Y&A LEGAL
ADVOCATES
MUMBAI - DELHI
DUBAI - LONDON

LAW ON CIVIL SUITS IN INDIA

INDEX

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 1: BRIEF HISTORY

Laws can be divided into two groups: (1) Substantive law, and (2) Adjective or Procedural law. Substantive law determines rights and liabilities of parties. Whereas, procedural law prescribes the practice procedure and machinery for the enforcement of those rights and liabilities. The Indian Contract Act, the Transfer of Property Act, the Industrial Disputes Act, are instances of Substantive law. While the Indian Evidence Act, the Limitation Act, the Code of Criminal Procedure, the Code of Civil Procedure are instances of procedural law.

The Code of Civil Procedure is an adjective law. It neither creates nor takes away any right. It is intended to regulate the procedure to be followed by civil courts. Before 1859, there was no Uniform Code of Civil Procedure. There were different systems of civil procedure in different parts of country.

The very first Uniform Code of Civil Procedure was enacted in 1859 which resulted in a failure. Another Code was enacted in the year 1877 and 1882 which were amended from time to time due to defects. Then finally, in the year 1908, the present Code of Civil Procedure was enacted. It was drafted by Sir Earle Richard after considering Indian culture, society and traditions. The present Code has been amended by two important Amendment Acts of 1951 and 1956.

Later, in the year 1976 some very important changes were made which made the doctrine of *res judicata* more effective. The practice to pass preliminary and final decree in certain suits was abolished. The scope of summary Trials was substantially widened. Some important changes were made to provide relief to the

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

poorer sections of the community and freedom from attachment of a portion of salary to all salaried employees among several other things were granted.

However, the amendments made in the year 1976 were not sufficient. With a view to dispose of civil cases expeditiously, Justice Malimath Committee was appointed by the Government. In pursuance of recommendations of the committee, the Code was amended by the Amendment Acts of 1999 and 2000. A new provision for settlement of disputes outside the court was introduced. In several matters, such as issuing of summons, filling of written statement, amendment of pleadings, production of documents, examinations of witnesses, pronouncement of judgements, etc., was prescribed. For speedy trial, the number of adjournments was restricted along with other important changes.

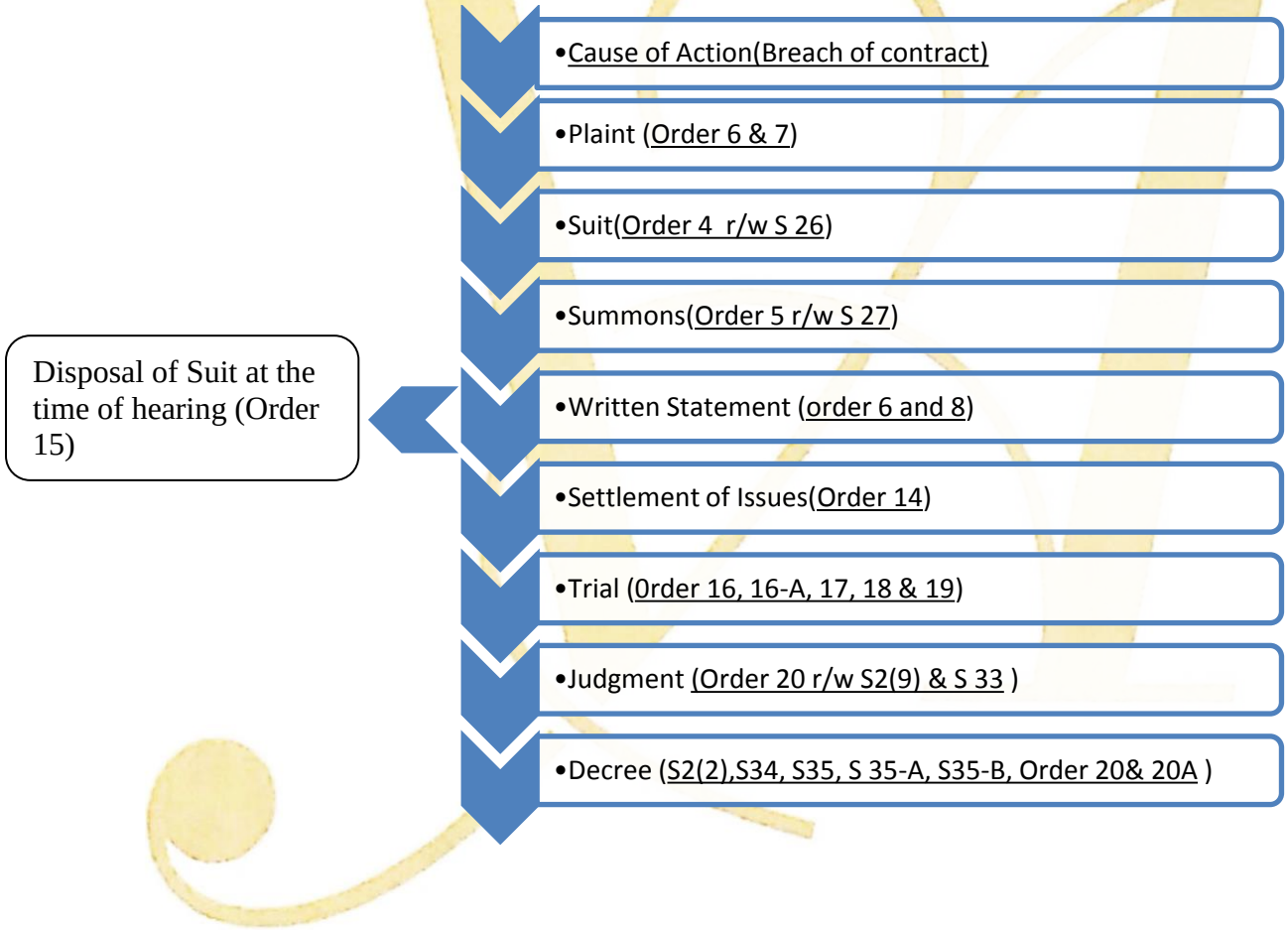
Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 2: BASIC STRUCTURE OF THE CODE OF CIVIL PROCEDURE

Code of Civil Procedure has been divided into two parts:-

- The body of the code (158 Sections)
- The first Schedule (51 Orders and Rules).

For any civil suit, there should be a cause of action. On the basis of that cause of action any civil suit can be initiated.



Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

After the Decree is passed the parties have following options:-

1. Execution (S36 to 74 r/w Order 21)
2. Appeal (S 96 to 112 , Order 41, 42, 43, 44, 45)
3. Review (S114 r/w Order 47)
4. Revision (S 115)
5. Reference (S 113 r/w Order 46)

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 3: INSTITUTION OF SUITS

1. *Meaning of Suits under Code of Civil Procedure,1908 :-*

'The term 'suit' has not been defined in the Civil Procedure Code, 1908. According to Chamber's 20th Century Dictionary (1983), it is a generic term of comprehensive signification referring to any proceeding by one person or persons against another or others in a court of law wherein the plaintiff pursues the remedy which the law affords him for the redress of any injury or enforcement of a right, whether at law or in equity. In the Black's Law Dictionary (7th Edition) this term is defined as the proceeding initiated by a party or parties against another in the court of law. According to some other views, 'suit' includes appellate proceeding also; but it does not include an execution proceeding. Ordinarily, suit under the CPC is a civil proceeding instituted by the presentation of a plaint.[1]

2. *Institution of Suit: At a Glance:-*

Section 26(1), CPC says that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Sub-section (2) provides that in every plaint, facts shall be proved by affidavit. The procedural framework relating to the institution of a suit is give below:

i. Preparing the plaint

ii. Choosing the proper place of suing

[1] Hansraj Gupta Vs. Ofiicial Liquidators of the Dehradun-Mussoorie Electric Tramways Co. Ltd.

iii. Presentation of the plaint

3.1. Preparation of the Plaint:

'Plaint' is not defined in this Code. It may, however, be described as 'a private memorial tendered to a Court in which the person sets forth his cause of action, the exhibition of an action in writing'. Order 7 is related to the format of Plaint. According to Rule 1 the particulars to be contained in a plaint are:

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 value of the subject matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

Other rules regarding the contents of a plaint:

a) In money suits, the plaint shall state the precise amount of amount claimed (Rule 2).

b) Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers (Rule 3).

c) Where the plaintiff sues in a representative character, the plaint shall show not only that has an actual existing interest in the subject matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it (Rule 4).

d) The plaint shall show that the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the plaintiff's demand (Rule 5)

e) Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed (Rule 6).

f) Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extend as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement (Rule 7).

g) Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly (Rule 8).

h) 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 (Rule 9).

3.1.1. Return of Plaint:

Rule 10 (1) says, "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."

3.1.2. Rejection of Plaint:

According to 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 written 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 provision of Rule 9.

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

According to Rule 12, when a plaint is rejected the Judge shall record an Order to that effect with the reasons for order. Rule 13 clarifies that the rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

3.1.3. Amendment of Pleading of the plaintiff (Plaint):

The Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just (Rule 17, Order 6).

3.2. Choosing the proper place of suing:

A defect of jurisdiction goes to the root of the matter and strikes at the authority of a court to pass a decree. A decree passed by the Court in such cases is a coram non judice. So choosing the proper court is the next which depends on the contents of the plaint. Section 9 of CPC has declared that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The jurisdiction of a court is decided by the legislature; parties by the framing of the plaint cannot interfere into the extent of this jurisdiction. They can choose one of some of the courts having same jurisdiction. In ***Ananti v. Chhannu*** ,the Court has laid down that the Plaintiff chooses the forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chosen.

3.3. Presentation of the Plaint: Commencement of the Suit:

Section 26 and Order 4 contain the provisions relating to the institution of a suit. Rule 1 of Order 4 goes as:

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

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

(3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-rules (1) and (2).

Section 26 provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Order 4 Rule 1 lays down the procedure for institution of suit; but does not speak of any 'other manner' for the purpose. The amendment makes it clear that unless the plaint is filed in duplicate it will be deemed to be incomplete. Sub-rule (3) has been inserted in order to curtail unnecessary adjournments for due compliance of the provisions of sub-rules (1) and (2) after the filing of the plaint.

The plaint may be presented either by the affected person himself, or by his advocate or by his recognized agent or by any person duly authorized by him. A proceeding which does not commence with a plaint is not a suit within the meaning of Section 26 and Rule 1 of Order 4.

I. Time and Place of Presentation:

Generally, the presentation of a plaint must be on a working day and during the office hours. However, there is no rule that such presentation must be made either at a particular place or at a particular time. A judge, therefore, may accept a plaint at his residence or at any other place even after office hours, though he is not bound to accept it. But if not too inconvenient, the judge must accept the plaint, if it is the last day of limitation. Thereafter, the particulars of a suit will be entered by the court in a book kept for the said purpose, called the Register of Civil Suits. After the presentation, the plaint will be scrutinized by the Stamp Reporter. If there are defects, the plaintiff or his advocate will remove them. Thereafter the suit will be numbered.

II. Registration of Suits:

Rule 2 of Order 4 provides that the Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

4. Essentials of the Institution of Suits:-

There are four essentials of a suit:

i. Opposing parties, i.e., parties to the suit;

ii. Subject-matter in dispute;

iii. Cause of action; and

iv. Relief

4.1. Parties to suit: Order 1:

In a civil suit, the presence of both the plaintiff, who files the suit, and the defendant, who is sued, is necessary. In each case there are two categories; first one is the necessary party and the other is proper party. A necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. A proper party is one in whose absence an effective order can be passed, but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

Where the number of plaintiff/defendant is one, no dispute arises regarding their representation; but some uniform rules become mandatory if this number crosses this limit. Order 1 contains these rules. These are enumerated below.

· Joinder of parties: Rules 1, 2, 3, 3A:

All persons may be joined in one suit as plaintiffs or defendants as the case may be, where-

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/ against such persons, whether jointly or severally or in the alternative; and

b. If such persons brought separate suits, any common question of law or fact would arise (Rules 1, 3).

Example: Where A assaults B, the latter may sue A for tort, as it individually affects him. The question of joinder of parties arises only when an act is done by two or more persons or it affects two or more persons. Thus, if A assaults B and C, or A and B assault C or A and B assault C and D, the question of joinder of parties arises.

The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes (Rule 6). When the plaintiff is in doubt regarding the joinder of persons from whom he is entitled to obtain redress, he may join two or more such defendants (Rule 7). It shall not be necessary that every defendant shall be interested as to all the relief

claimed in any suit against him (Rule 5). As per Rule 12(1), where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceedings; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding. Sub-rule (2) says, the authority shall be in writing signed by the party giving it and shall be filed in court.

· Misjoinder and non-joinder: Rules 9 and 13:

As per Rule 9, no suit can be defeated by reason of the misjoinder and non-joinder of parties unless such party is a necessary party. Rule 13 says that all objections regarding the misjoinder and non-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement.

· Representative Suits: Rule 8:

i. Meaning: If there are numerous persons having the same interest in one suit, 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; such a suit is called the 'representative suit'.

ii. Object: To facilitate the decision of questions in which a large number of persons are interested without recourse to the ordinary procedure.

iii. Conditions: As per 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.

iv. Formalities to be followed:

a. In such case, the permission of the Court must be obtained [sub-rule (1)].

b. The plaint must show that the suit is representative in character.

c. 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 [sub-rule (2)].

d. 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 [sub-rule (3)].

e. 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 expenses notice to all persons so interested in the manner specified in sub-rule (2) [sub-rule (4)].

f. 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 [sub-rule (5)].

g. 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 [sub-rule (6)].

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

· Power of the Court to order separate trials:

Where it appears to the Court that any such joinder may embarrass or delay the trial, the Court may order separate trials or make such other order as may be expedient in the interest of justice (Rules 2, 3A).

· Power of the Court to give judgment in case of joinder of parties: Rule 4:

Judgment may be given without any amendment—

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

Special Powers of the Court: Rule 10, 10A, 11:

i. While trying a suit, the court may, if satisfied that a person or body of persons is interested in any question of law which is directly and substantially in issue in the suit and that it is necessary in the public interest to allow that person or body of persons to present his or its opinion that question of law, permit that person or body of persons to present such opinion and to take such part in the proceedings of the suit as the court may specify (Rule 8A).

ii. The Court may make corrections to the pleadings of both parties if it seems to be wrong before the Court (rule 10).

iii. The court may, in its discretion, request any pleader to address it as to any interest which is likely to be affected by its decision on any matter in issue in any suit or proceeding if the party having interest which is likely to be so affected is not represented by any pleader (Rule 10A).

iv. The Court may give the conduct of a suit to such persons as it deems proper (Rule 11).

4.2. Subject-matter in dispute:

'Subject-matter' means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. This term includes the course of action. According to sub-rules (4) and (5) of Rule 1, where the court is

satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim. Where the plaintiff (a) abandons any suit or part of claim under sub-rule (1), or (b) withdraws from a 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.

Examples: a) Where the suit is instituted for the recovery of immovable property with or without rent, the subject-matter is that immovable property.

b) Where the suit is instituted for the compensation for wrong done to one movable property, the subject-matter is that movable property.

More specifically on the basis of the subject-matter the jurisdiction of a Court is determined in some cases. For example, a Presidency Small Causes Court has no jurisdiction to try suits for specific performance of a contract, partition of immovable property, foreclosure or redemption of a mortgage etc. Similarly, in respect of testamentary matters, divorce cases, probate proceedings, insolvency proceedings etc. only the District Judge or Civil Judge (Senior Division) has jurisdiction.

4.3. Cause of action: Order 2, Rules 3, 6 and 7:

Cause of action may be defined as 'a bundle of essential facts, which is necessary for the plaintiff to prove before he can succeed.' A cause of action is the foundation of a suit. It must be antecedent to the institution of a suit and on the basis of it the suit must have been filed. Every fact constituting the cause of action should be set out in clear terms. A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. If a plaint does not disclose a cause of action, the Court will reject that plaint.

· Joinder of Causes of Action:

Order 2, Rule 3 provides for the joinder of cause of action. According to this Rule, save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant(s), may jointly unite such causes of action in the same suit.

· Power of the Court:

Where it appears to the Court that the joinder of causes of action in new suit may embarrass or delay the trial or is otherwise in convenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice (Rule 6).

· Objections as to misjoinder:

All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues 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.

4.4. Relief: Order II, Rules 1-2, 4-5:

Relief is the legal remedy for wrong. According to Rule 1 of Order 2 every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

Rule 2 provides for the following conditions to be complied with:

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

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

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted...

· Object of this Rule:

This rule is based on the cardinal principle that a defendant should not be vexed twice for the same cause. The object of this salutary rule is doubtless to prevent multiplicity of suits.

· Conditions for the application of this Rule:

i. The second suit must be in respect of the same cause of action as that on which the previous suit was based.

ii. In respect of that cause of action, the plaintiff was entitled to more than one relief.

iii. Being thus entitled to more than one relief, the plaintiff without the leave of the Court omitted to sue for the relief for which the second suit has been filed. Such leave need not be express and it may be inferred from the circumstances of the case. It can be obtained at any stage. The question whether leave should be granted, depends on the circumstances of each case.

· Illustrations:

i. A lets a house to B at a yearly rent of ₹ 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

ii. A advances loan of ₹ 2200 to B. To bring the suit within the jurisdiction of Court X, A sues B for ₹ 2000. A cannot afterwards sue for ₹ 200.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

Rules 4 and 5 provide for the joinder of claims. Rule 4 states that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except-

a) claims for menses profit or arrear of rent in respect of the property claimed or any part thereof;

b) claims for damages for breach of any contract under which the property or any part thereof is held ; and

c) claims in which the relief sought is based on the same cause of action.

Rule 5 provides that no claim by or against an executor, administrator or heirs, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or the defendant sues or is sued as executor, administrator or heirs or are such as he was entitled to or liable for jointly with the deceased person whom he represents.

5. Institution of Special Suits:-

There are some special suits in which the process of instituting the same differ a little from the general suits. Some important ones are mentioned below.

5.1. Suits by or against the Government: Sections 79-82:

In such case the authority to be named as plaintiff or defendant, as the case may be, shall be in the case of Central Government, the Union of India and in the case of a State Government, the State.

5.2. Suits by or against military or naval men or airmen: Order 28:

In such case if such officer actually serving under the Government cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead. The authority shall be in writing and shall be signed by the officer in accordance with Rule 2.

5.3. Suits by or against minors and persons of unsound mind: Order 32:

Such suits can be said to have been instituted in the name of the minor or the person of unsound mind by a person who in such suit shall be called the next friend of the minor or the person of unsound mind when a plaint is presented and not when a guardian ad litem is appointed.

5.4. Suits by indigent persons: Order 33:

In such case the person claiming himself as indigent must apply to the Court for the permission in order to sue as an indigent person.

5.5. Suit against dead person:

According to one view, a suit against a dead person (dead at the time of institution of the suit) is non est and of no legal effect. The other view is such suit is not void ab initio and can be continued against the legal representatives of the defendant if they have been brought on record in accordance with the law.

6. Interpleader Suit and General Suits: A Comparative Approach:-

Section 88 and Order 35 are related to the Interpleader Suits. Section 88 defines it and Order 35 gives the description of procedural formalities.

Interpleader Suit

General Suit

a) In such suit the real dispute is not between the plaintiff and the defendant but between the defendants who interplead against the ordinary suit.

a) In general suits or ordinary the real dispute is between the plaintiff and the defendant.

b) If two or more persons adversely claiming some debt, sum of money or other property movable or immovable in dispute, from a person who does not claim any interest therein except the charges and costs incurred by him and is ready to pay or deliver the same to the rightful claimant, may file an interpleader suit.

b) In an ordinary suit, the plaintiff claims the relief or compensation from the defendant. The defendant can also apply for set-off and/or counter-claim.

c) In order to institute such suit there must be some debt, sum of money or other property movable or immovable.

c) An ordinary suit can be instituted in the cases other than those where some debt, sum of money or other property movable or immovable is related.

d) The Court may exempt the plaintiff from the suit if all liabilities have already been discharged by the plaintiff and may proceed to try the suit in the ordinary manner regarding the determination of the actual owner of the property in dispute.

d) In such suits neither the plaintiff nor the defendant can be exempted from the suit before the final order is passed.

7. Bar of Suits:-

Sections 10, 11 and 12 provide certain limitation. The provisions of Sections 10 (Stay of suit / res sub judice) and 11 (res judicata) clarify that in these cases institution of suit is not barred; but the trial is barred by law. Section 12 puts a bar on the institution of suits in cases, where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

8. Costs: Section 35-35B:-

As per Section 35(1) subject to such conditions and limitations as may be prescribed, and to the provisions of law for the time being in force, the costs of an incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. Section 35A empowers the Court in imposing

compensatory costs in case of false or vexatious claims or defences. Under Section 35 B the Court possesses the power to impose cost for causing delay.

9. Interpretation of the Provisions regarding the Procedure of Institution of Suits:-

The provisions regarding the institution of suit are framed in a way which in accordance with the 'literal rule of interpretation' indicates strict adherence to such rules by the plaintiff; but the question may arise whether a plaint should be dismissed if the plaintiff fails to comply with all such strict rules. It depends on two matters ─ (i) the nature of such failure and (ii) the intention of the plaintiff. If the failure is too minor or of such a nature which cannot prejudice the other party and the course of justice then the Court may allow the amendment to the plaint/pleading. If the failure is not based on an unfair intention the Court may either make some corrections or may order to make those corrections by the plaintiff. The principle behind such views is that the rules of procedure are intended to be a handmaid to the administration of justice and they must be construed liberally and in such manner as to render the enforcement of substantive rights effective.

To summarize, the general principles, which can be extracted from the above discussion, are:

First, a suit under the CPC 1908 can be instituted only by the presentation of a plaint in duplicate whose facts are to be proved by an affidavit. Second, Section 26 contains the principle behind the institution of suit and Order I, II, IV, VI and VII are related to the procedural formalities. Third, the stages of

institution of suit are: i) preparation of the plaint, ii) choosing proper place of suing, and iii) presentation of plaint. Fourth, the plaint must be prepared in accordance with the rules of Order VII. Fifth, the essentials of institution of suit are: i) parties to the suit, ii) subject-matter, iii) cause of action, and iv) relief. Sixth, in a suit the joinder of parties may be allowed by the Court if those are connected with the same transaction and the same question of law. Seventh, in case of every suit there are necessary parties and proper parties. Non-joinder and mis-joinder of necessary parties affect the course of justice. Eighth, in a suit if there are numerous persons having the same interest in one suit 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; such a suit is called the 'representative suit'. Rule 8 of Order 1 deals with the procedural formalities of such suit. Ninth, every suit shall be as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent litigation concerning them. Tenth, on the basis of the subject-matter in dispute in a suit, the jurisdiction of civil Courts varies. Eleventh, a cause of action is the foundation of a suit. It must be antecedent to the institution of a suit and on the basis of it the suit must have been filed. Twelfth, joinder of several causes of action can be permitted if the circumstantial facts allow the same. Thirteenth, the claim of the plaintiff can be adjusted to the set-off and counter-claim of the defendant. Fourteenth, where a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

The discussion on the institution of suit under the CPC and its essentials proves that the procedural formalities have been made with much complexity to ensure proper justice and to restrain vexatious and false suits in the course of administration of justice; but these complexities sometimes causes delay in the disposal of some cases. Thus too much adherence to the procedural formalities makes the Courts over-burdened with a huge number of cases. So the Civil Procedure Code has incorporated Section 89 for the settlement of certain disputes outside the Court through arbitration, conciliation, judicial settlement including settlement through Lok Adalat and mediation. To avoid unnecessary delay in the disposal of civil cases and to make balance between the number of suits instituted and disposed of, the Alternative Dispute Resolutions are in practice in India simultaneously with the general Civil Suit

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 4 : VAKALATNAMA

A person / party filing a case, May also represent their own case personally in any court. However, due to lack of knowledge of Law and Technical Procedures, Lawyers are engaged to report the interest of parties.

"Vakalatnama", is a document, by which the party filing the case authorizes the Advocate to represent on their behalf. Generally, a Vakalatnama may contain the following terms:

- The client will not hold the Advocate responsible for any decision.
- The client shall bear all the costs and /expenses incurred during the proceedings.
- The advocate shall have right to retain the documents, unless complete fees are paid.
- The client is free to disengage the Advocate at any stage of the Proceedings.
- The Advocate shall have all the right to take decisions on his own in the court of Law, during the hearing, to the best interest of client.

Vakalatnama is affixed on the last page of plaint / suit and is kept along with court records.

No fees are required to be paid on it. However, nowadays, certain High courts require an "Advocate Welfare Stamp" to be affixed on the Vakalatnama.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

The Plaint should also have the requisite court fees attached to it. Court fees are some nominal percentage of the value of the claim or value of the suit. The requisite amount of Court and stamp fees is different for every suit, and is mentioned in the "Court Fees Stamp Act." Different amount of court fees is paid for different type of documents.

Some of them are as follows ;

- In case of plaint / written statement == 10 RS. == if the value of the suit exceed Rs.5,000/- upto 10,000/-.
- Plaint, in a suit for possession == Fee of one half of the amount above.
- On a copy of a Decree or order == (50 paisa) == if the amount or value of having the force of a decree the subject matter of the suit wherein such decree or order is made is fifty or less than fifty rupees.

Value of Suit

- Value of suit exceeds Rs. 1,50,000-1,55,000 == Rs. 1700/-
- Value of suit exceeds Rs. 3,00,000-3,05,000 == Rs. 2450/-
- Value of suit exceeds Rs. 4,00,000-4,05,000 == Rs. 2950/-

Finally, a date shall be given to the plaintiff, for first hearing. On such hearing, the court will decide whether the proceedings should continue or not. If it decides, that the case no merits, then it will dismiss it there itself, without calling opposite party. If it decides otherwise, then proceedings shall begin.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 5: WRITTEN STATEMENT

When the notice has been issued to the defendant, he is required to appear on the date mentioned in the notice.

Before such date, the defendant is required to file his "written statement", i.e. his defence against the allegation raised by plaintiff, within 30 days from date of service of notice, or within such time as given by court.

The written statement should specifically deny the allegations, which defendant thinks are false. Any allegation not specifically denied is deemed to be admitted.

The written statement should also contain verification from the Defendant, stating that, the contents of written statement are true and correct.

The time period of 30 days, for filing a Written Statement, can be extended to 90 days after seeking permission of the court.(Order 8)

The Hon'ble Supreme Court of India in its judgment, in ***M/s SCG Contracts India Pvt. Ltd. v. K.S. Chamankar Infrastructure Pvt. Ltd. & Ors***. held that the failure to file written statements within the statutory time period of 120 days for filing written statements in a commercial suit will result in the forfeiture of the right of the defendant to file a written statement. The bench of the Supreme Court held as follows:

Mandatory filing of written statement within 120 days from receipt of Summons

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

The Supreme Court reviewed the provisions of Order V Rule 1 (1), Order VIII Rules 1 and 10 of the CPC, as amended by the Act, and held that under the aforesaid provisions a party is granted 30 days' time to file its written statement and a grace period of 90 days is provided, wherein, a court can, after recording the reasons for delay in filing and after imposing costs, allow a written statement to be taken on record. However, if the written statement is filed after 120 days from receipt of summons, the Defendant will be considered to have forfeited its right to file its written statement and the court will have no power to take the same on record in light of the amended provisions laid down in Order VIII Rule 10 of the CPC for commercial disputes.

Pendency of Order VII Rule 11 Application filed by the Respondent Infrastructure is not a valid ground for delay in filing written statement

The Supreme Court held that an application for rejection of plaint is independent of filing of the written statement and the filing of such an application cannot be used as an opportunity to retrieve the lost right to file a written statement, which was upheld in ***R K Roja v U S Rayudu & Ors ,[(2016) 14 SCC 275]***, as cited by the Respondent.

A court cannot use its inherent powers to avoid the consequences ensuing from a procedural provision.

The Supreme Court by relying on ***Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal, [(1962) Supp 1 SCR 450***], held that where there is a special provision in the CPC that deals with a particular procedure, the same

cannot be simply overlooked by taking recourse to the inherent powers of the court and hence the written statement cannot be ordered to be placed on record by exercising the inherent powers of the court.

CHAPTER 6: REPLICATION BY PLAINTIFF

"Replication" is a reply filed by the plaintiff against the "written statement" of Defendant.

"Replication" should also specifically deny the allegations raised by the Defendant in written statement. Anything not denied is deemed to be accepted. Replication should also contain, "verification from the plaintiff, stating that contents of "Replication" are true and correct.

Once Replication is filed, pleadings are stated to be complete.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 7: FRAMING OF ISSUES

"ISSUES" are framed by the court, on the basis of which arguments and examination of witness takes place.

Issues are framed, keeping in view the disputes in the suit, and the parties are not allowed to go outside the purview of "Issues".

Issues may be of : A) Fact or B) Law

While passing final order, the court will deal with each issue separately, and pass judgment on each issue.

The Delhi High Court, in one of its judgment passed by Hon'ble Mr. Justice Rajiv Sahai Endlaw, stated that the CPC, after competition of pleadings, vide Order XIV Rule 1 of 10 requires issues to be framed in the suit. Rule 1(1) of Order XIV provides that issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Rule 1(2) of Order XIV provide that 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. Order XIV Rule 1(3) provides that each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Rule 1(4) provides that issues are of two kinds i.e. issues of fact and issues of law. Thereafter, Rule 1(5) requires the Court to, at the first hearing of the suit, after reading the plaint and the written statement and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or law the

parties are at variance and proceed to frame and record the issues on which the right decision of the case appears to depend.

Framing of omnibus issues with respect to the reliefs claimed, as suggested, is in violation of Order XIV Rule 1(3) which requires distinct issues to be framed on each material proposition affirmed by one party and denied by the other. Such omnibus issues also do not cull out the material propositions of fact or law on which the parties are at variance and do not tell the Court the issues on which the right decision of the case depends, as required by Rule 1(5). Framing such omnibus issues has the potential of the trial as well as the decision, going haywire.

Order XIV Rule 3 of CPC provides that issues may be framed either on the allegations made on oath by the parties or on the basis of allegations made in the pleadings or on the basis of contents of documents produced by either party.

Once issues have been framed, the Court, under Order XV Rule 3 of the CPC, has to consider whether existing undisputed evidence in the form of documents available on the record is sufficient to determine such issues and if not, to give an opportunity to the parties for production of evidence as may be necessary for decision upon such issues.

The Court concludes the evidence led by the parties is to be guided by the issues framed and not by the reliefs claimed in the plaint. The determination by the Court also has to be of the issues framed and not of the reliefs claimed in the plaint. The grant of the relief claimed in the plaint is

consequential to the determination of the issues.

The question as to who leads the evidence first i.e. whether the plaintiff or the defendant and in the event there are more than one defendants, which of the defendants, also depends upon the issues framed and the onus of proof thereof. Thus, if the onus of all the issues or of the principal issue is on the defendant and not on the plaintiff, it is the defendant who will lead evidence first and not the plaintiff.

That the evidence to be led in the suit is to be guided by the issues and not by the pleadings becomes further clear from Order XVIII Rule 3 of the CPC which provides that where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party.

Thus, not only the trial even the judgment is to be structured on the issues.

CHAPTER 8: EVIDENCE

THE CONCEPT OF 'PREPONDERANCE OF PROBABILITIES':

How a fact is to be proved in a Civil case?

The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities (**Narayan Ganesh Dastane Vs. Sucheta Narayan Dastan)**[2]. This is for the reason that under the Evidence Act, section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

The belief regarding the existence of a fact that thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if no weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact.

The court thus applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second.

[2] 1975 AIR 1534

Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies.

Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on promissory note. The nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue.

1. The degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear."— Lord Denning.

2. But whether the issue is one of cruelty or of a loan on promote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved.

In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.

APPRECIATION OF DOCUMENTARY EVIDENCE IN CIVIL CASE:-

The Honble Sri Justice Ramesh Ranganathan And Honble Sri Justice M.Satyanarayana Murthy, in ***P.Madhusudhan Rao vs Lt.Col.Ravi Manan***,

clearly illustrated the rules for interpretation of a document with an aid of rulings of the Hon'ble Supreme Court of India.

The Supreme Court in ***Delhi Development of Authority Vs. Durga Chand***,[3] has also noticed Orders Rules and quoted them with approval and as the observation of the Supreme Court have the force of law of the land, it may be taken Orders Rules (known as golden rules of interpretation) have been judicially recognized and may be adopted as Rules for interpretation of the documents in India.

These Rules are listed hereunder:

1. The meaning of the document or of a particular part of it is therefore to be sought for in the document itself.
2. The intention may prevail over the words used
3. Words are to be taken in their literal meaning
4. Literal meaning depends on the circumstances of the parties
5. When is extrinsic evidence admissible to translate the language?
6. Technical legal terms will have their legal meaning.
7. Therefore the deed is to be construed as a whole.

Apart from the said seven rules listed by Order, it would be convenient to list the following rules for the sake of convenience are called additional rules and given number in continuation:

8. Same words to be given the same meaning in the same contract.

[3] 1973 AIR 2609

9. Harmonious construction must be placed on the contract as far as possible. However, in case of conflict between earlier or later clauses in a contract, later clauses are to be preferred to the earlier; while in a will, earlier clause is to be preferred to the later.

10. Contra Proferendum Rule-If two interpretations are possible, the one favourable to the party who has drafted the contract and the other against him, the interpretation against that party has to be preferred.

11. If two interpretation of a contract are possible the one which helps to make the contract operative to be preferred to the other which tends to make it inoperative

12. In case of conflict between printed clauses and typed clauses, type clauses are to be preferred. Similarly, in conflict between printed and hand written clauses, hand written clauses are to be preferred and in the event of conflict between typed and hand written clauses, the hand written calluses are to be preferred

13. The special will exclude the general

14. Rule of expression unius est exclusion alterius

15. Rule of noscitus a sociss

16. Ejusdem generic rule will apply both the contract and statute

17. Place of Punctuation in interpretation of documents.

From the Rules stated above, when the language used in a document is unambiguous conveying clear meaning, the Court has to interpret the document or any condition therein taking into consideration of the literal meaning of the words in the document. When there is ambiguity, the

intention of the parties has to be looked into. Ordinarily the parties use apt words to express their intention but often they do not. The cardinal rule again is that, clear and unambiguous words prevail over the intention. But if the words used are not clear or ambiguous, intention will prevail. The most essential thing is to collect the intention of the parties from the expressions they have used in the deed itself. What if, the intention is so collected will not secure with the words used. The answer is the intention prevails. Therefore, if the language used in the document is unambiguous, the words used in the document itself will prevail but not the intention. (As to appreciation of documentary evidence in civil case, Avadh Kishore vs. Ram Gopal, AIR 1979 SC 861; Collector, Raigarh vs. Harisingh Thakur, AIR 1979 SC 472.)

Order 13 Rule 4 sub rule 1 CPC:–

Admission of documents under Order 13 Rule 4 of Civil Procedure Code does not bind the parties and unproved documents cannot be regarded as proved nor do they become evidence in the case without formal proof.

Case law:-

- Ferozchin Vs. Nawab Khan, AIR 1928 LAHORE 432.
- Hari Singh Vs. Firm Karam Chand, AIR 1927 Lahore 115
- Sudir Engineering Company Vs. Nitco Roadways Ltd, 1995 (34) DRJ 86

1. Mere admission of document in evidence does not amount to its proof.

2. Admission in evidence of a party's document may in specified cases exclude the right of opposite party to challenge its admissibility. The most prominent examples are when secondary evidence of a document within the meaning of Sections 63-65 of the Evidence Act is adduced without laying foundation for its admissibility or where a document not properly stamped is admitted in evidence attracting applicability of section 36 of Stamp Act.

3. But, the right of a party disputing the document to argue that the document was not proved will not be taken away merely because it had not objected to the admissibility of the document. The most constructive example is of a Will. It is a document required by law to be attested and its execution has to be proved in the manner contemplated by Section 68 of the Evidence Act read with Section 63 of the Succession Act.

4. 'Admission of a document in evidence is not be confused with proof of a document'.

5. The mere marking of an exhibit does not dispense with the proof of document. ***(Sait Taraj Khimechand Vs. Yelamarti Satvam)***

<u>Two stages relating to documents:-</u>

1. One is the stage when all the documents on which the parties rely are filed by them in Court.

2. The next is when the documents formally tendered in evidence.[4]

[4] Baldeo Sahal Vs. Ram Chander &Ors.AIR 1931 Lahore 546.

RE-OPENING EVIDENCE AND INHERENT POWERS OF THE COURT :-

The Supreme Court in **K.K. Velusamy v. N. Pallanisami** has examined the power of the Courts with regard to re-opening the evidence and recalling witnesses. The Court while examining the relevant provisions of the Code of Civil Procedure, 1908 has culled out the principles for invoking the inherent powers of the Court.

The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate – 2009 (4) SCC 410]. 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.

The Hon'ble Apex Court however agrees that section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of section 151 has been explained by this Court in several decisions

(:Padam Sen vs. State of UP-AIR 1961 SC 218; Manoharlal Chopra vs. Seth Hiralal – AIR 1962 SC 527; Arjun Singh vs. Mohindra Kumar – AIR 1964 SC 993; Ram Chand and Sons Sugar Mills (P) Ltd. vs. Kanhay Lal – AIR 1966 SC 1899;Nain Singh vs. Koonwarjee – 1970 (1) SCC 732; The Newabganj Sugar Mills Co.Ltd. vs. Union of India- AIR 1976 SC 1152; Jaipur Mineral Development Syndicate vs. Commissioner of Income Tax, New Delhi – AIR 1977 SC 1348; National Institute of Mental Health & Neuro Sciences vs. C Parameshwara – 2005 (2) SCC 256; and Vinod Seth vs. Devinder Bajaj – 2010 (8) SCC 1).

The same can be summarized as follows:

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is `right' and undo what is `wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

CHAPTER 10: LIST OF WITNESS

Whichever witness the parties wish to produce and is to be examined has to be produced before the court.

Both the parties to the suit shall file a list of witness within 15 days from the date on which issues were framed or within such other period as the court may prescribe.

The parties may either call the witness on its own, or ask the court to send summons to them.

In case court send summons to witness then the party calling for such witness has to deposit money ' with the Court for their expenses, known as "Diet Money".

A person who does not appear before the court when he is required by the court to do so shall be liable to a fine and penalty.

Finally on the date the witness will be examined by both the parties.

Examination by party of its own witness is called "Examination-in-chief"

Examination by party of other party's witness is called "Cross Examination".

Whatever, has to be deposed in "Examination-in-chief", can also be filed by way of an Affidavit.

Once the Examination and Cross- Examination of witness is over, and also the admission and denial of documents, then the court will fix a date for final hearing.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 10: FINAL HEARING

- On the day fixed for final hearing, the arguments shall take place.
- The arguments should strictly be confined to the issues framed.
- Before the final Arguments, the parties with the permission of Court, can amend their pleadings.
- Whatever is not contained in the pleadings, the court may refuse to listen.
- Finally, the court shall pass a "final Order", either on the day of hearing itself, or some other day fixed by the court.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 11: CERTIFIED COPY OF ORDER

Certified copy of order means the final order of court and having the seal and stamp of court. Certified copy is useful, in case of execution of the order, or in case of Appeal.

Certified copy can be applied by making an application to the Registry of concerned Court, along with nominal fees for the order.

In case of "urgent requirement some additional amount has to be deposited. "Urgent order" can be obtained within a week, and the normal might take 15 days.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 12: JUDGEMENT

The judgment given by any court is followed by its decree and they play an important role to define the scope and limitations of any individual. Daily various judgments are pronounced and decree following it took place in the courts of our country. Various civil cases are also being disposed off each working day. These judgments are important as they act as precedents for future declarations, so it is very necessary that they stick to the judicial reasoning without bringing their own discretionary power blindly. After so many judgments and backing it up with the decree also, certain issues do arises which tends to confuse us. Civil Procedure Code, 1908 has been drafted very nicely but then also certain loopholes are there providing leeway for the creeping of unnecessary elements. As no law seems to perfect for us but then also effort should be made to take them somewhere close to the shell of perfectness.

Section 2(9) defines judgment as "Judgment means the statement given by a judge on the basis of a decree or order."

Essentials

The essential element of a judgment is that there should be a statement for the grounds of the decision[5]. Every judgment other than that of a court of small causes should contain:

1. A concise statement of the case

[5] Vidyacharan Shukla v.Khubchand Baghel AIR 1964 SC 1009

2. The points for determination

3. The decision thereon

4. The reasons for such decision

A judgment in the court of small causes may contain only point b) and c). Sketchy orders which are not self-contained and cannot be appreciated by an appellate or revisional court without examining all the records are, therefore, unsatisfactory and cannot be said to be a judgment in that sense.

As the Supreme Court in ***Balraj Taneja v. Sunil Madan***[6], a judge cannot merely say "suit decreed" or "suit dismissed". The whole process of reasoning has to be set out for deciding the case one way or the other. Even the Small Causes Courts judgments must be intelligible and must show that the judge has applied his mind. The judgment need not, however, be a decision on all the issues in a case. Thus, an order deciding a preliminary issue in a case, e.g. constitutional validity of a statute is a judgment.

Conversely, an order passed by the Central Administrative Tribunal cannot be said to be a judgment, even it has been described as such. Similarly the meaning of the term 'judgment' under the Letters Patent is wider than the definition of 'judgment' under the CPC[7].

Pronouncement of a Judgment

After the hearing has been completed, the court shall pronounce the judgment in open court, either at once or at some future day, after giving due

[6] (1999) 8 SCC 396 at p.415

[7] Shah Babulal v. Jayaben D Kania (1981) 4 SCC 349

notice to the parties or their pleaders[8]. Once the hearing is over there should not be a break between the reservation and pronouncement of judgment.

Before the Amendment Act 1976, no time limit was provided between hearing of arguments and delivery of the judgment. There was a persistent demand all over India for imposing a time limit for the delivery of the judgment after the conclusion of the hearing of the case.

Accordingly, it is provided that if a judgment isn't pronounced at once then it must be delivered within 30 days from the conclusion of the hearing. Where however it is not practicable to do so due to exceptional and extraordinary circumstances, it may be pronounced within 60 days. Due notice of the day fixed for the pronouncement of the judgment shall be given to the parties or their pleaders[9]. The judge need not read out the whole judgment and it would be sufficient only if the final order is pronounced[10]. The judgment must be dated and signed by the judge[11]. Rule 2 enables a judge to pronounce a judgment which is written but not pronounced by his predecessor.

A reference in this connection can be made to the case of ***Anil Rai v. State of Bihar***[12] in which after arguments of the counsel were over but the

[8] Section 33, order 20 rule 1
[9] Proviso to rule 1(1)
[10] Rule 1(2)
[11] Rule 3
[12] (2001) 7 SCC 318

judgment was reserved by the High Court which was pronounced after 2 years. The action was strongly deprecated by the Supreme Court.

The court was conscious that for High Court no particular period was prescribed for pronouncement of judgment, but the judgment must be pronounced expeditiously.

Moreover, the judgment must be based on the grounds and points in the pleadings and not outside the case put forward by the parties in their pleadings. On one hand the court should record findings on all the points raised by the parties and on the other hand, it should not decide any question which doesn't arise from the pleadings of the parties or is unnecessary[13].

Copy of the judgment

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[14].

Contents of the judgment (rules 4-5)

Contents of judgment as per rule 4 order 20

[13] Swaran Lata v. H.K. Banerjee (1969) 1 SCC 709
[14] Order 20 Rule 6-B

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

(1) Judgments of a court of small causes need not contain more than the points for determination and the decision thereon.

(2) Judgments of other courts—Judgments of other courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

In suits in which issues have been framed, the court must record its findings with each separate issue with reasons[15]. Recording of reasons in support of judgment may or may not be considered to be one of the principles of natural justice, but it can't be denied that the recording of reasons in support of a decision is certainly one of the visible safeguards against possible injustice and arbitrariness and affords protection to the person adversely affected.

A judgment may be a self-contained document from which it should appear as to what the facts of the case were and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to a particular conclusion and decreed or dismissed the suit should certainly be reflected in the judgment[16].

Alteration of a judgment

A judgment once signed cannot be amended afterwards or altered except:

1. To correct clerical or arithmetical errors
2. Errors due to accidental slips or omissions (section 152)
3. Or on review (section 114)[17]

[15] Order 20 rule 5
[16] Balraj Taneja v. Sunil Madan (1999) 3 Civ LJ 370
[17] Samarendra Nath v. Krishna Kumar AIR 2001 SC 1440

Chapter 13: Decree

Section 2(2) of the Code of Civil Procedure defines Decree as follows:-

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 of CPC, 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.

Essentials of a decree

The following are the essentials of a decree:-

- There must be a formal expression of an adjudication;
- The adjudication must have been given in a suit before the Court;
- The adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit.
- Such adjudication must be conclusive.

"Adjudication.- The legal process of resolving a dispute. The formal giving or pronouncing a judgment or decree in a court proceeding; also the

judgment or decision given. The entry of a decree by a court in respect to the parties in a case. It implies a hearing by a court, after notice, of legal evidence on the factual issue(s) involved."

Kinds of decrees

The Civil Procedure Code under section 2(2) recognizes the following three classes or types or kinds of decrees:

1. Preliminary Decree;
2. Final Decree
3. Partly preliminary and partly final Decree

Preliminary Decree:

A preliminary decree is that decree which decides the rights of the parties, with regard to all or any of the matters in controversy in suit but does not completely dispose of suit. It declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceeding.

Explanation: appended to Section 2(2) states that a decree is preliminary when further proceeding have to be taken before the suit can be completely disposed of. Thus, preliminary decree is passed in those cases where proceeding in a suit are to be carried out in two stages, First when rights of Parties are adjudicated thereafter, in Second stage those rights are implemented.

Final decree:

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

Explanation: attach to the definition of decree under Section 2(2) clearly states that a decree is final when the adjudication completely disposes of the suit.

Partly preliminary and partly final decree:

A decree may be partly preliminary and partly final. The issue of a decree being partly preliminary and partly final arises when the Court decides two question by the same decree. Thus, in a suit for possession of immovable property with Menses Profits, if the Court passes a decree of possession of immoveable property in favour of plaintiff and directs an enquiry into the menses profits, then the former part of decree is final while latter part is preliminary decree because the final decree for relief of menses profits can be drawn only after enquiry.

Deemed decree

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

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

(b) Any order for dismissal for default.

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

The adjudications of a court may be divided into two classes: either Decree or Order. It means the adjudications, which are not decree, are orders and vice versa.

Adjudication means: judicial determinations of the matters in disputes. So, if a suit is dismissed for default of appearance of parties, or an appeal for want of prosecution etc. it cannot be considered as adjudication as court has not determined the matter in controversy judicially.

Court: is a place where justice is administered. To be a court, the person constituting it must have been entrusted with judicial functions. Hence, a decision by an administrator on administrative nature cannot be considered as a decision by the court. Thus an order passed by an officer who is not a decree[18] .

[18] Deep Chand V. Land Acquisition Officer, AIR 1994 SC 1901

Suit: The word suit is not defined anywhere in the code. However, Privy Council have defined it in ***Hansraj Gupta V. Official Liquidators of the Dehra Dun-Mussoorie Electric Tramways Co. Ltd***[19] "As per the definitions given in this case, the word 'suit' generally means and apart from some other context must be taken to mean, a civil proceeding instituted by the presentation of a Plaint".

Thus, if a proceeding does not start by presenting a plaint, rather by other means; say by making an application or otherwise, then it cannot be considered as a suit and hence adjudication so done by the court will not be termed as a decree.

Now, if it so, the problem may be faced when any adjudication take place on any matter presented in front of the court by making an application, especially under the Indian Succession Act, the Hindu Marriage Act, the Land Acquisition Act, the arbitration Act, etc. And hence, the legislature to treat the adjudication of the court in the above mentioned act as decree has given the status of this adjudication as 'Statutory Decree'.

Therefore, a proceeding which does not commence with a plaint and which is not treated as a suit under any other act (means statutory suit), cannot be said to be a suit under the Code and the decision given therein cannot be said to be a decree under sec-2(2) of the Code. Thus, as observed in ***Diwan Bros.***

[19] AIR 1933 PC 63

V. Central Bank of India[20], a decision of a tribunal, even though described as 'decree' under the Act, is a decree passed by a tribunal and not by a court covered by Sec-2(2).

Necessity of a decree

The Code requires passing of decree in all suits. A decree is thus an essential part of the ultimate outcome of the suit. Decree is an indispensible requisite. An appeal lies against a decree and not against a judgment. Without a decree an appeal cannot be "put in motion". A decree is therefore an absolute necessity.

Drawing up of a decree: Rule 6-A

A decree should be drawn up within 15 days from the date of the judgment. If a decree is not drawn up, an appeal can be preferred without filing a copy of the decree.

Form of a decree

A decree should be in the form as prescribed by Appendix D to the (First) Schedule with necessary variations.

Contents of a decree

The decree shall follow the judgment, agree with it and bear:

1. The number of the suit

[20] AIR 1976 SC 1503

2. The names and description of the parties and their registered addresses

3. The particulars of their claims

4. The relief granted

5. The amount of costs incurred in the suit , and by whom or out of what property and in what portions are they paid

6. The date on which the judgment was pronounced

7.The signature of the judge[21]

[21] Section 33 rule 6, 7. Jagat Dhish v Jawahar Lal AIR 19961 SC 832

CHAPTER 14: APPEAL FROM ORIGINAL DECREE

Right to appeal is statutory and substantive right. It is not merely appeal procedural right. Statutory right means must be conferred by statute unless it provides there won't be any right to appeal. While right to institute a suit is not conferred by law. The right is inherent. But right to appeal has to be conferred by appeal statute. Where statute provides for right to appeal, it may constitute appeal machinery where shall the appeal lie. While the same isn't true for right to sue. A civil suit has to be filed subject to condition of jurisdiction. An appeal is appeal substantive right. Right to appeal can't be taken retrospectively because general rule of specific interpretation. Substantive law operates prospectively unless an express statute provides so. According to Section 96, In general, an appeal lies from any decree passed by the court.

In cases, where the value of suit does not exceed Rs.10, 000 An appeal can be filed only on a question of law. When a decree has been passed against the Defendant as "Ex-Parte", i.e. without his appearance, no appeal is allowed.

When an appeal is headed by two or more judges, then the majority decision shall prevail. In case there is no majority, then the decree of lower court shall be confirmed.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

In case, the number of judges in the court, where appeal is filed is more, than the number of judges hearing the appeal, then if there is a dispute on a point of law, such dispute can be referred to one or more judges.

Procedure For Appeal From Original Decrees (Order 41)

- The appeal shall be filed in the form prescribed, singed by the appellant, along with a true certified copy of the order.
- The appeal shall contain the grounds of objection under distinct heads, and such grounds shall be numbered consecutively.
- If the appeal is against a decree for payment of money, the court may require the appellant to deposit the disputed amount or furnish any other security.
- A ground / objection which has not been mentioned in the appeal, cannot be taken up for arguments, without the permission of court.
- Similarly any point of act which was not taken up y the Appellant, in lower court, cannot be taken up in appeal lies only against only those points which have been decided by the court rightly or wrongly.

Who can Appeal?

1. Any party to the suit, who is adversely affected by the decree or the transferee of interest of such party has been adversely affected by the decree provided his name was entered into record of suit.

2. An auction purchaser from an order in execution of a decree to set aside the same on the grounds of fraud.

3. Any person who is bound by the decree and decree would operate res judicata against him.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 15: SECOND APPEAL

As per Section 100 of the Civil Procedure Code, 1908:

1. An appeal shall lie to the High Court for the decision made by the District Court.
2. An appeal lies if the decree is passed ex-parte.
3. If High Court is satisfied that substantial question of law is involved it shall formulate the decisions.

   It is to be noted that the second appeal is on the grounds of a substantial question of law not on finding errors of facts.

Nature of the second appeal

- The right to appeal is not inherited but it is created by statute. The right to file suits is inherent in nature.
- This right starts from the date of filing suits.
- The decision of Appellate Court is final.
- The rights cannot be declared void until and unless declared by the statue.

Forum of the second appeal

Appeal from original decree– Generally every decree passed by subordinate court firstly appeal has to lies to High Court. But appeal shall not lie if it has been passed by the consent of the parties under Section 96 of CPC.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 16: APPEAL FROM ORDER

An appeal shall lie from the order which is appealable; (Order 43 R 1 r/w Section 104)

- It is an order made under section 35A,i.e Compensatory cost.
- Refusing leave to institute a suit under nature of section 91 and 92.
- An order under section 95 i.e. compensation for obtaining arrest, or injunction.
- Insufficient grounds.
- Any order made under rules from which an appeal is expressly allowed by rules.
- An order made under this code imposing a fine or directing the arrest.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 17: APPEAL TO THE SUPREME COURT

An appeal shall lie to the Supreme Court if-

- The case involves a substantial question of law which is of general importance.
- When the High Court thinks themselves that the case deemed to be fit and decided by the Supreme Court.

Grounds of Appeal:-

- Appellant has to mention grounds of appeal in the memorandum of appeal.
- Appellant has to mention the ground of objection and present it before the Appellate Court.
- The new ground can be raised by additional application later on, and the High Court has the power to reject or accept the application.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 18: LIMITATION

- For every appeal, there is a limited period, within which appeal should be filed. Such a limitation is provided under the Limitation Act, 1963.
- For appeal, in case of a decree passed by lower court in civil suit, the limitation is :
- Appeal to High Court - 90 days from the date of decree or order.
- Appeal to any other court - 30 days from the date of Decree or order.
- In case there are more than one plaintiffs or defendants, then any one of them can file on appeal against all of them respectively.
- Merely because an appeal is filed, does not mean that the order or decree of lower court is stayed. In case of temporary stay of decree or order, it has to be specifically asked, and stay will operate only if court grants it.
- In case of execution of decree, the court, which passed the decree, can itself stay the execution for time being on sufficient reasons shown.
- The court may require the appellant to deposit some sort of security.
- The appellate court may, on the day fixed for hearing the appellant dismiss the appeal, or issue notice to the opposite party to appear on next day.
- If on the first day of hearing, appellate court issues summons to the opposite party, then :
- It shall fix a date for next hearing, and such date shall be published in the court house.
- Notice shall also be sent to the lower court, whose decree or order has been appealed.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

- To appellant is required to file "Process Fee" which is very nominal in amount, and on such filing, the notice shall also be sent to opposite party.
- In case of appeal, the one who files the appeal is known as appellant, and against whom it is filed, is known as "Respondent".

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 19: EXECUTION

1] Execution is the last stage of any civil litigation. There are three stages in litigation- a. Institution of litigation, b. Adjudication of litigation, c. Implementation of litigation. Implementation of litigation is also known as execution. Decree means operation or conclusiveness of judgment. A decree will be executed by the court which has passed the judgment. In exceptional circumstances, the judgment will be implemented by other court which is having competency in that regard. Execution enables the decree-holder to recover the fruits of the judgment.

2] Meaning of Execution:-

The term "execution" has not been defined in the code. 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. Hon'ble Apex Court in ***Ghanshyam Das v. Anant Kumar Sinha***[22] dealing with provision of the code relating to execution of decree and orders, observed in following words –

" so far as the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all aspects. The numerous rules of Order 21 of the code take care of different situations providing effective remedies not only to

[22] AIR 1991 SC 2251

judgmentdebtors and decree-holders but also to claimant objectors, as the case may be."

3] Execution is the enforcement of a decree by a judicial process which enables the decree-holder to realize the fruits of the decree and judgment passed by the competent Court in his favour. The execution is complete when the decree-holder gets money or other thing awarded to him by the judgment, decree or order of the Court.

4] Order XXI of the CPC is the lengthiest order provides detailed provisions for making an application for execution and the manner that, how they are to be entertained, dealt with and decided. Execution is the enforcement of a decree by a judicial process which enables the decreeholder to realize the fruits of the decree passed by the competent Court in his favour. All proceedings in execution commence with the filing of an application for execution. Such application should be made to the Court who passed the decree or where the decree has been transferred to another Court, to that Court. Once an application for Execution of decree is received by the Court, it will examine whether the application complies with the requirements of Rules (11 to 14). If they complied with, the Court must admit and register the application.

5] Application for Execution of decree :-

All proceedings in Execution commence with the filing of an application for Execution. Following persons may file an application for Execution: 1. Decree- holder 2. Legal representative of the decree holder 3. Representative

of a person claiming under the decree-holder 4.Transferee of the decree-holder, in some cases.

6] Court which may execute a decree. :-

Section 38 of the Code specifies that, a decree may be executed either by the Court who passed it or by the Court to which it is sent for execution. Section 37 defines the expression 'Court which passed a decree' while sections 39 to 45 provide for the transfer for execution of a decree by the Court which passed the decree to another Court, lay down conditions for such transfer and also deal with powers of executing Court.

7] U/s. 37 the expression Court which passed the decree is explained. Primarily the Court which passed the decree or order is the executing Court. If order or decree is appealed against and the appellate Court passes a decree or order, even then the original Court which passed the decree or order continues to be treated as Court which passed decree. The Court which has passed the decree or order ceased to exist or ceased to have jurisdiction to execute the decree already passed, then the Court which will be having a jurisdiction upon that subject matter, when application of execution is made will be the competent Court to execute the decree.

8] Merely because the jurisdiction of the Court which has passed the decree is transfer to another Court due to transfer of territorial area, the jurisdiction to execute the decree passed by such a Court is not ceased. However, the Court to whom the transfer of territorial area is made, will also have a jurisdiction to conduct the execution of decree or order.(Sec.37). Sec. 38 contemplates that a

decree may be executed either by the Court which passed it, or by the Court which it is sent for execution. However the execution on judgment debtor is criteria of executing Court of territorial jurisdiction.

9] MODES FOR EXECUTION:-

Section 51 to 54 describe procedure in execution or mode for execution.

9.1 Mode of executing decree under section 51:

(a) By delivery of any property specifically decreed. Property may be movable or immovable.

(b) By attachment and sale of the property or by sale without attachment of the property.

(c) by arrest and detention.

(d) by appointing a receiver.

(e) is the residuary clause and comes into play only when the decree cannot be executed in any of the modes prescribed under clause (a) to (d).

9.2 Enforcement of decree u/s 52 against Legal representative:

9.2.1**.** Section 52 (1) empowers a creditor to execute his decree against the property of deceased in the hands of legal representative so long as it remains in his hand. For application of this clause the decree should have passed against the party as the legal representative of the deceased person, and it should be for the payment of money out of the property of the deceased.

9.2.2**.** Section 52 (2) empowers a creditor to execute his decree against the legal representative personally if he fails to accounts for the properties received by him from deceased person.

9.3 Section 53: Liability of ancestral property -

No legal representative should be held personally accountable where the suit has been filed against a joint Hindu family unless he has received some property of joint Hindu family. Under pious obligation if he has received the property of joint Hindu family then will be held liable. Where the decree has been passed against Karta, no execution be made against the son under pious obligation if the decree is passed after partition. Even after partition a son can be held liable if suit was pending before partition.

9.4 Section 54: Partition of estate or separation of share.

Section 54 comes into play when a decree has been passed for partition or for separate possession of a share of an undivided estate paying revenue to the government. Section 54 deals with a case where though the civil court has the power to pass a decree yet it is not competent to execute the same. Under this section the execution of decree shall be made by collector.

10] PRINCIPLES WITH REGARD TO EXECUTION OF DECREE:-

Principles with regard to execution of decree and order can briefly be summarized as under -

- Provision of CPC relating to execution of decree and order shall be made applicable to both Appeal and Suit.
- A decree may be executed by the court which passed the judgment and decree or by some other court which is having competency to implement the judgment passed by such other court.
- The court which passed the decree may send it for execution to other court either on application of the applicant (decree-holder) or by the court itself.
- A court may order for execution of decree on the application of decree holder (a) by delivery of any property which was in possession of judgment-debtor and decree has been specifically passed concerning such property (b) by attachment and sell of the property of the judgment-debtor (c) by arrest and detention (d) by appointing a receiver (e) in such other manner which depends upon nature of relief granted by the court.
- Upon the application of decree-holder, the court may issue "percept" to any other court which is competent in that regard.
- All questions arising between the parties to the suit in the decree shall be determined by the court while executing the decree and not by separate suit.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

- Where a decree is passed against a party as the "legal representative" of a deceased person and decree is for payment of money out of the property of deceased person, it may be executed by attachment and sell of any such property.
- Where immovable property has been sold by the court in execution of a decree such sale shall be absolute. The property shall be deemed to be invested in the favour of purchaser, and the purchaser shall be deemed as a party to litigation.
- The court to which decree is sent for execution shall require certifying to the court which has passed decree stating the manner in which decree has been implementing concerning the fact of such execution.

11] Whether Executing Court can go behind the decree :-

Section 38 lays down the general rule that, a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. The executing Court has no power to entertain any objection as to the validity of the decree or as to the legality or correctness of the decree. The reason underline the above rule is that, although a decree may not be according to law, it is binding and conclusive as between the parties to the suit, unless it is set aside in appeal or revision. It is for the same reason that, the Court executing a decree cannot alter, vary or add to the terms of the decree even with the consent of the parties. In the case of

V.Ramswami Vs T.N.V.Kailash Theyar[23] it was observed that, "the duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though, it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation ". It has been held by the Supreme Court in ***Karansing Vs Chaman Pawan***[24] , that a decree passed by a Court without jurisdiction is a nullity, and its validity can be set up whenever and wherever, it is sought to be enforced or relied upon, including the stage of its execution. In ***Topanmal Vs M/s Kundomal Gangaram*** [25], it was held by the Supreme Court that, an executing Court must take the decree as it stands. An executing Court cannot go behind the decree. It can neither add something in the decree already passed, nor alter the decree. It cannot grant relief which is not contemplated by the decree.

A Court executing a decree cannot go behind the decree. The court must take the decree as it finds it. It cannot entertain any objection that, the decree is incorrect in law or on facts, because until the decree is set aside by an appropriate proceedings in appeal, or in revision, a decree even if erroneous, is binding between the parties. It has to see the decree as it is and execute it in accordance with the terms therein. It cannot question the correctness or legality of the directions. However, if the court which passed the decree has no inherent jurisdiction, the decree is incapable of execution. Dealing with this question, the Supreme Court observed in

[23] AIR 1951 S.C,189(192)
[24] (1955) 1 SCR 117
[25] AIR 1960, SC 388

Karan Singh V.Chaman Paswan that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up wherever and whenever it is sought to be enforced, whether in execution or in collateral proceedings. However, where the defect in jurisdiction was of a kind that fell within the saving of S.21 of the Code or S.11 of the Suits Valuation Act, it could not be raised except in the manner and subject to the conditions mentioned therein. This rule holds good only between parties to the decree and their representatives. The Court has no power to entertain any objection as to the validity of the decree that, it was obtained by fraud, or as to the legality or correctness of the decree, e.g. An objection that the decree sought to be executed was passed against a wrong person; or that it was passed against a lunatic or a minor not properly represented; or that the court which passed it, had no jurisdiction to do so. The reason being that a decree, though not according to law, is binding and conclusive between the parties until it is set aside, either in appeal or revision. For the same reason, the court executing a decree, cannot alter, vary or add to the terms of the decree even by the consent of the parties. A decree passed against an unregistered firm in violation of S.69(2) of the Partnership Act is not a nullity and cannot be questioned in execution. It is not open to the executing court to go into the validity of an order amending the decree. Broadly speaking, the distinction is one between a plea that the decree sought to be executed is a nullity and a plea that, it is invalid, improper or erroneous. It has been held that, the award of mesne profit for more than 3 years is in contravention of O.20 R.12, and is a nullity and that the objection can be taken in execution. An objection to the execution of a

decree passed on a rent control order is admissible. The executing court cannot entertain an objection that the personal decree passed against the defendant before proceeding against the properties is erroneous. It is also not open to the executing Court to enquire whether the property charged by the decree was not available on the date of decree. Also, the objection based on the absence of territorial jurisdiction could be taken in execution, unless it is apparent on the face of the decree. However, when on the allegations in the plaint, the suit is beyond the pecuniary jurisdiction of the Court, a decree passed by it is a nullity and that objection can be raised in execution.

If the decree is free from ambiguity, the court of execution is bound to execute it whether it be right or wrong. But though a court executing a decree cannot go behind the decree, it is quite competent to construe the decree whether the terms of the decree are ambiguous, and to ascertain its precise meaning, for, unless this is done, the decree cannot be executed. But it cannot, under the guise of interpretation, make a new decree for the parties. The construction of a decree must be governed by the pleadings and the judgment. But when a particular construction has been put upon a decree in former execution proceedings, it is not open to the court to treat that construction as erroneous in a subsequent application.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

12] Stay of execution:-

As per Order XXI Rule 26 the executing Court may stay the execution proceeding, the Court which passes the decree can stay the proceeding on application of judgment-debtor enabling him to file the appeal and to bring the stay to the execution proceeding. Where the suit is pending in any Court decree-holder and judgment-debtor in such circumstances if the Court is found the rights of parties are required to be adjudicated by the Court where such suit is pending and unless the rights are to be determined, the decree cannot be executed in such circumstances, Court can stay the execution proceeding. The appellate Court can also grant the stay to the execution proceeding.

13] CONCLUSION: –

From the above discussion it clearly appears that execution is the enforcement of decrees and orders by the process of Court, so as to enable the decree-holder to realize the fruits of the decree. Order 21 of the Code contain elaborate and exhaustive provision for execution of decrees and order, take care of different type of situation and provide effective remedies not only to the decree-holder and judgment-debtors but also to the objectors and third parties.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

CHAPTER 20: SUMMARY SUITS

Introduction to Summary suit:-

Summary suit or summary procedure is provided under order XXXVII of the Code of Civil Procedure, 1908. The summary suit is a unique legal procedure used for enforcing a right in an efficacious manner as the courts pass judgment without hearing the defence.

While this prima facie would appear to be violative of the cardinal principle of natural justice, Audi Alteram Partem, nobody should be condemned unheard, this procedure is only used in cases where the defendant has no defence and is applicable to only limited subject matters.

Therefore, this gives rise to an interesting question which forms the crux of this paper: What amounts to having no defence? This question is central to the practical application of Or.37 and has been analyzed further after considering a catena of recent judgments and provisions under this order.

This article also analyzes and highlights the Salient features of summary suits by juxtaposing and comparing summary suits with ordinary suits. This would help one appreciate the unique position summary suits hold in the civil justice system and the problems summary suits intend to redress.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

Nature of Summary Suits:-

A summary suit under order 37 of the Code of Civil Procedure is a legal procedure used for enforcing a right that takes effect faster than ordinary suits as unlike in ordinary suits the courts do not hear the defence.

However it does not violate the principles of Audi Alteram Partem, nobody should be condemned unheard as it is used only in certain limited cases where the defendant has no tenable defence, which is a complex question of law and fact and has been elaborately analyzed subsequently.

Object:-

The object underlying the summary procedure is to ensure an expeditious hearing and disposal of the suit and to prevent unreasonable obstruction by the defendant who has no defence or a frivolous and vexatious defence[26] and to assist expeditious disposal of cases.[27]

The Gujarat High Court in outlining the object of summary suits opined that the sheer purpose of enacting Summary Suits is to give impetus to commerce and industry by inspiring confidence in commercial population that their causes in respect of money claims of liquidating amounts

[26] Kocharabhai ishwarbhai patel v. Gopal bhai C patel AIR 1973 Gujrat 29 (31)
[27] Bankyag B G Agarawal v. Bhagwanti Mehji 2001 (1) Bom LR 823 (DB)

(ascertained amount) would be expeditiously decided and their claims will not hang on for years blocking their money for a long period. [28]

Scope and extent of applicability :-

A summary suit can be instituted in High Courts, City Civil Courts, Courts of Small Causes and any other court notified by the High Court. High Courts can restrict, enlarge or vary the categories of suits to be brought under this order.

As explained above that the object of Summary suits is to aid commercial transactions by a swift redressal mechanism these suits can be instituted only in case of certain specified documents.

The documents such as a bill of exchange, hundies, and promissory notes[29] and suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a written contract; or on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only[30].

[28] Navinchandra Babulal Bhavsar v. Bachubhai Dhanabhai Shah AIR 1969 Gujrat 124 (128) DB.
[29] Order 37. R.1(2)
[30] Order 37. R. 1(2)b

The Procedure of Summary Suit:-

Rules 2 and 3 of Order 37 provide the procedure of summary suits. Under rule 2 after the summons of the suit has been issued to the defendant. The defendant is not entitled to defend Summary suit unless he enters an appearance.

In default of this, the plaintiff will be entitled to an ex parte decree which is on a different footing to an Ex Parte decree passed in ordinary suits.

In the case that the defendant appears, the defendant must apply for leave to defend within ten days from the date of service of summons upon him and such leave will be granted only if the affidavit filed by the defendant discloses such facts as may be deemed to entitle him to defend.

The cases where leave to defend should and shouldn't be granted have been analyzed subsequently.

Analyzing Summary Suits:-

As the purpose of summary suits is to act as a welfare mechanism to achieve justice in an expedient manner, the language under Or.37 is to be interpreted liberally, which has been reflected in numerous judgments.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

An illustrative example would be the phrase written contracts that have been given the widest possible interpretation as even Invoices/Bills are written contract within the contemplation of Order 37.[31]

Difference between a summary suit and original suit :-

The major difference between ordinary suits and summary suits is that in the later the defendant will get a chance to defend himself only if leave to defend is granted.

Unlike ordinary suits, summary suits are restricted to matters related to bills of exchange, promissory notes and contracts, enactments, guarantees of specified nature. Interestingly Res Judicata is not applicable to summary suits, i.e. summary suits can be filed on the matter directly and substantially in issue in a previous ordinary suit.

In summary suits in the case of non-appearance of the defendant, a decree in favour of the plaintiff is passed easily, whilst in ordinary suits usually, multiple summonses are served and only then an ex parte order is passed.

Therefore, in Summary, suits setting aside an ex parte decree is stricter and more stringent and special circumstances for non-appearance need to be set out, while in ordinary suits only sufficient cause needs to be shown. The difference between special circumstances and sufficient cause has been elucidated below.

[31] KIG Systel Ltd v. Fijitsu ICIM Ltd AIR 2001 Del 357

Special circumstances v. sufficient cause

The two terms have been lucidly juxtaposed in ***Karumili Bharathi v. Prichikala Venkatchalam***[32]. The reasons offered by the defendant to explain the special circumstances should be such that he had no possibility of appearing before the Court on a relevant day.

For instance, there was a strike and all the buses were withdrawn and there was no other mode of transport. This may constitute "special circumstances". But if the defendant were to plead that he missed the bus he wanted to board and consequently he could not appear before the Court. It may constitute a 'sufficient cause', but not a 'special circumstance'. Thus a 'special circumstance' would take with it a 'cause' or 'reason', which prevents a person in such a way that it is almost impossible for him to attend the Court or to perform certain acts which he is required to do. Thus the 'reason' or 'cause' found in "special circumstances" is stricter or more stringent than in "sufficient cause" and depends on the facts of each case.

Analyzing what constitutes no defence:-

As mentioned above, to proceed with summary suits the defendant must have no tenable defence.

[32] 1999 (3) ALD 366

What constitutes conditions when a leave to defend must be granted has been dealt by the Supreme court in *IDBI* ***Trusteeship Services Ltd v. Hubtown Ltd***[33] held that the position in law with respect to granting of leave to defend a summary suit is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case.

The Court explained that at one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. However, it must be borne in mind that on the other end of the spectrum are frivolous or vexatious defences, which should result in a refusal of leave to defend.

In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. The judgement lays out principles that have been summarized below.

If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign the judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

This reiterates the position laid out in ***Precision Steel & Engg. Works vs Prem Deva Niranjan Deva Tayal***[34] where it was held that mere disclosure of facts, not a substantial defence is the sine qua non. What is a substantial defence depends upon facts and circumstances of each case.

[33] 2016 SCC OnLine SC 1274
[34] 1982 Air 1518

Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith or the genuineness of the triable issues, or if they are plausible but not probable, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security.

Moreover, recently in ***Uma Shankar Kamal Narain v. MD overseas limited***[35], the Supreme court upheld previous judgements like ***Southern Sales and Sevices v. Sauermilch Design and Handles GMBH***[36], and the ***Sunil Enterprise v. SBI***,[37] and reiterated the principles to be adhered to in the case of a leave to defend summary suit relating to the dishonored cheques.

It has been held that "Unconditional leave to defend a suit shall not be granted unless the amount as admitted to be due by the Defendant is deposited in Court."

[35] 2007 4 SCC 133
[36] GMBH 1982 AIR 1518
[37] (1998) 5 SCC 354

Conclusion:-

It is humbly opined that summary suits act like an ingenious solution to help prevent unreasonable obstructions by a defendant who has no tenable defence.

Summary suits would be beneficial to businesses as unless the defendant is able to demonstrate that he has a substantial defence, the plaintiff is entitled to a judgment.

Order 37 engineers an appropriate mechanism that ensures that the defendant does not prolong the litigation especially as in commercial matters time is of the essence and helps further the cause of Justice.

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

DISCLAIMER

The above information has been sourced from:

a) The Code of Civil Procedure, 1908 (5 of 1908).

b) The Limitation Act, 1963 (36 of 1963).

c) Institution of Suits and its Essentials : Legal source of India, available at: http://www.legalservicesindia.com/article/2212/Institution-of-Suit-and-its-Essentials.html

d) https://indiankanoon.org

e) https://www.advocatekhoj.com/index.php

f) https://www.lawctopus.com/summary-suits-explained/

g) https://lawtimesjournal.in/judgement-decree-order-cavet/

Research by: Adv. Priyanshi Bathia, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner