 Mad 365, which was decided by a Full Bench of the Madras High Court, an order dismissing a suit for default was set aside on an application for that purpose. It was held that where an order dismissing a suit for default is set aside on an application for that purpose, the suit remains as it was on the day when it was dismissed and all proceedings taken up to that date must be deemed to be in force when the dismissal is set aside and all interlocutory orders will be revived on the setting aside of the dismissal. Similarly, an order for attachment of property will also be revived. In that case an attachment before judgment was raised on security being furnished. The suit in which the attachment was levied was dismissed for default, but was restored on an application made for that purpose and decreed and the decree holder sought to enforce the security bond. It was held that on the restoration of the suit, all ancillary orders were restored without any further order, and that therefore, the security bond given for the raising of attachment before judgment was also restored and the decree holder was entitled to enforce the security bond.

Order 21, Rule 58 of the code is a material provision relating to any claim that may be preferred or any objection that may be made to the attachment of any property in execution of a decree. Any sale that is held would, undoubtedly, be subject to the order that may be passed under Order 21, Rule 58 of the Code and, thereafter, as provided in the Code before its amendment in 1976, the result of a suit that may be filed challenging such order passed by the executing Court under Order 21, Rule 58. But after a sale becomes absolute on the dismissal of the application of the judgment-debtors claim for setting aside the sale, another application for setting aside the sale by the judgment-debtor is not maintainable and the period of limitation as prescribed by Article 134 of the Limitation Act cannot be computed from the date of the dismissal of the second application for setting aside the scale, Ganpat Singh (Dead) by LRs. v. Kailash Shankar, AIR 1987 SC 1443.

Sale of property

Proclamation of sales by public auction (Order 21 Rule 66)—

(1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(a) the property to be sold or, where a part of the property would be sufficient to satisfy the decree, such part;

(b) the revenue assessed upon the estate or past of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

(c) any encumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property :

Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under Rule 54, it shall not be necessary to give notice under this Rule to the judgment-debtor unless the Court otherwise directs :

Provided further that nothing in this Rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given, by either or both of the Parties.

(3) Every application for an order for sale under this Rule shall be accompanied by a statement signed and verified in the manner herein before prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-Rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to

any such matters and require him to produce any document in his possession or power relating thereto.

Mode of making proclamation (Order 21 Rule 67) — (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by Rule 54, sub-Rule (2).

(2) Where the Court so directs, such proclamation shall also be published in the Official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

Scope - Order 21 Rule 68 provides that - Save in the case of property of the kind described in the proviso to Rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least ***fifteen days*** in the case of immovable property, and of at least ***seven days*** in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale.

It is important to mention that as per Rule 72 &72A of order 21 Decree holder and Mortgagee not to bid for or buy property without permission of the Court.

Sale of movable property

Sale of agricultural produce (Order 21 Rule 74)—(1) Where the property to be sold is agricultural produce, the sale shall be held,—

(a) if such produce is a growing crop, on or near the land on which such crop has grown, or

(b) if such produce has been cut or gathered, at or near the threshing floor or place for trading out grain or the like or fodder-stack on or in which it is deposited :

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,—

(a) a fair price, in the estimation of the person holding the sale, is not offered for it, and

(b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till next day or, if a market is held at the place of sale, the next market-day,

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

Sale by public auction (Order 21 Rule 77)—(1) Where movable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the movable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the

same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

Sale of immovable property

Postponement of sale to enable judgment-debtor to raise amount of decree(Order 21 Rule 83) — (1) Where an order for the sale of immovable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immovable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

(2) In such case the Court shall grant a certificate to the judgment-debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in Section 64, to make the proposed mortgage, lease or sale :

Provided that all moneys payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set-off such money under the provisions of Rule 72, into Court :

Provided also that not mortgage, lease or sale under this Rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this Rule shall be deemed to apply to a sale of property directed to be sole in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

Deposit by purchaser and re-sale on default (Order 21 Rule 84) — (1) On every sale of immovable property the person

declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold.

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase-money under Rule 72, the Court may dispense with the requirements of this Rule.

Application to set aside sale on deposit (Order 21 Rule 89)—

(1) Where immovable property has been sold in execution of a decree, any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person, may apply to have the sale set aside on his depositing in Court,—

(a) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

(b) for payment, to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under Rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this Rule.

(3) Nothing in this Rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

Scope : Limitation for filing application - Limitation for filing application under Rule 89 for setting aside the sale is prescribed under Article 127 of Limitation Act, 1963 and therefore, any application under Rule 89 filed after 60 days will be barred and is not maintainable. Provisions of Section 5 of Limitation Act have been expressly excluded and are not application. **Mohan Lal V. Hari Prasad Yadav & Ors., 1994 (4) SCC 177.**

Application to set aside sale on ground of irregularity or fraud (Order 21 Rule 90) — (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this Rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation.—The mere absence of, or defect in, attachment of the property sold shall not, by itself,

be a ground for setting aside a sale under this Rule.

Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest(Order 21 Rule 91)—The purchaser at any such sale in execution of a decree

may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

Sale when to become absolute or be set aside (Order 21 Rule 92)—(1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute:

Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.

(2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the deposit required by that Rule is made within **sixty days** from the date of sale, or in cases where the amount deposited under Rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

Provided further that the deposit under this sub-Rule may be made within **sixty days** in all such cases where the period of **thirty days**, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.

(3) No suit to set aside an order made under this Rule shall be brought by any person against whom such order is made.

(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

(5) If the suit referred to in sub-Rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered.

Return of purchase-money in certain cases(Order 21 Rule 93)—Where a sale of immovable property is set aside under Rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.

Certificate to purchaser (Order 21 Rule 94)—Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

Delivery of property in occupancy of judgment-debtor (Order 21 Rule 95)—Where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted

under Rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

Delivery of property in occupancy of tenant (Order 21 Rule 96).—Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under Rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

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(IV) Adjudication of the claims and objections between the parties to the suit (Sec.47 of C.P.C.)

Questions to be determined by the Court executing decree (Section 47) — (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this Section, be determined by the Court.

Explanation 1 — 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.

Scope -Rule 114(a) of JCCR Provided that - A preliminary hearing of petition filed u/s 47 of C.P.C., in Execution Proceeding shall be made before admission and registering the same as Misc. Case.

Scope- Execution cannot be allowed to be challenged on the ground of lack of jurisdiction, when the judgment is sought to be enforced on the ground that the judgment was based on wrong

conclusion or wrong application of law. The settled legal position is that the executing Court can go behind a decree only if there was lack of inherent jurisdiction, K.P. Antony "Santhosh", Edakkad Amsom, Puthiyangadi, Calicut v. Thandiyode Plantation (Private) Limited, Thandiyode, South Wynad and Ors., AIR 1996 Ker. 37.

Refusal to execute on ground of nullity of decree - Under Section 47 of the Code, all questions arising between the parties to the suit in which the decree was passed or their representatives relating to the execution, discharge or satisfaction of decree have got to be determined by the Court executing the decree and not by a separate suit. The powers of the Court under Section 47 are quite different and much narrower than its powers of appeal, revision or review. The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus, it is plain that the executing Court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing. Government of Orissa v. Ashok Transport Agency, 2002 (9) SCC 28.

Power of executing court to correct its own mistake- An executing Court has power to correct its own mistake in any order made by it under Sections 151, 152 and 153. Kariyanna v.

Ishuri Subbeiah Setty, A.I.R. 1981 Kant. 234: (1981) 1 Kant. L.J. 63.

Where certain property was not covered under the decree but was wrongly delivered in the execution and application filed by JD for resumption of the said property, held the application was maintainable. Gopalkrishan Kammath v. R. Bhaskar Rao, AIR 1989 Ker. 251

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(V) Resistance to delivery of possession (Order 21 Rule 97 to 106)

Resistance or obstruction to possession of immovable property. **(Order 21 Rule 97)**.—(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-Rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

99. **Dispossession by decree-holder or purchaser (Order 21 Rule 99)**..—(1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

Question to be determined. (Order 21 Rule 101).—All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be

determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions

Hearing of application (Order 21 Rule 105).—(1) The Court, before which an application under any of the foregoing Rules of this Order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may

be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit.

Explanation —An application referred to in sub-Rule (1) includes a claim or objection made under Rule 58.

Orders after adjudication (Order 21 Rule 98)—(1) Upon the determination of the questions referred to in Rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-Rule (2),—

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

Order to be passed upon application complaining of dispossession (Order 21 Rule 100) —Upon the determination of the questions referred to in Rule 101, the Court shall, in accordance with such determination,—

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

Orders to be treated as decrees (Order 21 Rule 103) —Where any application has been adjudicated upon under Rule 98 or Rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.

Rule not applicable to transferee pendente lite (Order 21 Rule 102) - Nothing in Rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgement-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Order 21 Rule 104 provided that - Every order made under Rule 101 or Rule 103 shall subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order, is made if in such suit the party against whom the order under Rule 101 or Rule 103 is made has sought to establish a right which he claims to the present possession of the property.

Scope : A conjoint reading of Order 21, Rule 97, 98, 99 and 101 projects the following picture : (1) If a decree-holder is resisted or obstructed in execution of the decree for possession with the result that the decree for possession could not be executed in the normal manner by obtaining warrant for possession under Order 21, Rule 35 then the decree-holder has to move an application under Order 21, Rule 97 for removal of such obstruction and after hearing the decree-holder and the obstructionist the Court can pass appropriate orders after adjudicating upon the controversy between the parties as enjoined by Order 21, Rule 97, sub-Rule (2) read with Order 21, Rule 98. In short the aforesaid statutory provisions of Order 21 lay down a complete code for resolving all disputes pertaining to execution of the decree for possession obtained by a decree-holder and whose

attempt at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the executing Court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only under Order 21, Rule 97, sub-Rule (1) and he cannot bypass such obstruction and insist on resistance of warrant for possession under Order 21, Rule 35 with the help of police force, as that course would amount to bypassing and circumventing the procedure laid down under Order 21, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the executing Court it is difficult to appreciate how the executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order 21, Rule 99 CPC and pray for restoration of possession. Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal, AIR 1997 SC 856

Third party who is resisting or obstructing the execution of decree can also seek adjudication of his claims and rights by making application under Rule 97 Order 21 CPC, as the provisions are to be widely and liberally construed to enable executing Court to adjudicate the inter se claims of decree holder and third parties in executing proceedings to avoid prolongation of litigation by driving parties to independent suits. Ashan Devi v. Phulwasi Devi, AIR 2004 SC 511.

Limitation in case of two successive obstructions- What article 129 of the Limitation Act of 1983 does is to bar the

making of an application about the resistance or obstruction which was made more than 30 days ago. If a second obstruction is made, the complaint is not about the first obstruction but is about the second obstruction and since the law allows the decree-holder to make such an application, it cannot be said that the provisions of Article 129 are made nugatory. Parmeswaran v. Kumara Pillai, A.I.R. 1981 Ker. 29

What should be starting point of limitation- Each obstruction made in execution of warrant for delivery of possession provides a fresh cause of action for filing an application under this Rule. Narayan and another v. Smt. Kalan Bai, (Raj H.C.) 1985

Applicability of the Rule - O.21 R.97 of CPC is applicable to only person who is claiming independent right, title and interest and not under the judgment-debtor. Gajanan v. Jayamma, AIR 2008 Kar.11

What is required to be shown in order to maintain an obstruction to delivery of property is really possession of the person so obstructing. But proof of such possession would be of no avail unless it is further established that possession was not obtained from or under the judgment-debtor, for if it be otherwise, it would naturally be subject to the result of the suit. Any transaction during pendency of the suit would be hit by the Rule of lis pendens and therefore possession of person obstructing, based upon his coming into possession pendenti lite, would of course be not sufficient. That is why what has to be shown is independent possession. Raghavan Nair v. Bhagyalakshmi Amma, A.I.R. 1972 Ker. 125

The petitioner company which came in possession of schedule premises by virtue of rent deed executed by judgment-debtors long after initiation of execution proceedings would have no locus standi to resist delivery of possession to decree holders in view of O. 21, R. 102 of Civil P.C. Profit Shoe Company Pvt. Ltd v. M. Krishna Reddy, AIR 2010 A.P. 163.

Application of res judicata - Essential conditions are that the previous order must be between the two parties and the matter should be heard and decided by the Court. Execution application of decree for possession filed against sub-tenant, was dismissed on the ground that he was not party to the suit in which decree was passed. Subsequent application for execution of the decree against the tenant, will not be barred. Neither the suit filed under Rule 103 against the tenant and sub-tenant for setting aside the trial Court's order dismissing the subsequent petition will be barred by the principles of res judicata. Amena Amma (dead) through L.Rs. & Ors. v. Sundaram Pillai & Ors., 1994(1) SCC 743

Sub-Rule (1) of Rule 105 speaks clearly of applications "under any of the foregoing Rules", i.e., Rule 1 to Rule 104 of Order 21. The Civil Rules of Practice which regulates the procedure and practice of subordinate Civil Courts in the State gives an inclusive definition for the word "application" which takes in execution petitions, execution applications, cheque applications and interlocutory applications, whether oral or written. Rule 105 deals with the hearing of applications which can either be the main execution petition or an execution application. The Rule says that if the opposite party who has been issued with notice fails to appear, the Court shall hear the

application ex parte and proceed to pass any order deemed fit. These orders can be orders finally disposing of the execution petition or orders deciding any specific issue, say, regarding the executability of the decree which is often decided on the basis of objections filed by judgment-debtors in response to notice under Rule 22 or the liability for arrest often decided pursuant to notice under Rule 37 or even settlement of draft proclamation decided in response to notice under Rule 66. Rule 106(1) of Order 21 contemplates cancellation of all types of ex parte orders passed under Rule 105(3) and orders for default passed under Rule 105(2). C. L. Cleetus v. South Indian Bank Ltd., AIR 2007 Kerala 301.

Limitation - A bare perusal of sub-Rule (3) of Rule 106 will clearly go to show that when an application is dismissed for default in terms of Rule 105, the starting period of limitation for filing of a restoration application would be the date of the order and not the knowledge there about. As the applicant is represented in the proceeding through his Advocate, his knowledge of the order is presumed. The starting point of limitation being knowledge about the disposal of the execution petition would arise only in a case where an ex- parte order was passed and that too without proper notice upon the judgment debtor and not otherwise. Thus, if an order has been passed dismissing an application for default, the application for restoration thereof must be filed only within a period of thirty days from the date of the said order and not thereafter. In that view of the matter, the date when the decree holder acquired the knowledge of the order of dismissal of the execution petition was,

therefore, wholly irrelevant. Damodaran Pillai v. South Indian Bank Ltd., AIR 2005 SC 3460

Some important limitation in execution proceedings

1	For execution of any decree other than mandatory and perpetual injunction	12 years from the date of decree Or Order becoming enforceable	Article 136 Limitation Act
2	For the enforcement of a decree granting a mandatory Injunction under Order 21 Rule 32 r/w 35 CPC	3 years from the date of decree or date fixed for performance	Article 135 Limitation Act
3	For execution of decree granting perpetual injunction	No time limit prescribed.	Article 136 Proviso
4	To record an adjustment or satisfaction of a decree under Order 21 Rule 2 CPC	30 days : when the payment or adjustment is made	Article 125 Limitation Act
5	Time for sale	For immovable property after expiry of 15 days from the date on which the copy of proclamation is affixed on Court notice board. For movables property it is 7 days.	(Order 21 Rule 68 CPC)
6	Time limit for deposit of 1/4 the sale proceeds-	Immediately after declaration of sale. If DECREE HOLDER is the purchaser may be dispensed with.	Order 21 Rule 84
7	Time limit for deposit of 3⁄4 th sale proceeds and S.C. Charges (Rule 85) or amount required for stamps	15 days from the date of sale	Order 21 Rule 85
8	To set aside sale in execution of decree	The deposit required by the rule is made within 60 days from the date of sale	Order 21 Rule 89
9	For delivery of possession by a purchaser of immovable property at a sale in execution of decree	One year from the date of confirmation of Sale	Article 134 Limitation Act
10	For removal of resistance or	30 days from the date	Article 129

	obstruction to delivery under Order 21 Rule 97 CPC	of resistance or obstruction.	Limitation Act
11	For possession by one dispossessed of immovable property	30 days from the date of dispossession	Article 128 Limitation Act
12	Detention of Person - **(a)** where the decree is for the payment of a sum of money exceeding five thousand rupees	for a period not exceeding three months, and,]	Sec - 58 of C.P.C.
	(b) where the decree is for the payment of a sum of money exceeding two thousand rupees, but not exceeding five thousand rupees,	for a period not exceeding six weeks.	Sec - 58 of C.P.C.
	(c) Where the total amount of the decree does not exceed two thousand rupees	No order for detention of the judgment debtor shall be made.	Sec. – 58 of CPC

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