

Final Year

Sri Lanka Law College

Civil Procedure - I



Empowers Independent Learning



Independent Law Student Movement

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Reviews, responses and criticism

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1. INSTITUTION OF ACTIONS

Matters to consider

1. Identify the cause of action
2. Identify procedure
3. Identify Court
4. Identify Prescriptive Period – Divorce: none; Custody: none; Accident: 2 years; Defamation: 2 years; Any action for damages: 2 years; Oral agreement: 3 years; Written contract: 6 years; Sale of goods: 1 year
5. Identify the parties to the suit. Two types of parties could sue or be sued i.e. natural persons and juristic persons. Action may be brought against a company as it is a juristic person. Action against a partnership should be brought against the individual partners as partnerships are not given recognition as juristic persons. Action for or against the State should be instituted for or against the Attorney General and not the relevant public officer (nominii officii) unless it is given corporate status i.e. actions against corporations and statutory boards should be filed in their respective names.

Procedure to follow – Civil Procedure Code

1. Section 5 – accruing cause of action
2. Letter of demand to be sent wherever necessary
3. Sections 23-30 and 39-51 – filing of proxy and plaint
4. Sections 55-71 – service of summons to the defendant
5. Sections 72-78 – filing of proxy and answer by defendant
6. Sections 79 – filing of replication of plaintiff where there is a claim in reconvention
7. Sections 80-83 – fixing the case for trial
8. Sections 121 and 175 – filing of witness and documents list at least 15 days before the trial
9. Section 146 – Recording of admissions
10. Sections 146(a) – Section 149 – Framing of issues
11. Sections 150-183 – Recording of evidence
12. Written submissions if necessary
13. Sections 184-187 – Judgement
14. Section 188 – Decree

2. SELECTION OF JURISDICTION

Jurisdiction means the power to decide.

Section 9 – Subject to the pecuniary or other limitations prescribed by any law, action shall be instituted in the court within the local limits of whose jurisdiction,

(a) a party defendant resides; or

“*part defendant*” – *Hassan v Peiris* – means “any party defendant”.

“*residence*” – *Vaidyalingam v Arunasalam* – where he eats drinks and sleeps, the courts look for the defendant’s intention to return;

Mendis v Perera – generally where the family of a defendant resides is considered to be the residence of a defendant; *Blue Diamonds Ltd. v Rotterdam MV* – ‘Resides’ in the case of a natural person refers to place where he has his family establishment and home. In the case of corporation in India the corporation is deemed to carry on business at the sole or principle office. But our CPC does not have a similar explanation. The plea based on residence in the plaint is insufficient as there is no unequivocal assertion that Amro resides within jurisdiction. The use of the word ‘deemed’ in the plaint to describe residence suggests that Amro did not in fact reside within the jurisdiction.

(b) the land in respect of which the action is brought lies or is situate in whole or in part;
or

Appuhamy v Gunasekara – held that an action by a lessee compelling his lessor to accept rental can not be considered as an action relating to land. Further, in such an instance, such an action should be filed based on the agreement and more preferably where the agreement was made.

(c) the cause of action arises; or

If the place of performance is mentioned in the contract, action could be filed under this heading.

Plesspol v Lady de Zoysa – parties entered into a contract in Colombo which was to be performed in Kandy. It was held that action could be validly filed in Kandy District Court.

(d) the contract sought to be enforced was made.

Dias v Constantine – plaintiff, a resident of Galle, entered into an agreement with the defendant from Kaluthara to supply goods at Kaluthara. There was no express agreement regarding payment. The plaintiff instituted action to recover the value of the goods in the Galle District Court. On the basis of the English law principle that the debtor must seek out the creditor, it was held that the action was correctly filed.

Ponnaiah v Kanagasaby – promissory note was silent regarding the place of payment and it was decided that action should be filed where the plaintiff (creditor) resides.

Sowdoona v Abdul Muees – Gratien J stated that “performance of a contractual obligation must prima facie be made where the obligation was contracted unless another place of performance has been expressly or impliedly agreed upon”

Lallyett v Negris - Defendants advertised hams for sale and plaintiff posted order from Nuwara Eliya for 3 hams which were dispatched from Colombo and paid for by plaintiff. Hams allegedly unfit for human consumption. Court held that the advertisement was an invitation to treat and not an offer, therefore the contract was made in Colombo and the Nuwara Eliya court did not have jurisdiction.

When it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more courts any immovable property is situate, any one of those courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect, and thereupon proceed to entertain and dispose of any action relating to that property; and its decree in the action shall have the same effect as if the property were situate within the local limits of its jurisdiction: Provided that the action is one with respect to which the court is competent as regards the nature and value of the action to exercise jurisdiction.

Pecuniary and Other Limitations

Mediation Boards Act Section 7(1)(a) - Where a Panel has been appointed for a Mediation Board area, subject to the provisions of subsection (2), no proceeding in respect of any dispute arising wholly or partly within that area or an offence alleged to have been committed within that area shall be instituted in, or be entertained by any court of first instance if the dispute is in relation to movable or immovable property or a debt, damage or demand, which does not exceed Rs. 25,000 in value.

HCPA - wherever the cause of action arises out of a commercial transaction, the value of which exceed Rs. 3,000,000, the Commercial High Court of the relevant district should have jurisdiction; to date jurisdiction to be exercised in Commercial High Courts is being exercised in the Commercial High Court of the Western Province in Colombo, being the only Commercial High Court which has been brought into operation by Gazette Notification.

Arbitration Act Section 7 - Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any existing or future differences between them shall be referred to arbitration, and any one or more of the said parties, or any person claiming through or under them, shall nevertheless commence any action against the other party, or against any person claiming through or under them, in respect of the matters so agreed to be referred, it shall be lawful for the court in which the action is brought, on application by the defendants, or any of them, upon being satisfied that no sufficient reason exists why such matters cannot be referred to arbitration according to such agreement as aforesaid, and that the defendants or any of them were, at the time of the bringing of such action, and still are, ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration, to make an order staying all proceedings in such action, and compelling reference to arbitration on such terms as to costs and otherwise as to such court may seem fit: Provided always that any such rule or order may, at any time afterwards, be discharged or varied as justice may require.

(1) Preventive or ouster clauses in statute may limit the jurisdiction of courts

3 JOINDER OF PLAINTIFFS AND DEFENDANTS

Section 11 – All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. And judgment may be given 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, without any amendment of the plaint for that purpose. But the defendant though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the court in disposing of the costs of the action otherwise directs.

Section 14 – All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

Section 17 - No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Nothing in the CPC shall be deemed to enable plaintiffs to join in respect of distinct causes of action. If the consent of anyone who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the reasons therefor being stated in the plaint.

Section 18(1) - The court may on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that the name of any party, whether as plaintiff or as defendant improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action, be added.

Hilda Perera v Somawaithie – in order to avoid multiplicity of actions and to diminish the cost of litigation and for the effective and complete adjudication of all questions, the District Court was correct in ordering the addition of the company as a party defendant.

4 HOW A PARTY APPEARS IN COURT

Section 24 – Litigant can either enter an appearance by himself, by his recognised agent or through a duly appointed attorney-at-law

Wherever a litigant decides to appear in person, he is required to take all steps in the action. Where a party retains an attorney, all steps in action have to be taken through such attorney.

Section 27(1) - The appointment of a registered attorney to make any appearance or application, or do any act as aforesaid, shall be in writing signed by the client, and shall be filed in court; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a registered attorney, instead of the party whom he represents, may be made.

- This is commonly referred to as the proxy
- Once the proxy is filed, it remains in force until it is revoked or until the death of the litigant or the attorney or the incapacity of the attorney by reason of his removal or suspension by the Supreme Court
- *Letchman v Christian* – lawyer can not appear without a proxy being filed
- *Jinadasa v Sam Silva* – on summons returnable date, the lawyer appeared and moved for time to file proxy and answer. It was held that this was an instance where no appearance was made and therefore the District Court should have ordered an ex-parte trial against the defendant

Section 28 – if attorney should die, or be removed or suspended, or otherwise become incapable to act as aforesaid, at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared until 30 days after notice to appoint another registered attorney has been given to that party either personally or in such other manner as the court directs.

Section 25 – identifies the following persons as recognised agents –

- (a) The Attorney General on behalf of the State
- (b) An attorney authorised by the Attorney General to appear on behalf of the State
- (c) Persons holding general powers of attorney from litigants not residing in the jurisdiction
- (d) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance or application is made or act done, in matters connected with such trade or business only, where no other agent is expressly authorized to make such appearances and applications and do such acts.

Section 26 – process served on a recognised agent is effectual in law.

5 TRANSFER OF AN ACTION

Section 10 – Application for transfer of action must be made before the case is taken up for trial. All parties to the action must be noticed. Application must be made by way of an affidavit or a motion. The Court of Appeal will conduct an inquiry where the parties have a right to be heard. If the court of appeal is convinced that the case should be transferred it must allow the application.

- *Somawathie v Danny* – court must consider the convenience of the parties
- *Sivasubramaniam v Sivasubramaniam* – sufficient grounds must be urged to effect transfer under Section 10

Judicature Act Section 46 - Whenever it appears to the Court of Appeal –

- (a) that a fair and impartial trial cannot be had in any particular court or place; or
- (b) that some questions of law of unusual difficulties are likely to arise; or
- (c) that a view of the place in or near which any offence is alleged to have been committed may be required for the satisfactory inquiry into or trial of the same ; or
- (d) that it is so expedient on any other ground,

the court may order upon such terms as to the payment of costs or otherwise as the said court thinks fit, for the transfer of any action, prosecution, proceeding or matter pending before any court to any other court and accordingly in every such case, the court to which any such action, prosecution, proceeding or matter is so transferred shall, notwithstanding anything to the contrary in this or any other law, take cognizance of and have the power and jurisdiction to hear, try and determine such action, prosecution, proceeding or matter, as fully and effectually to all intents and purposes as if such court had an original power and jurisdiction.

6 SERVICE OF SUMMONS ON THE DEFENDANT

Once the plaint is filed, summons is served on the defendant in the form set out in the CPC. The summons is the first intimation to the defendant that an action has been instituted against him.

The requirements are that summons should,

- (i) Be in writing and signed by a Registrar of the Court
- (ii) Specify the date on which the defendant is expected to appear in court (summons returnable date); this should not be later than 3 months after the filing of the action
- (iii) Generally be served by registered post but where it is not possible to serve summons by registered post or where the defendant fails to respond after having been served summons by registered post, the court has to serve summons either personally or by substituted form (e.g. grama niladrai affixing the summons to a conspicuous place where the defendant resides); whenever substituted service of summons takes place, the court would specify the time that the defendant is permitted to file answer
- (iv) Be in accordance with the procedure set out in Sections 63-68 of the CPC where the defendant is in jail
- (v) Be in accordance with Section 69 of the CPC where the defendant is abroad

7 LIST OF DOCUMENTS AND WITNESSES

Section 121

The parties may, after the summons has been delivered for service on the defendant, obtain, on application to the court or to such officer as the court appoints in that behalf, before the day fixed for the hearing, summonses to persons whose attendance is required either to give evidence or to produce documents.

- (1) Every party to an action shall, not less than 15 days before the date fixed or the trial of an action, file or cause to be filed in court after notice to the opposite party-
 - a. a list of witnesses to be called by such party at the trial, and
 - b. a list of the documents relied upon by such party and to be produced at the trial.

Section 80

On the date fixed for the filing of the answer of the defendant or where replication is permitted, on the date fixed for the filing of such replication, and whether the same is filed or not, the court shall appoint a date for the trial of the action, and shall give notice thereof, in writing by registered post to **all parties** who have furnished a registered address and tendered the cost of service of such notice, as provided by subsection (2) of section 55.

Section 175

(1) No witness shall be called on behalf of any party unless such witness shall have been included in the list of witnesses previously filed in court by such party as provided by section 121: Provided, however, that the court may in its discretion, if special circumstances appear to it to render such a course advisable in the interests of justice, permit a witness to be examined, although such witness may not have been included in such list aforesaid, Provided also that any party to an action may be called as a witness without his name having been included in any such list.

(2) A document which is required to be included in the list of documents filed in court by a party as provided by section 121 and which is not so included shall not, without the leave of the court, be received in evidence at the trial of the action:

Provided that nothing in this subsection shall apply to documents produced for cross examination of the witnesses of the opposite party or handed over to a witness merely to refresh his memory.

8 FILING OF AN ANSWER

Once the summons is served, the defendant is expected to file a proxy and thereafter to file and answer. Although Section 55 of the CPC requires that the answer should be filed on a date being a day not later than three months from the date of the institution of the action in court, the courts have interpreted this liberally.

In *Paul Perera v Chelliah* and *Fernando v Samarkoon*, it was held that a mere denial in answer as regards to the factual matters in a plaint is not sufficient. Further whenever the defendant does not answer the contents of any averment in a plaint, he is deemed to have admitted such averment.

In *Weerasooriya v Vanderpooten* and more recently, *Blue Diamonds Ltd. v Amsterdam Rotterdam MV*, it was decided that any objection to jurisdiction cannot be raised at the stage of appeal and must be made by way of a separate and distinct plea.

Section 75 permits the defendant to set out a claim in reconvention in his answer (this has been inherited from the Roman Dutch principles of law). There is no requirement for the claim in reconvention to arise from the same set of facts on which the cause of action of the plaintiff is based. *Silva v Perera* provides that the only requirement must be that the claim should be of such a nature that the respective claims of such plaintiff and defendant should be mutually adjustable.

An answer may be rejected or returned on the grounds that it is in a defective form, it is argumentative or prolix or where it contains matters irrelevant to the action.

The answer must be served on the plaintiff and it is the practice of the court to provide a translation where required.

9 EX-PARTE TRIAL

Section 84 - If the defendant fails to file his answer on or before the day fixed for the filing of the answer, or on or before the day fixed for the subsequent filing of the answer or having filed his answer, if he fails to appear on the day fixed (or the hearing of the action, and if the court is satisfied that the defendant has been duly served with summons, or has received due notice of the day fixed for the subsequent filing of the answer, or of the day fixed for the hearing of the action, as the case may be, and if, on the occasion of such default of the defendant, the plaintiff appears, then the court shall proceed to hear the case ex-parte forthwith, or on such other day as the court may fix.

It is not possible to order an ex-parte trial where the defendant does not appear in response to summons sent by registered post. In such situations the appropriate order would be to make an order for personal service of summons.

Seneviratne v Dharmaratne - The plaintiff sued the defendant for damages in a sum of Rs. 78,000/- for failure to grant her a Diploma Certificate in Montessori Training for which she claimed to have qualified at a course conducted by the Defendant. At the ex-parte hearing of the action under Section 84 of the Civil Procedure Code, the only evidence adduced was that of the Plaintiff's sister. There was nothing in her evidence which showed that she was testifying to the facts from her own knowledge. All the transactions which led to the dispute had been between the plaintiff and the defendant. There was no evidence that the witness herself played a direct role in that regard. Held that the evidence led is clearly hearsay and hence 'no evidence at all' on which a judgment may be entered under Sec. 85(1) of the CPC. Consequently, the ex parte decree entered by the District Judge is illegal.

Sirimavo Bandaranayake v Times of Ceylon - Even in an ex parte trial, the judge must act according to law and ensure that the relief claimed is due in fact and in law, and must dismiss the plaintiff's claim if he is not entitled to it. An ex parte judgment cannot be entered without a hearing and adjudication.

Procedure in Ex Parte Trial Sec. 85

(1) The plaintiff may place evidence before the court in support of his claim by affidavit, or by oral testimony and move for judgment, and the court, if [1977] satisfied that the plaintiff is entitled to the relief claimed by him, either in its entirety or subject to modification, may enter such judgment in favour of the plaintiff as to it shall seem proper, and enter decree accordingly.

(2) Where the court is of opinion that the entirety of the relief claimed by the plaintiff cannot be granted, the court shall hear the plaintiff before modifying the relief claimed.

(3) Where there are several defendants of whom one or more file answer and another or others of whom fail to file answer, the plaintiff may move for judgment against such of the defendants as may be in default without prejudice to his right to proceed with the action against such of the defendants as may have filed answer. The provisions of this subsection shall apply notwithstanding that the defendants are jointly liable upon a bill of exchange, promissory note or cheque.

(4) The court shall cause a copy of the decree entered under this section to be served on the defendant in the manner prescribed for the service of summons. Such copy of the decree shall bear an endorsement that any application to set aside the decree under subsection (2)

Vacation of an Ex-Parte Trial

Section 86(2A) – at any time prior to the entering of judgement against a defendant for default, the court may, if the plaintiff consents, but not otherwise, set aside any order made on the basis of the default of the defendant and permit him to proceed with his defence as from the stage of the default upon such terms as to costs or otherwise as to the court shall appear fit.

Section 86(2) – Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper.

Once an application under Section 86(2) is made, the plaintiff could file his objections to the vacation of the ex parte judgment and decree. Thereafter the court has to hold an inquiry into the question of whether the grounds urged by the defendant should be accepted or not.

After the inquiry, the court may make two types of orders –

- (i) Accepting the grounds of the defendant and setting aside the judgement and decree
- (ii) Not accepting the reasons urged by the defendant and dismissing his application

Sirimavo Bandaranayake v Times of Ceylon – Section 88 must be read with section 753 of the CPC. The fact that section 88(1) bars an appeal against an ex parte default judgment restricts the right of appeal conferred by section 754 of the CPC but does not affect the revisionary jurisdiction by section 753, if anything it confirms that jurisdiction. From the fact that section 88(2) confers a right of appeal, one cannot, possibly infer an exclusion of revisionary jurisdiction on the same matter. In this case the Supreme Court recognised the right of the defendant to come by way of revision under Article 138 of the Constitution where the ex parte judgement entered is based on manifest error, perversity or the like.

Non-appearance of Plaintiff. – Sec. 87

(1) Where the plaintiff or where both the plaintiff and the defendant make trial, the court shall dismiss the plaintiffs action.

(2) Where an action has been dismissed under this section, the plaintiff shall be precluded from bringing a fresh action in respect of the same cause of action.

(3) The plaintiff may apply within a reasonable time from the date of dismissal, by way of petition supported by affidavit, to have the dismissal set aside, and if on the hearing of such application, of which the defendant shall be given notice, the court is satisfied that there were reasonable grounds for the non- appearance of the plaintiff, the court shall make order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the action as from the stage at which the dismissal for default was made.

Non-appearance of a party on the adjourned day – Sec. 144

If on any day to which the hearing of the action is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the action in one of the modes directed in that behalf by Chapter XII, or make such other order as it thinks fit.

Default of party to carry out purpose of adjournment. – Sec 145

If any party to an action, to whom time has been granted, fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the action, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the action forthwith.

10 INTERROGATORIES

Interrogatories (also known as requests for further information) are a formal set of written questions propounded by one litigant and required to be answered by an adversary, in order to clarify matters of fact and help to determine in advance what facts will be presented at any trial in the case.

Interrogatories are an optional step which is available to any party in a civil suit. The objective of interrogatories is to obtain information and admissions from the opposite party who has flatly denied a position raised by the party interrogating in his pleadings.

Unfortunately the provisions relating to interrogatories are not adopted by practitioners and hence this important provision has basically become meaningless.

Independent Newspapers Limited v Gurusingham - Particulars could be obtained through interrogatories but a party should do so at any time before the hearing and if a defendant before he tenders his answer.

Once a party interrogated receives the interrogatories, it has a duty to answer them truthfully. However, such a party may refuse to answer on the following grounds –

- (a) That the interrogatories are irrelevant
- (b) That the interrogatories are scandalous
- (c) Where it is alleged that they have not been framed bona fide and for the purpose of the action
- (d) That the answer will incriminate himself
- (e) That the matter inquired after is not sufficiently material at that stage of the case

Consequences of refusing to answer

CPC Section 100 - If any person interrogated omits or refuses to answer or answers insufficiently any interrogatory, the party interrogating may apply to the court for an order requiring him to answer or to answer further, as the case may be. And an order may be made requiring him to answer or to answer further, either by an affidavit or by viva voce examination, as the court may direct...

CPC Section 109 - If any party fails to comply with any order under this Chapter to answer interrogatories, or for discovery, production, or inspection, which has been duly served, he shall, if a plaintiff, be liable to have his action dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not appeared and answered. And the party interrogating or seeking discovery, production, or inspection may apply to the court for an order to this effect, and the court may make such order accordingly. Any party failing to comply with any order under this Chapter to answer interrogatories, or for discovery, production, or inspection which has been served personally upon him, shall also be deemed guilty of the offence of contempt of court.

Seneviratne v Dharmaratne – held that the court has discretion under Section 109 before making an order of dismissal of the plaintiff's action or an order striking off the answer of the defendant

Kennedy v Dodson – “the legitimate use of interrogatories is to obtain from the party interrogated, admissions of facts which is necessary for the party interrogating to prove in order to establish his case”

Wijesekera v Eastern Bank – whilst accepting *Keendy v Dodson*, the court held further that the purpose of interrogatories is to obtain admissions of facts relevant to a fact in issue or leading up to a matter in issue

Gunawardena v Dunuvila – the case stated the circumstances under which the court will not allow interrogatories

Namasivayam Chetty v Ragsoobhoy – Failure to answer interrogatories does not make a defendant liable to have his defence struck off under section 109 of the CPC. In order to make the defendant liable to the penalty it is necessary that a peremptory order should be made under section 100. The Court has a discretion to grant an indulgence in a case under section 109.

Amim Jrai v Hadji Omar – an order made under section 109 which attached serious consequences should be made only where there is evidence of contumacious (stubbornly or wilfully disobedient to authority) refusal to comply with a peremptory order under section 100. Where the interrogated party does not have sufficient time to answer the interrogatories, an order under section 109 should not be made.

11 DISCOVERY OF DOCUMENTS

Notice to admit genuineness of Documents – Sec. 101

(1) Either party may, by a notice issued by order of court, to be obtained on motion ex parte within a reasonable time not less than ten days before the hearing, require the other party to admit (saving all just exceptions to the admissibility of such document in evidence) the genuineness of any document material to the action.

(2) The admission shall also be made in writing, signed by the other party or his registered attorney, and filed in court.

(3) If such notice be not given, no costs of proving such document shall be allowed, unless the court otherwise orders.

(4) If such notice is not complied with within four days after its being served, and the court thinks it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the result of the action.

Order for discovery of documents. Sec. 102

(1) The court may, at any time during the pendency therein of any action, order any party to the action to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the action, and any party to the action may, at any time before the hearing, apply to the court for a like order.

(2) Every affidavit made under this section shall specify which, if any, of the documents therein mentioned the declarant objects to produce, together with the grounds of such objection.

Order for production of documents. Sec. 103

The court may, at any time during the pendency therein of any action, the production by any party thereto or such of the documents in his possession or power relating to any matter in question in such action or proceeding as the court thinks right; and the court may deal with such documents when produced in such manner as appears just.

State required to make discovery or give inspection of documents under certain circumstances. Sec. 103A

(1) In any action to which the State is a party, the State may also be required to make discovery or give inspection of documents.

(2) The provisions of subsection (1) shall not prejudice the right of the State to withhold any document on the ground that in the opinion of the Minister in charge of the subject to which the document relates, the public interest would suffer by such disclosure.

Notice to produce documents for inspection – Sec 104

(1) Any party to an action may, at any time before or at the hearing thereof, by motion ex parte, obtain an order of court for notice to issue to any other party in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his registered attorney, and to permit such party or registered attorney to take copies thereof.

(2) No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such action, unless he satisfies the court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice.

Time and place of such production be specified by party receiving – Sec 105

The party to whom such notice is given shall, within ten days from the receipt thereof, deliver through the court to the party giving the same a notice stating a time within three days from such delivery at which the documents, or such of them as he does not object to produce, may be inspected at his registered attorney's office or some other convenient place, and stating which, if any, of the documents he objects to produce, and on what grounds.

Otherwise, order for inspection to be made by court – Sec. 106

If any party served with notice under section 104 omits to give notice under section 105 of the time for inspection, or objects to give inspection, or names an inconvenient place for inspection, the party desiring it may apply to the court for an order of inspection.

Consequence of not complying – Sec. 109

(1) If any party fails to comply with any order under this Chapter to answer interrogatories, or for discovery, production, or inspection, which has been duly served, he shall, if a plaintiff, be liable to have his action dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not appeared and answered. And the party interrogating or seeking discovery, production, or inspection may apply to the court for an order to this effect, and the court may make such order accordingly.

(2) Any party failing to comply with any order under this Chapter to answer interrogatories, or for discovery, production, or inspection which has been served personally upon him, shall also be deemed guilty of the offence of contempt of court.

12 AFFIDAVITS

An affidavit means a statement or declaration made under oath or affirmation by a person who is aware of the facts mentioned therein.

An affidavit should only contain matters that are within the personal knowledge of the declaring person or matters that he has personally observed (see *Chandrawathie v Dharmaratne*)

Section 181

Affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to, except on interlocutory applications in which statement of his belief may be admitted, provided that reasonable grounds for such belief be set forth in the affidavit.

Section 182

Petitions cannot be converted to affidavits

Who may administer oaths - Sec183.

In the case of any affidavit under this Chapter -

- (a) any court, or Magistrate, or Justice of the Peace; or
- (b) any officer whom the Minister in charge of the subject of Justice may appoint for the purpose (and who shall be styled " Commissioner for Oaths ") may administer the oath to the declarant.
- (c) any person qualified to administer an Oath or affirmation according to the law of the country, in which the affidavit is sworn or affirmed.

In every affidavit deponent must state his religion and that the Justice of the Peace or Commissioner of Oaths before whom the signing of the affidavit takes place attests that the affidavit was read over and explained to declarant.

Section 183A

states that where a person is required to under CPC or any other law make an affidavit,

- (a) where the action is brought by or against the Attorney-General, any officer of the State, and
- (b) where the action is brought by or against a corporation, board, public body, or company, any secretary, director or other principal officer of such corporation, board, public body or company; and
- (c) where any party to the action is absent from Sri Lanka, his attorney duly authorised to bring, conduct or defend the action, as the case may be; and
- (d) where any party to the action, or where there is more than one party to the action such of the parties as are in Sri Lanka, or when such attorney of the parties as is just above mentioned, is or are unable, for want of personal knowledge or bodily or mental infirmity, to make the required affidavit, any recognized agent of such party,

may make an affidavit in respect of these matters, instead of the party to the action:

Provided that in each of the foregoing cases the person who makes the affidavit instead of the party to the action, must be a person having personal knowledge of the facts of the cause of action, and must in his affidavit swear or affirm that he deposes from his own personal knowledge of the matter therein contained and shall be liable to be examined as to the subject-matter thereof at the discretion of the Judge, as the party to the action would have been, if the affidavit had been made by such party.

Only class of persons mentioned in the above section can file in lieu of party in circumstances mentioned therein. In *Umma Anina v Jawahar* – held that affidavit filed by power of attorney holder of defendant petitioner could not be accepted since there was no material to show he was out of country and since it did not contain an averment to the effect that matters were within his personal knowledge.

Sec 183B – Punishment for wilful false statement

Where any person wilfully makes any false statement by affidavit or otherwise, in the course of any of the proceedings aforesaid he may be punished as for a contempt of court, besides his liability to be tried and punished under the Penal Code for the offence of giving false evidence, where such statement is on oath or affirmation.

13 RES JUDICATA

Section 33 – Every regular action shall, as far as practicable be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them.

This section, read with Section 34 introduces concept of res judicata which means that an issue or point of law that has been previously decided by a court of authoritative and competent jurisdiction and which when pleaded is conclusive of matter in controversy.

The aim of res judicata is to ensure that multiplicity of suits can be avoided.

Sec. 207

All decrees passed by the court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall hereafter be non-suited.

Sec. 406 states that if a Plaintiff withdraws an action without the permission of court to bring a fresh action, he shall be precluded from bringing fresh action.

14 AMENDMENT OF PLEADINGS

Section 93(1) states that upon application to court before first day of trial in presence of parties, or with reasonable notice to parties, court shall have full power of amending in its discretion all pleadings in act by way of addition or alteration or omission.

Section 93(2) however states that on or after the first day set for trial and before final judgement is given an application for amendment of any pleadings will not be allowed unless court is satisfied that for reasons to be recorded by court, grave irremediable injustice will be caused if such amendment is not permitted, and no other ground, and that party applying is not guilty of laches.

Original provision was amended in 1988 and thereafter in 1991. Prior to this the District Court exercised wide discretionary powers in relating to application for amendments or pleadings. Generally amendment was allowed if proposed amendment facilitated the court in proper adjudication of case. i.e. alteration would make real issue between parties clear to court (see *Ratwatte v Owen* and *Vipassi Nayake Thero v Jinaratne Thero*). The exception to this is that amendment/correction sought should not be allowed if injustice is done to opposite party – see *Casim Lebbe v Natchiya*.

In *Lebbe v Sandanam* was stated that court should not allow amendment in specific grounds such as where character of action is changed, where it creates a new cause of action or amendment sets up new case. However in *Daryani v Eastern Silk Emporium* it was stated these grounds are not exhaustive and rules are not binding rules on our courts. This had the effect of allowing amendment of pleadings even where new cause of action was sought to be added.

The amendment in 1988 was necessitated by judgement in *Mackinnon Mackenzie v Grindlays Bank* where it was stated that main considerations to be borne when exercising discretion is that the (a) rules of procedure have no other aim that to facilitate task of administering justice and (b) amendments of clerical error or bona fide wrong description of property and amendments that do not alter fundamental character of action or foundation of suit should be allowed, but if injustice or irremediable prejudice will be caused to opposite party should not be allowed.

After the 1991 amendment a two pronged test was introduced –

1. If before trial date, will be allowed on same liberal grounds under original section.
2. However on or after trial date courts took more strict approach in subsection 2. Accordingly if application in made under section 93(2), the burden shifts on applicant to adduce material and satisfy court as to why his application should be allowed (see *Colombo Shipping Co v Chirayn Clothing Case*).

In *Paramlingam v Seneviratne* it was stated that laches meant negligence or unreasonable delay in asserting or enforcing a right. In *Gunasekera v Abdul Latiff* it was stated that application should not be allowed unless delay is explained. In another decided case it was stated that laches meant delay that could not be reasonably explained.

Clerical errors however, are said not to have been contemplated under section 93 and amendment on such grounds would likely be allowed – *Seylan Bank v Thangaveil*.

15 RESPONSIBILITIES OF AN ATTORNEY

Section 24 - Any appearance, application, or act in or to any court, required or authorized by law to be made or done by a party to an action or appeal in such court, except only such appearances, applications, or acts as by any law for the time being in force only attorneys-at-law are authorized to make or do, and except when by any such law otherwise expressly provided, may be made or done by the party in person, or by his recognized agent, or by an attorney-at-law duly appointed by the party or such agent to act on behalf of such party : Provided that any such appearance shall be made by the party in person, if the court so directs. An attorney-at-law instructed by a registered attorney for this purpose, represents the registered attorney in court.

Section 27

(1) The appointment of a registered attorney to make any appearance or application, or do any act as aforesaid, shall be in writing signed by the client, and shall be filed in court; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a registered attorney, instead of the party whom he represents, may be made.

(2) When so filed, it shall be in force until revoked with the leave of the court and after notice to the registered attorney by a writing signed by the client and filed in court, or until the client dies, or until the registered attorney dies, is removed, or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client.

(3) No counsel shall be required to present any document empowering him to act. The Attorney-General may appoint a registered attorney to act specially in any particular case or to act generally on behalf of the State.

Before representing client in court the Attorney must first file proxy – see *Shafeer v Dharmapala*.

Daniel v Chandradeva -

- a. Courtesy to court is more than a matter of good manners.
- b. Every attorney must encourage respect for the administration of justice by treating the courts not only with candor and fairness but respect and courtesy.
- c. If an attorney is discourteous he renders himself unfit to practice and be an officer of the court.
- d. Courtesy to the court is a duty recognised by Rule 15 of the Supreme Court Rules.
- e. An attorney-client relationship is more than contractual and it does not terminate on non payment of fees and cannot be abruptly terminated.
- f. An attorney is ordinarily justified in withdrawing his services if the client is unable to pay after being reasonably requested to do so. However, attorney should not do so at a time when the client may not be able to find other assistance. Reasonable warning should be given.
- g. When an attorney intends to function in a contentious civil matter only as a registered attorney and not as a counsel, he must retain a counsel. Otherwise will be acting in breach of rule 15 and 16 Supreme Court Conduct and Etiquette Rules of Attorneys-at-Law 1958.

Other duties -

- a. File a list of documents as witnesses as per section 121.
- b. By the time the action reaches trial stage attorney has to be ready with all the relevant documents
- c. Ensure that all the witnesses are ready at the date of the trial. In order to do this he will have to pay the expenses of witnesses before the date of the trial as laid down in sections 122 and 123 of the CPC.

16 JUDGEMENTS AND DECREES

Section 184 –

- (1) The court, upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, and after the parties have been heard either in person or by their respective counsel or registered attorneys (or recognised agents), shall, after consultation with the assessors (if any), pronounce judgment in open court, either at once or on some future day, of which notice shall be given to the parties or their registered attorneys at the termination of the trial.
- (2) On the day so fixed, if the court is not prepared to give its judgment, a yet future day may be appointed and announced for the purpose.

Section 185 - A Judge may pronounce a judgment written by his predecessor, but not pronounced.

Section 186 - The judgment shall be in writing and shall be dated and signed by the Judge in open court at the time of pronouncing it.

Section 187 - The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively.

Warnakula v Ramani Jayawardena - Bare answers to issues without reasons are not in compliance with the requirements of section 187 of the CPC. The evidence germane to each issue must be reviewed or examined. The judge must evaluate and consider the totality of the evidence. Giving a short summary of the evidence of the parties and witnesses and stating that he prefers to accept the evidence of one party without giving reasons are insufficient.

Section 188 - As soon as may be after the judgment is pronounced, a formal decree bearing the same date as the judgment shall be drawn up by the court in the form No. 41 in the First Schedule or to the like effect, specifying in precise words the order which is made by the judgment in regard to the relief granted or other determination of the action. The decree shall also state by what parties and in what proportions costs are to be paid, and in cases in the Primary Courts shall state the amount of such cost. The decree shall be signed by the Judge.

King v Harvey – a decree is merely a formal expression of adjudication by a civil court. It is not necessary that it should be drawn up and signed by the same judge who pronounces the judgement. It can be done by any judge of the court.

Section 189 –

- (1) The court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment.
- (2) Reasonable notice of any proposed amendment under this section shall in all cases be given to the parties or their registered attorneys.

17 OTHER NOTABLE SECTIONS

DATE OF TRIAL - Section 80

On the date fixed for the filing of the answer of the defendant or where replication is permitted, on the date fixed for the filing of such replication, and whether the same is filed or not, the court shall appoint a date for the trial of the action, and shall give notice thereof, in writing by registered post to all parties who have furnished a registered address and tendered the cost of service of such notice,

EVIDENCE DE BENE ESSE - Section 178

(1) If a witness is about to leave the jurisdiction of the court, or if other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately, the court may upon the application of either party or of the witness, at any time after the institution of the action and before trial, take the evidence of such witness in manner hereinbefore provided.

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

(3) The evidence so taken may be read at any hearing of the action, provided that the witness cannot then be produced.

EVIDENCE TAKEN ON AFFIDAVIT OR ON COMMISSION - Section 179

The court may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or by depositions taken on commission, instead of by the testimony of witnesses given viva voce before it, or that the affidavit, or deposition taken on commission, of any witness may be read at the hearing of the action on such conditions as the court shall think reasonable;

Provided that when it appears to the court that either party bona fide desires the production of a witness before the court for cross-examination viva voce, and that such witness can be so produced, an order shall not be made authorizing the evidence of such witness to be given otherwise than viva voce.

18 DRAFT PLAINT

In the [] court of []

[Name of Plaintiff]
[Address of Plaintiff]
Plaintiff

Case No:

Procedure: Regular

VS

Nature: [Money/Land/Special]

Value: [to be included]

[Name of Defendant]
[Address of Defendant]
Defendant

On this [] day of [] 20[]

The plaintiff of the plaintiff(s) above named appearing by [name of attorney], his/their attorney-at-law states as follows

1. The plaintiff above named is a [] carrying on business as a [] in the name and style of [] at []
2. The defendant above named is a [] carrying on business as a [] in the name and style of [] at []
3. [the cause of action arose/the subject matter of this case is situated in/the contract was entered into in/the defendant resides within the local limits of] the jurisdiction of this court and therefore, the plaintiff states that this court has jurisdiction to decide the case
4. Plaintiff states (start setting out facts of case in point form. If annexing any documents state "A true copy of the (document name) is annexed hereto marked "P(number)" and is pleaded as part and parcel of this plaint")
5. If only one cause of action the final averment (before wherefore clause) should be in the form of "a cause of action has therefore accrued to the Plaintiff to sue the 1st to (number of defendants) jointly and severally for the recovery of sum (*if money recovery*) of _____ with legal interest thereon until the date of the decree and thereafter on the aggregate sum of the decree until payment in full".
6. The plaintiff values this action at a sum of Rs. [] for the purpose of stamp duty

Wherefore the plaintiff prays:

- a. For the judgement against defendant(s jointly and severally) in a sum of [] together with legal interest thereon until the date of the decree and thereafter on the aggregate sum of the decree until payment in full; and
- b. For costs, and
- c. For such other and further relief as the court shall seem meet.

Documents filed with the plaint:

(1) True copy of marked P1. Etc

Registered Attorney at law for the plaintiff_____
Registered Attorney at law for the plaintiff

19 DRAFT ANSWER

In the [] court of []

[Name of Plaintiff]
[Address of Plaintiff]
Plaintiff

Case No:
Procedure: Regular
Nature: [Money/Land/Special]
Value: [to be included]

VS

[Name of Defendant]
[Address of Defendant]
Defendant

On this [] day of [] 20[] (within 3 months of submission of the plaint)

The answer of the defendant abovenamed, appearing by [name of attorney] his/its registered attorney-at-law states as follows:

2. The Defendant abovenamed denies all and singular and several the averments contained in the plaint of the plaintiff save and except those that are expressly admitted herein.
3. The Defendant admits the averments in paragraphs 1,2 etc etc of the plaint.
4. The Defendant denies the averments in paragraphs 3,4 etc etc of the plaint.
5. (give reasons why the denial of certain averments has been made)
6. The Defendant further denies all averments in paragraph () and state that no cause of action has accrued to the plaintiff.
7. (if claim is made for defamation/pain of mind etc) the Defendant states that the claims of the plaintiff have caused him/it damage to him/its reputation and (if applicable) pain of mind/trauma, loss of revenue, income etc.

WHEREFORE the Defendant prays:

- a. That the action of the plaintiff be dismissed; and
- b. That the defendant be granted a decree for damages amounting to Rs. () for loss of income/revenue/defamation against the plaintiff with legal interest until the date of decree and thereafter interest on the aggregate sum until decree is satisfied and payment is made in full, and
- c. For costs, and
- d. For such other and further relief as the court shall seem meet.

Registered Attorney at Law for the Defendant

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