

PLACE OF SUING (SECTION 15 TO 20)

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

Rules as to forum

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

a. Rules as to pecuniary jurisdiction:

The rule about the pecuniary jurisdiction is that the "Every suit shall be instituted in the court of the lowest grade competent to try it." The above rule is one of procedure only and not of jurisdiction and therefore, exercise of jurisdiction by a Court of higher grade than is competent to try the suit is mere irregularity covered by section 99 and the decree passed by the Court is not nullity while the exercise of jurisdiction by a Court of lower grade than the one which is competent to try it, is a nullity as being without jurisdiction.

b. Rules as to nature of the suit:

Suits may be divided into three classes - i. Suits in respect of immoveable property; - see ii. Suit for compensation for wrong (for torts) to person or movable property; - and iii. Suits of other kinds, - section- 20.

1) Suits in respect of immoveable property:

Suits to be instituted where subject-matter situate: Section 16 provides as Subject to the pecuniary or other limitations prescribed by any law, suits for the recovery of immoveable property with or without rent or profits-

a. for the partition of immoveable property;

b. for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property;

c. for the determination of any other right to or interest in immoveable property;

d. for compensation for wrong to immoveable property,

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

2) Suit for compensation for wrong to person or movable property:

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

3. Suits for other kinds

Subject, to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction- a. the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendant who does not reside, or carry on business,

or personally work for gain, as aforesaid, acquiesces in such institution; or c. the cause of action, wholly or in part, arises.

Explanation:

Place of institution of suit where local limits of jurisdiction of Courts are uncertain:

1. Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, anyone of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and there upon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction. Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suits to exercise jurisdiction. 2. Where a statement has not been recorded, and the objection is taken before an Appellate Court or Revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the Appellate Court or Revisional Court shall not allow the objection unless in its opinion there was, at the time of institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice

OBJECTIONS TO JURISDICTION - Section 21

Objections as to territorial (Place of suing) jurisdiction:

"No objection as to the place of suing shall be allowed by any Appellate or Revisional Court less 1) such objection was taken in the Court of first instance, 2) at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, 3) and unless there has been a consequent failure of Justice."

All these three conditions must co-exist.

Objections as to pecuniary jurisdiction:

"No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court less 1) such objection was taken in the Court of first instance, 2) at the earliest possible opportunity, c. and unless there has been a consequent failure of Justice."

Lack of jurisdiction and Waiver of defect as to place of suing:

It is well settled principle of law that neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court otherwise incompetent to try a suit. An objection as to local jurisdiction of a Court can be waived and this principle has been given a statutory recognition in the Code of Civil procedure and provides that the defect as to the place of suing may be waived. Objections as to jurisdiction both territorial, pecuniary and technical are not open to consideration by an Appellate Court unless there has been prejudice on merits and the section does not preclude objections as to the place of suing being taken in the Appellate

Court or Revisional Court, if the trial Court has not decided the suit on merits. The mere lack of territorial or pecuniary jurisdiction is considered as merely technical and it can be waived in the sense that if objection with regards to them is not taken at the earliest opportunity, at any stage, at or before the settlement of issues, the same cannot be allowed to be raised at a later stage unless it is established that there is a consequent failure of Justice. It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity and that invalidity could be set up wherever it is sought to be enforced or relied upon even at the stage of execution.

Bar of Fresh Suit - Section -21-A

Bar on suit to set-aside decree on objection as to place of suing:

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

Explanation:

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

INSTITUTION OF PARTIES TO SUIT (ORDER-I)

Order I of the code provides the provisions with respect to the parties to suits and joinder, misjoinder and non-joinder of parties. Joinder of Plaintiff (Rule 1) Joinder of Parties Joinder of Defendant (Rule 3) The question of joinder of parties arises only when 'an act is done by two or more persons Joinder of defendants) or it affects two or more persons (Joinder of plaintiffs)

1. Joinder of Plaintiffs: (Rule 1) :

All persons may be joined in one suit as plaintiffs 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 such persons, whether jointly, severally or in the alternative; and b) if such persons brought separate suits, any common question of law or fact would arise.

2. Joinder of Defendants: Rule (3) :

All persons may be joined in one suit as defendants where - 1) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and 2) if separate suits were brought against such persons, any common question of law or fact would arise.

Example:

An Altercation takes place between P on the one hand and Q and R on the other. I. P assaults Q and R simultaneously. Q and R may join as plaintiffs in one suit for damages against P for that tortious act. II. Q and R simultaneously assault P. P may join Q and R as defendants in one suit for damages for that tortious act.

1. Joinder of parties liable on same contract:

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 anyone contract, including parties to bill of exchange, hundis and promissory notes.

2. When plaintiff in doubt from whom redress is to be sought:

Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what

extent, may be determined as between all parties.

3. Separate trial:

Where it appears to the Court that any joinder of plaintiffs or defendants may embarrass delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient in the interest of justice. Judgment for or against one or more of joint parties: The Court may give judgment for one or more of the plaintiffs as may be found to entitle to relief or as against one or more of the defendants as may be found to be liable.

4. Necessary and Proper Parties:

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 made. In the absence of a necessary party no decree can be passed, while a proper party is one in whose absence an effective order can be made, but whose presence is required for a complete and a decision on the question involved in the proceeding. In the absence of a proper party a decree can be passed so far as it relates to the parties to the suit.

Example:

In a petition for compensation in a road accident case, the claimant(s) may join three parties i.e. owner(s) of the vehicle(s) involved in the accident, the insurer(s) of the vehicle(s) and the driver(s) of the vehicle as respondents. The owner(s) and insurer(s), if any, are the necessary parties along with the claimant(s), while the driver(s) of the vehicle(s) involved is/are the formal/proper party whose presence enables the Court to adjudicate more "effectually and completely" but even in his absence the Court can pass a decree.

5. Non Joinder or misjoinder of parties:

Non joinder means not joining proper or necessary parties to the suits, while mis-joinder is a state of joining two or more persons (whether necessary or proper parties) as plaintiffs or defendants on one suit in contravention of rules 1 and rule 3 respectively. As a general rule, assuit shall not be dismissed only on the ground of non-joinder or mis-joinder of parties, except in a case of non-joinder of a necessary party.

6. Objections as to non joinder or misjoinder of parties:

As has been provided in Rule 13 of Order I, all objections on the grounds of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases in which 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.

7. Suit in the Name of Wrong parties:

Order I, Rule 10 deals with the cases of striking out, addition or substitution of parties.

8. Addition or substitution of plaintiff:

In a case where a suit has been instituted in the name of wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, a court may at any stage of the suit, on the satisfaction of the following: i) that the suit has been instituted through a bona fide mistake, and ii) that it is necessary for the determination of the real matters in dispute, order any other person to be added or substituted as plaintiff upon such terms as the Court may think just.

9. Court may strike out or add parties:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly

joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle

10. all the questions involved in the suit, be added. No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent, i.e., no person can be added as a plaintiff without his consent. On the addition of a defendant, the plaint shall unless the Court otherwise directs be amended and amended copies of the plaint shall be served on the new defendant and if required, on the original defendant. All proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

REPRESENTATIVE SUIT: (Order I, Rule 8) Introduction:

Meaning:

Representative Suit may be defined as under "A representative suit is a suit filed by or against one or more persons on behalf of themselves and others having the same interest in the suit."

Who may sue or defend in Representative Capacity:

1) Where there are numerous persons having the same interests 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; b. The Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

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

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

4) No part of the claim in any such suit shall be abandoned under Sub-rule (1) and no such suit shall be withdrawn under Sub-rule (3) of Rule (1) of Order XXIII, i.e. Order 23, Rule 1 (3), and no agreement, compromise or satisfaction shall be recorded in any such suit under Rule (3) of that Order, unless the Court has given, at the plaintiff's expense,

notice to all persons so interested in the manner specified in sub-rule (2).

5) Where any person suing or defending in any suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit. 6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be.

Explanation:

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

CONDITIONS TO APPLY RULE 8 :

The Apex Court has decided in T. N. Housing Board v. Ganapathy, AIR1990 SC that for the application of Rule 8 the following conditions must be fulfilled:- a. the parties must be numerous; Rule 8(1)(b) they must have the same interest in the suit; Rule 8(1)(c) the permission must have been granted [Rule 8(1)(a)] or direction must have been given by the Court [Rule 8(1)(b)]; and notice must have been issued to the parties whom it is proposed to represent in the suit. Rule 8(2)

1) Numerous persons: The word "numerous" means a group of persons. It is not necessary that the number of persons should be capable of being ascertained. But it is necessary that the body of persons represented by the plaintiffs or the defendants must be sufficiently definite so as to enable the Court to recognize as participants in the suit.

2) Same Interest: The persons on whose behalf the suit is instituted must have the same interest which is common to all of them or they must have a common grievance which they seek to get redressed. For the purpose of this condition the above explanation to Rule 1 is relevant.

3) Permission or direction by the Court

4) Notice: The fact about the representative nature of the suit must be stated in the body of the plaint as well as in the file of the suit. In a representative suit, even on the death of the person appointed to conduct such suit, such suit will not abate and other person or persons interested in the suits may proceed with the suit or may apply to be added as plaintiff.

FRAME OF SUIT (ORDER II) Introduction:

Cpc 1908 deals with the provisions relating to the framing of suits and the rules regarding causes of action. A cause of Action means every fact which it is necessary for the plaintiff to establish to support his claim in obtaining judgment in his favour. Order II, Rule 1 explains that every suit shall be framed so as to afford ground for the final decision upon the subject in disputes and to prevent further litigation concerning them.

Suit to include the whole claim:

Order II of CPC 1908 is based upon the principle that a defendant should not be vexed twice for the same cause of action. Sub-rule OF CPC 1908 provides that every suit shall include the whole claim in respect of a cause of action.

Relinquishment of claim:

But a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of the Court. 15 and where a person is entitled to more than one relief in respect of the same cause of action, then he may sue for all or any of such relief. 16

Effect of Relinquishment: Omission to sue: 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. 17 and if he omits to sue for all such relief with respect to the same cause of action except with the leave of the Court, he shall not afterwards sue for any relief so omitted.

For example:

A lets a house to B at a yearly rent of Rs. 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 and 1906. The provisions of order II, Rule 2 apply only to suits and not to appeals, execution proceedings, and arbitration proceedings or to a petition under Art. 226.

JOINDER of Cause of Action:

Subject to the provisions of Rules 4 and 5 of order II and rule 3 of order I, Rules 1 and 3 of Order II provide the provision for joinder of several causes of action in one suit. Rule 3 contemplates the under mentioned four types of situations:

1) One plaintiff and several causes of action: In this condition the plaintiff is at liberty to unite several causes of action in one suit.

2) Joinder of Plaintiffs and Causes of Action (two or more plaintiffs and same defendant): In this condition, subject to Order I, rule 1, the plaintiffs may unite such causes of action in one suit against the same defendant if they all are jointly interested.

3) Joinder of defendants and Causes of Action (One plaintiff and two or more defendants): In this condition, subject to rule 3 of order I, the plaintiff may unite in the same suit several causes of action against those defendants, if the defendants are jointly interested in the causes of action.

4) Joinder of plaintiffs, defendants and causes of Action (Two or more plaintiffs and two or more defendants): In this condition, subject to rules 1 and 3 of order I the plaintiffs may unite the causes of action against the defendants in the same suit only when all the plaintiffs and all the defendant- are jointly interested in the causes of actions.

Conditions of MIS-JOINDER:

1) Mis-joinder of plaintiffs and causes of action: Where plaintiffs are not jointly interested in the causes of action and the suit is bad for mis-joinder of plaintiffs and causes of action.

2) Multifariousness: Where defendants are not jointly interested in the causes of action, the suit is bad for Multifariousness.

3) Double mis joinder: Where neither the plaintiffs nor the defendants are jointly interested in the cause of action i.e., mis joinder of plaintiffs and causes of action and mis joinder of defendants and causes of action.

Objections as to misjoinders:

All objections on the ground of mis-joinder of causes of actions shall be between 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 taken shall be deemed to have been waived.

Separate trial:

Where it appears to the Court that the joinder of causes of action in one suit may embarrass delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other orders as may be expedient in the interests of justice.

PLEADING (ORDER VI) Meaning:

According to order VI Rule 1, pleading shall mean plaint or written statement. "Pleadings are statements in writing drawn up and filled by each party to a case, stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer. In proceedings before a Civil Court pleading may include a petition and reply thereto by the respondent whether to the form of an affidavit or otherwise. Plaintiff's pleading is called a plaint while the defendant's pleading is called a Written Statement

Object:

The object of pleading is to bring parties to definite issues and to diminish expense and delay and to prevent surprise at the hearing. "The object of the rule is twofold. First is to afford the other side intimation regarding the particular facts of this case so that they may be met by the other side. Second is to enable the

Court to determine what is really the issue between the parties." "Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must lie. The entire law governing the "Pleading" is contained in the provisions of Order VI (Pleading), Order VII (Plaint) and Order VIII (Written Statement) of the Code. Apart from this some important fundamental procedural matters relating to the practice are the provisions of Order I (Parties to suit), as to the manner in which a suit should be framed Order II (Frame of suit), as to who should sign the pleading Order III and Order IV (Institution of suit) and as to taking out of summons and their services Order V.

Fundamental Rules of Pleading:

The general rule regarding the pleadings is as under: 1) Pleading must state facts and not law; 2) Only the material facts must be stated; 3) Pleading should not include the evidence; and 4) The facts stated must be in concise form.

Material Facts:

The facts are of two types: 1) Facts probanda: the facts required to be proved (material facts); and 2) Facts probantia: the facts by means of which they are to be proved (particulars or evidence). It is the fundamental rule of pleading that pleadings must include the material facts and not the facts by means of which they are to be proved i.e., evidence. The term material facts has not been defined in the code, but the expression "material facts" has been defined by the Hon'ble S.C. in *Udhav Singh V/s Madhav Rao Scinda* AIR 1977 that "all the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence are material facts." It means all facts upon which the plaintiffs cause of action or the defendant's defence depends, or all those facts which must be proved in order to establish the plaintiff's right to relief claimed in the plaint or the defendant's defence.

Striking out Pleading:

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

Signing (Rule 14) and Verification (Rule 15) of Pleadings: Every pleading shall be signed by the party and his pleaders (if any) or by any person duly authorized to sign the same or to sue or defend on his behalf and every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. The person verifying shall specify what he verifies to his own knowledge and what upon information received he believes to be true. The person verifying shall furnish an affidavit in support of his pleading and the verification shall be signed with date and place at which it was signed. Amendment of Pleading (Order VI, Rule 17)

As a general rule, material facts and necessary particulars must be stated in the pleadings and the decision cannot be based on the grounds outside the pleadings. But due to various reasons parties have to amend their pleadings for which Order VI rule 17 states as under: "The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be

just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial." In order to try a case on its merits and for determining the real question in controversy between the parties, the Courts are empowered under 'rule 17' to allow the amendment of the pleadings. Amendment in the pleading may be with the permission of the Court.

Permission to amend when granted:

A leave to Amend the pleading will be granted by the Court whereby the amendment no injury will be caused to the opposite party and he can be sufficiently compensated by costs or other terms to be imposed by the order and where the amendment is necessary for the determination of the real question in controversy and no injustice will be caused to the other party the Court may allow the amendment of the pleadings. It is true that the courts have a very wide discretion in the matter of amendment of pleadings. In *Ganga Bhai V Vijay Kumar* AIR 1974 SC 1126, the Supreme Court has observed that "the power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations, and wider the discretion, greater alight to be the care and circumspection on the part of the Court."

Effect of amendment:

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

Failure to amend:

If a party remained failed to amend after the order of amendment, within the time specified for that purpose in the order or if no time is specified, then within 14 days from the date of the order, he shall not later on be permitted to amend after expiry of the specified time or of 14 days unless the time is extended by the court. Failure to amend does not result in the dismissal of the suit and the court has discretion to extend the time even after the expiry of the period originally fixed. Order under rule 17 is Revisable: An order granting or refusing amendment is a 'case decided' within the meaning of section 115 and is revisable by the Court. The above order is neither a decree nor appealable order and hence not appealable.

PLAINT (Order VII)

Introduction:

Every civil suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in that behalf. Plaint is a pleading of the plaintiff.

Meaning:

The word has not been defined in the code but it can be said to be a statement of claim, a document, by presentation of which the suit is instituted.

Plaint: Body of Plaint, Relief Prayed for Title of the suits Plaint: Body of Plaint Relief Prayed for Title: Title of the suit consists of the name of the Court, case number to be given by the office of the Court and descriptions of parties.

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

Reliefs: The plaint shall finally contain the relief which the plaintiff claims either simply or in the end. Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative. Generally, the plaintiff is not entitled to relief for which there is no foundation in the plaint, except in a case where on the pleadings, issues and evidence the relief is clear because the primary duty of the Court is to do justice and the rules of procedure are meant to advance the cause of justice and not to impede it. The plaintiff ought to be given such relief as he is entitled to get on the facts established on the basis of the evidence in the case even if the plaint does not contain a specific prayer for the relief. The equitable relief under Order VII, Rule 7 may be granted even though grounds on which relief is sought have not been stated as required by the rule.

Particulars of Plaint:

A plaint shall contain the following particulars:

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

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

3) The description of the immovable property.

4) The interest and liability of the defendant. 5) If the suit is filed in the representative character it must state the facts about an actual existing interest of the plaintiff in the subject matter and that all steps necessary have been taken by him to institute such suit. 6) The grounds upon which the exemption from the law of limitation where the suit is time barred.

Return of Plaint (Order 7 Rule 10) Rule 10:

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

2) Explanation:

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

3) Procedure on returning plaint: On returning a plaint the judge shall endorse thereon the date of its presentation and return, the name of the party representing it, and a brief statement of the reasons for returning it.

Rule 10-A:

Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return - 1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff. 2) Where an intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an

application to the Court -a. specifying the Court in which he proposes to present the plaint after its return, b. praying that the Court may fix a date for the appearance' of the parties in the said Court, and c. requesting that the notice of the date so fixed may be given to him and to the defendant. 3) Where an application is made by the plaintiff under sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit, -a. fix a date for appearance of the parties in the court in which the plaint is proposed to be presented, and b. give to the plaintiff and to the defendant notice of such date for appearance. Where notice of the date for appearance is given under Sub-rule (3), -4) Where notice of the date for appearances is given under Sub-rule (3)

a. It shall not be necessary for the Court in which the Plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that court, for reasons to be recorded, otherwise directs, and b. the said notice shall be deemed to be a summons for the appearance of the defendant in the suit in which the plaint is presented on the date so fixed by the Court by which the plaint was returned. 5) Where the application made by the plaintiff under Sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint.

Rejection of Plaint (Order 7 Rule 11) Rule 11:

The Plaint shall be rejected in the following cases:- a). Where it does not disclose a cause of action. b). Where the relief claimed is undervalued, and the plaintiff on being required by the Court to correct the valuation within the time to be fixed by the Court fails to do so. c). Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp-paper within the time to be fixed by the Court, fails to do so. d). Where the suit appears from the statement in the plaint to be barred by any law. e). Where it is not filed in duplicate. f). Where the plaintiff fails to comply with the provisions of Rule-9. Provided that the time fixed by the Court for the correction of the valuation or for the supply of the requisite stamp- papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by the cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

Rule 12:

Procedure on rejecting plaint:

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

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

Procedure on Admitting Plaint:

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

service of summons on the defendants.

Production of Documents on Which Plaintiff Sues or Relies

1). Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint. 2). Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is. 3). A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

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

WRITTEN STATEMENT (Order VIII)

Meaning:

A Written Statement is a pleading of the defendant for submission of every material fact to answer the allegation made by the plaintiff in his plaint. The word has not been defined in the code, but the same may be defined as under: A Written Statement is the pleading of the defendant wherein he deals with every material fact alleged by the plaintiff in his plaint and also states any new facts in his favour or takes legal objections against the claim of the plaintiff.

Preparation of Written Statement:

All relevant rules of pleading apply to a Written Statement and it should be prepared with great caution. In the Written Statement firstly, the defendant should mention the name of the Court trying the suit, then -1 the names of the parties. It is not necessary to mention the names, directions and place of residence of all the parties in the title of the Written Statement, but mentioning the name of the 1st plaintiff and 1st defendant is enough. The number of suit may be mentioned thereafter. The defendant thereupon replies to each Para of the plaint except where any preliminary objection like inability of the suit, locus standi of the plaintiff to file suit, the non-joinder or misjoinder of parties as to the jurisdiction of the Court or as to limitation, for consideration which is necessary in the instance before the suit is tried on merits.

Rules of Defence:

The denial in a Written Statement must be specific and not general. The grounds alleged by the plaintiff must be denied by a defendant specifically with each allegation of fact of which he does not admit the truth, except damages. The denial should not be vague or evasive. Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as regards a person under disability. In cases where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts in the plaint except as against a person under disability, but the Court, in its discretion, may require any such fact to be proved. Whenever a judgment is pronounced under Rule 2, a decree shall be drawn up in accordance with such judgment.

Time to File Written Statement:

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

Extension of time to Present Written Statement:

Ordinarily the time schedule prescribed by Order VIII, Rule 1 has to be honoured. The extension of time sought for by the defendant from the Court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the Court.

Subsequent Pleadings:

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

Failure to present Written Statement:

Where a party fails to file a Written Statement as required under Rule 1 or Rule 9 within a time permitted or fixed by the Court, the Court shall pronounce judgment against him or make such order as it thinks fit and on such judgment a decree shall be drawn up. The provisions regarding duty of defendant to produce documents upon which relief is claimed or relied upon by him have been given in Order VIII, Rule 1-A.

Set-Off (Order VIII, Rule 6) Meaning:

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

Order VIII, Rule 6 and is as under:

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

2. Effect of set-off:

The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this not after the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree. 3. The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of a set-off.

Example:

A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1000. The two claims both definite, pecuniary demands may be set-off. A sues B for compensation on account of trespass. B holds a promissory-note for Rs. 1,000, from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for as soon

as A recovers, both sums are definite pecuniary demands.

Conditions:

A defendant may claim a set-off, if the following conditions are satisfied:- I). The suit must be for the recovery of money. II). The sum of money must be ascertained. III). Such sum must be legally recoverable. IV). It must be recoverable by the defendant or by all the defendants, if more than one. V). It must be recoverable by the defendant from the plaintiff or from all plaintiffs'; if more than one. VI). It must not exceed the pecuniary jurisdiction of the Court in which the suit is brought. Both the parties must fill in the defendant's claim to set-off, the same character as they fill in the plaintiff's suit.

EQUITABLE SET-OFF:

The provision of Rule 6 are not exhaustive. Order VIII, Rule 6 deals with legal set-off while Order XX, Rule 19(3) recognizes an equitable set-off. An equitable set-off may be claimed by the defendant in respect of an unascertained sum of money, provided that both the cross demands arise out of one and the same transaction or are so connected, in the nature and circumstances, that they can be looked upon as parts of one transaction.

Example:

A sues B to recover Rs. 25,000/- under a contract, B can claim set-off towards damages sustained by him due to breach of the same contract by A.

Distinction between legal and equitable set-off:

1. Claim for A legal set-off must be for an ascertained sum of money. An Equitable set-off may be allowed even for an unascertained sum of money. 2. As Right A legal set-off can be claimed as a right and the court is bound to claim as a right and it is granted at once and adjudicated upon it. An equitable set-off cannot be the court's discretion and the court may refuse to adjudicate upon it. 3. Same Transaction In a legal set-off, it is not necessary that the cross demands arise out of the same transactions. An equitable set-off can be allowed only when the cross-demands arise out of the same transactions. 4. Legally Recoverable In a Legal Set - Off The amount claimed as set-off must be legally recoverable and relationship between the parties, a should not be time barred. An Equitable set-off In cases, where there is time barred claim may be allowed by way of equitable set-off. But even in cases of equitable- set-off where the defendant's claim was not barred at the date of suit but it is barred at the date of W.S., it will be allowed only to the extent of plaintiff's claim, and a decree for balance, if found due to him, shall not be passed in his favour.

5. Court Fee A legal set-off requires a Court fee. No Court fee is required in equitable set-off. Counter-Claim (Rules 6-A to 6-G) Meaning:

It is a claim made by the defendant in a suit against the plaintiff and can be enforced by a cross action. Counter claim is a cause of action in favour of the defendant against the plaintiff. A counter-claim is a weapon in the hands of a defendant to defeat the relief sought by the plaintiff against him and may be set-up only in respect of a claim for which the defendant can file a separate suit and therefore, it is substantially a cross action.

In Laxmidas Vs Nanabhai AIR 1984, 'SC.

It was held that the Court has power to treat the counter claim as a cross suit and hear the original suit and counter claim together if the counter claim is properly stamped. Order VIII,

Rule 6-A deals with the counter claim, which is as under. a. A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered defence or before the time limited for delivering his defence has expired whether such counter claim is in the nature of a claim for damages or not: Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court. b. Such counter claim shall be the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim. c. The plaintiff shall be at a liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court. d. The counter-claim shall be treated as a plaint and governed by the rules applicable to the plaints.

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

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

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

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

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

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

Defence or set-off or counter-claim founded upon separate grounds:

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

Distinction between Set-off and Counter-claims

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

amount: at the date of Written Statement.

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

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

SPECIAL SUITS BY INDIGENT or PAUPERIS PERSONS (ORDER XXXIII)

Introduction:

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

Meaning of Indigent Person: An indigent person is one who is not possessed of sufficient means due to bad personal economic condition. The word 'person' includes juristic person. According to Explanation I Rule 1, Order XXXIII, An indigent person is a person, who a). if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or b. where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the Subject matter of the suit.

Explanations II and III read as under -Explanation-II:

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

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

Procedure to sue as Indigent Person: Before an indigent person can institute a suit, permission of Court to sue as an indigent person is required. The application for permission to sue as an indigent person, shall be presented to the Court by the applicant in person, unless he is exempted from appearing in court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person: PROVIDED that, where there are more plaintiffs than one, it shall be sufficient if the application is presented by one of the plaintiffs.

CONTENTS OF APPLICATION:

Every such application shall contain the following particulars:- a. the particulars required in regard to plaints in suits; b. a schedule of any moveable or immovable property belonging to the applicant, with the estimated value thereof; and c. it shall be signed and verified as provided in Order of CPC 1908. The suit commences from the moment an application to sue in forma pauperis is presented According to Rule 1-A, an inquiry to ascertain whether or not a person is an indigent person shall be made.

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

Examination of Applicant and Rejection of Application:

Examination: (Rule 4) 1. Where the application is in proper form and duly presented, the court may if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

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

Rejection of Application: Rule 5: The court shall reject an application for permission to sue as an indigent person - 1. Where it is not framed and presented in the manner prescribed by rules or 2. Where the applicant is not an indigent person, **Dis Pauperisor** 3). Where he has, within two months before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as an indigent person: PROVIDED that no application shall be rejected if, even after the value of the property disposed of by the applicant is taken into account, the applicant would be entitled to sue as an indigent person, or 4). Where his allegations do not show a cause of action, or 5). Where he has entered into any agreement with reference to the subject matter of the proposed suit under which any other person has obtained an interest in such subject matter, or 6). Where the allegations made by the applicant in the application show that the suit would be barred by any law for the time being in force, or 7). Where any other person has entered into an agreement with him to finance the litigation.

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

Procedure at Hearing:

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

Procedure if Application Admitted:

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

Withdrawal of Permission of Indigent Person suit:

The Court may, on the application of the defendant, or of the government pleader and after giving seven days notice in writing to the plaintiff, withdraw the permission granted to the plaintiff to sue as an indigent person on the following conditions: 1. if he is guilty of vexatious or improper conduct in the course of the suit; 2. if it appears that his means are such that he ought not to continue to sue as an indigent person; or 3). if he has entered into any agreement with reference to the subject matter of the suit under which any other person has obtained an interest in such subject matter.

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

b). **Where Indigent person fails:** Where the plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed, - 1. because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court fee or postal charges (if any) chargeable for such service or to present copies of the plaint or concise statement, or 11. because the plaintiff does not appear when the suit is called on for hearing, the court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person.

c). **Where an indigent person's suit abates** : Where the suit abates by reason of the death of the plaintiff or of any person added as a co-plaintiff, the court shall order that the amount of court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person shall be recoverable by the State government from the estate of the deceased plaintiff. According to rule , where the application to sue as an indigent person is refused, it shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided he pays the costs incurred by the Government Pleader and the opposite party in opposing in application. When an application is either rejected under rule , the Court will grant time to the applicant to pay the requisite Court fee within the specified time or within time extended by the Court from time to time, and upon payment of such Court fee and on payment of the costs referred to in rule within that time, the suit shall be deemed to have been instituted on the date on which the application for permission to sue as an indigent person was presented. The costs of an application for permission to sue as an indigent person and of an

inquiry into indigence shall be costs in the suit.

Defence by an indigent person: Any defendant, who desires to plead a set off or counter claim, may be allowed to set up such claim as an indigent person, and the rules contained in this Order shall, so far as may be, apply to him as if he were a plaintiff and his written statement were a plaint. Subject to the provisions of this order, the Central or State Government may make such supplementary provisions for free legal services to those Who have been permitted to sue as indigent persons, 60 and where an indigent person is not represented by a pleader, the Court may, if the circumstances of the case so require, assign a pleader to him.

Indigent Person or Pauperis:

A person unable to pay Court fees on memorandum of appeal may apply to allow him to appeal as an indigent person. The necessary inquiry as prescribed in Order XXXIII will be made before granting or refusing the prayer. But where the applicant was allowed to sue as an indigent person in the trial Court, no fresh inquiry will be necessary if he files an affidavit that he continues to be an indigent person.

SUITS IN PARTICULAR CASES Suits by or AGAINST THE GOVERNMENT OR THE PUBLIC OFFICERS in their Official Capacity ORDER XXXIV

Title to Suit: The authority to be named as a plaintiff or defendant, in any suit by or against Governments shall be. 1. the Union of India: officer to identify the person serving the notice; 2.). Notice has been delivered or left at the offices of the appropriate authority specified. The cause of action and the relief claimed have been substantially indicated.

Procedure in Suit: Signature and Verification of Plaintiff Or Written Statement

Agent and Authorized Agent: The Court shall allow a reasonable time in fixing a day for the Government to answer the plaint, for the purpose of necessary communication with the Government through proper channel and for the issue of instructions to the Government pleader to appear and answer on behalf of the Government. The time so allowed may, at the discretion of the Court, be extended but the time so extended shall not exceed two months in the aggregate. Where in any case the Government Pleader is not accompanied by any person on the part of the Government, who may be able to answer any material questions relating to the suit, the Court may, direct the attendance of such a person.

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

Procedure in Suit against Public Officer: The defendant (public officer) on receiving the summons may apply to the Court to grant the extension of time fixed in the summons, to enable him to make reference to the Government, and to receive orders thereon through the proper channel 6 and the Court shall, on such application extend the time for so

long as it appears to it to be necessary. The Government shall be joined as a party to the suit, where the suit is instituted against the public officer for damages or for any other relief in respect of any act alleged to have been done by him in his official capacity. Where the government undertakes the defence of a suit against a public officer, the government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits. Where no application under sub-rule (1) is made by the government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties. No need of security from government or a public officer in certain cases:

No such security as is mentioned in rules 5 and 6 of order XLI shall be required from the government or, where the government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done

Where the suit is by or against the Central Government, or the State: Where the suit is by or against the State Government Requirement of Notice:

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

NOTICE TO WHOM:

a. Against Government: The Notice issued under section 80(1) shall be delivered to, or left at the office of - 1) In the case of a suit against Central Government - i) a Secretary to that Government: when it does not relate to a railway, and ii) the General Manager of Railway: when it relates to a railway.

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

3) In the case of a suit against any other State Government - i) a Secretary to that Government; or ii) the collector of the district.

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

Contents of Notice:

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

Exemption from Notice:

A suit may, with the leave of the Court, be instituted to obtain an urgent or immediate relief without serving any notice as required under rule. But, in such suit, the Court shall not grant any relief, whether interim or otherwise; except after giving to the Government or Public Officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed in the suit. It is also provided that the Court shall return the plaint for presentation to it after complying with the requirements of section , if after hearing the parties, the Court is satisfied that no urgent or immediate relief need to be granted. No Dismissal of suit: Any suit instituted against the Government or such public officer shall not be dismissed, by reason of any error or defect in the notice, if such notice

contains-I.The name, description and residence of the plaintiff, so as to enable the Government or such public by him in his official capacity.

Exemption from Arrest, Personal Appearance and Attachment of Property:

According to section 81 of the Code, if the suit is against a public officer in respect of any act purporting to be done by him in his official capacity – a.the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and b.where the court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

Execution of decree:

Where, in a suit by or against the Government or by or against a public officer in respect of any act purporting to be done by him in his official capacity, any decree passed against the Union of India or a State or, as the case may be, the public officer, shall not be executed except in accordance with the provisions of sub-section .i.e. An execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such decree. The provisions of sub-sections shall apply in relation to an order or award as they apply in relation to a decree, if the order or award – a). is passed or made against the Union of India or a State or a public officer in respect of any such act as aforesaid, whether by a Court or by any other authority; and b). is capable of being executed under the provisions of this Code or of any other law for the time being in force as if it were a decree.

Definition of 'Government' and 'Government Pleader': mean respectively "i). in relation to any suit by or against the Central Government or against a public officer in the service of that Government- the Central Government and such pleader as that Government may appoint. ii). in relation to any suit by or against a State Government or against a public officer in the service of a State- the State Government and such Government pleader as defined in Section , or such other pleader as the State Government may appoint.

INTER PLEADER SUIT ORDER XXXV Introduction:

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

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

Principle: According to Section "Where two or more persons claim adversely to one another the same debts, sum of money or other property, moveable or immovable, from another person, who claims no interest therein other than for charges and costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself: Provided that where any suit is pending in which the rights of the parties can properly be decided, no such suit of interpleader shall be instituted.

Conditions for Application: Before the institution of an interpleader suit, the following conditions must be satisfied: a). Existence of some Debt,

Money or Moveable or Immoveable Property there must be some debt, sum of money or other moveable or immovable property in dispute; b). Adverse Claim by two or more persons: two or more persons must be claiming the above debt, money or property, adversely to one another; c). The person from whom the debt, money or property is being claimed should not be interested in it: the person from whom such debt, money or property is claimed, must not be claiming any interest therein other than the charges and costs; d). The above person must be ready to deliver it: The above person must be ready to pay or deliver it to the rightful claimant; and e). No Pendency of Suit: there must be no suit pending in which the rights of the rival claimants can be properly decided.

Who may not institute an interpleader suit?

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

A deposited a box of jewels with 8 as his agent. A alleges that the jewels were wrongfully obtained from him by A, and claims them from B. 8 cannot institute an interpleader suit against A and C. (C claims adversely to A, and therefore, no interpleader suit can file). B then writes to C for the purpose of making the jewels a security for a debt due from himself to C. Afterwards alleges that C's debt is satisfied, and C alleges the contrary. 8th claim the jewels from B. B may institute an interpleader suit against A and C. (C claims through A and , therefore, it can file.)

Procedure in Interpleader Suit: Order provides the procedure for the institution of an interpleader suit.

Plaint in Interpleader Suit: In every interpleader suit the plaintiff in addition to other statements necessary for plaint, state – a. that the plaintiff claims no interest in the subject matter in dispute other than the charges or costs; b. the claims made by the defendants severally; and c. there is no collusion between the plaintiff and any of the defendants.

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

Procedure where defendant is suing plaintiff (Stay of Proceedings):

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

Procedure of First Hearing:

1). At the first hearing, the Court may – a. Declare that the plaintiff is discharged from liabilities to the defendants in respect of the thing claimed, award him his costs and dismiss him from the suit; or b. if it thinks that justice or convenience so require, retains all parties until the final disposal of the suit. 2). Where the Court finds that the admission of the parties or other evidence enable the

Court to do so, it may adjudicate the title to the thing claimed. 3). Where the admissions of the parties do not enable the Court so to adjudicate the Court may direct – a) that an issue or issues between the parties be framed and tried, and b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff, and shall proceed to try the suit in the ordinary manner.

APPLICATION FOR EXECUTION: XXXVI INTRODUCTION:

The execution proceedings commence with the filing of an application for execution before the Court, which passed the decree, or before the Court to which the decree has been transferred for execution. Rules and Order deal with execution applications.

Who may apply for execution: An execution proceeding may be started on the application of the – i) Decree holder- Rule of Order ii) Where the decree-holder is dead, his legal representative- iii) Any other person claiming under the decree-holder- iv) Representative of or a person claiming under the decree-holder - v) Transferee of decree-holder, subject to the following- a). Where the decree has been transferred by an assignment, in writing or by operation of law; b). The application is to the Court which passed the decree; c. Notice and after providing an opportunity of being heard to the transferor and the judgment debtor. vi) One or more of the joint decree holders, subject to the fulfillment of the following conditions: a). There is no contrary condition imposed by the decree. b). The execution application is to the execution of the whole decree; and c. The application is made for the benefit of all the joint decree holders; or if anyone of them is dead, for the benefit of the survivors and the legal representatives of the deceased decreeholder.

Against whom an execution proceeding can be started:

Execution proceeding may be started against the following persons: – a. Judgment debtor, b. When the judgment debtor is dead, against his legal representatives. But the legal representatives shall be liable only to extent of the property of the judgment debtor received by them. - c. Representative of or the person claiming under the judgment debtor. - S. 146. d. Surety of the judgment debtor.

Court to whom an execution application may be made:

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

Contents of Application: According to Rule CPC 1908, every application for execution, except in a case of a money decree, shall be in writing, signed and verified by the applicant or by some other person acquainted with the facts of the case and shall contain the particulars like the number of the suit, the name of the parties, the date of the decree, the amount of the decree etc. Rules should be read together.

Procedure: admission and hearing admission:

According to Rule of CPC 1908, on receiving an application for execution of a decree, the Court must admit and register the application, if the Court is satisfied that the execution application complies with the requirements of Rule 11 to 14. Where such application does not comply with the above requirements then the Court shall allow the defect to be remedied then and there or within a time fixed by it, and if the defect is not remedied as

specified then, the Court shall reject the application.

Hearing:

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

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

Stay of Execution: Rules of CPC 1908 deal with the stay of execution. The provisions of Rule are mandatory and imperative while the provisions are not mandatory but discretionary. But this discretion must be exercised judicially and in the interest of justice. The execution proceeding may be stayed either by the executing Court i.e. the Court which passed the decree or the Court to - which the decree has been transferred for execution or by the Court having appellate jurisdiction in respect of the decree or to which the decree has been transferred for the execution thereof. The provisions regarding stay of execution of a decree are made in Rule , which lays down that the executing Court (the Transferee Court) shall, on sufficient cause being shown by the judgment-debtor, and after furnishing security or fulfilling the conditions, which may be imposed upon him by the Court, stay the execution of a decree for a reasonable time, to enable the judgment debtor to apply to the Court which has passed the decree or to the appellate Court for an Order to stay execution. The transferor Court can stay the execution absolutely while the power to stay the execution by the Transferee Court is for a reasonable time to enable the judgment debtor to apply to the transferor Court or to the appellate Court to grant stay against the execution.

Stay of Execution Pending suit: Rule of CPC 1908 deals with the provisions regarding stay of execution pending suit between the decree holder and the judgment debtor. Rule says that "where a suit is pending in any Court against the holder of a decree of such Court or of a decree which is being executed by such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as it thinks fit, stay execution of the decree until the pending suit has been decided. Provided that if the decree is one for payment of money, the Court shall if it grants stay without requiring security, record its reasons for so doing.

Mode of execution: There are various modes of execution of decree provided in the Code. A decree may be enforced, as specified U/s of the Code of Civil Procedure- a). by delivery of any property specifically decreed; b). by attachment and sale or by sale without attachment of any property. c). by arrest and detention in prison for such period not exceeding the period specified , where arrest and detention is permissible under that section; d). by appointing a receiver; or e. in such other manner as

the nature of the relief granted may require.

Choice of mode of execution and simultaneous execution:

As a general rule, it is for the decree holder to choose a particular mode of executing his decree and it is permissible too in law to opt for even simultaneous execution, but the Court may in its discretion refuse execution at the same time against the person and the property of the judgment debtor. The Supreme Court in *Shyam Singh v. collector, Dist. Hamirpur* observed: "Code of the CPC 1908 gives an option to the creditor, of enforcing the decree either against the person or the property of the creditor; and nowhere it has been laid down that execution against the person of the debtor shall not be allowed unless and until the decree holder has exhausted his remedy against the property." However, the discretion is with the Court to order simultaneous execution and that discretion must be exercised judicially. The Court can refuse simultaneous execution by allowing the decree holder to avail of only one mode of execution at a time.

Modes of Execution: 1. By delivery of Property:

a). **Specific moveable property:** The decree for any specific movable properties which do not include money and are in the possession of judgment debtor may be executed: - i) by seizure and delivery of property; or ii) by detention of the judgment debtor; or iii) by attachment and sale of his property; or iv) by attachment and detention both. The provisions of Rule of CPC 1908 are not applicable for the execution of a decree for money or where the property is not in possession of the judgment debtor but is in the possession of a third party.

b). **Appointment of Receiver:** The provisions relating to the execution by appointment of a Receiver are provided in Order. . An execution of a decree by appointment of receiver is an equitable remedy which cannot be claimed as a right and is granted by the Court in its discretion, and the same is an exception to the general rule that a decree holder can choose the mode of execution and that the Court has no power to refuse the mode chosen by him. The provisions of section should be read with - the provisions of Order, Rule .

Questions to be determined by the Executing Court: the provisions regarding the matters arising subsequent to the passing of a decree, and deals with objections to execution, discharge and satisfaction of a decree. i). All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. ii). Omitted iii). Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

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

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

meaning of this section. In *Jugal Kishore V. Raw Cotton Com. Ltd.*, AIR 1955, SC., the Court has decided that once the suit is decreed, requires that the executing Court alone should determine all questions in execution proceedings and filing of separate suit is barred. It does not matter whether such questions arise before or after the decree has been executed. For the said purpose, the Court can treat a suit as an execution application or an application as a suit in the interest of justice. But after the Amendment Act of 1976, which deleted sub-section , by which the Court was empowered to treat an application U/S 47 as a suit, or a suit as an application, now the Court cannot treat an application U/S 47 as a suit, or a suit as an application.

An Executing Court Can not go behind the Decree:

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

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

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

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

INTERLOCUTORY ORDERS (Order XXXIX Rules 6 to 10) Meaning:

Interim orders or interlocutory orders are those orders passed by a Court during the pendency of a suit or proceeding which do not determine finally the substantive rights and liabilities of the parties in respect of the subject-matter of the suit or proceeding. After the suit is instituted by the plaintiff and before it is finally disposed of, the Court may make interlocutory orders as may appear to the Court to be just and convenient. Interim orders or interlocutory orders are made in order to assist the parties to the suit in the prosecution of their case or for the purpose of protection of the subject matter of the suit.

Interlocutory Orders :

1.Power of Court to Order Interim Sale:On the application of any party (an application by the plaintiff under Rules may be made at any time after the institution of the suit while by the defendant, it may be made at any time after appearance) to the suit, the Court may, order the sale of any moveable property, being the subject-matter of such suit, or attach before judgment in such suit, which is subject to speedy

and natural delay, or which for any just and sufficient cause it may be desirable to have been sold at once.

2.Detention, Preservation, Inspection, etc, of Subject-matter of Suit : The Court may make an order for detention, preservation and inspection of any property which is the subject-matter of the suit, or as to which any question may arise therein; and authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and authorize any sample to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

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

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

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

APPEALS Introduction:

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

a.First Appeal, Sections 96 to 99-A, 107. b) Second Appeal, Sections 100 to 103, 108 3) Appeals from Orders Sections 104, 108 4) Appeals by Indigent persons 5). Appeals to Supreme Court Section 109 and Order 45

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

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

right can be taken away only by a subsequent enactment if it so provides expressly or by necessary implication, and not otherwise.

First Appeal : Appeal from Original Decree: of the Code provides as:1). Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized. to hear appeals from the decision of such Court. 2nd An appeal may lie from an original decree passed ex parte. 3rd appeal No appeal shall lie from a decree passed by the Court with the consent of parties.4). No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of small causes, when the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees.

Who may Appeal:The following persons are entitled to prefer an appeal :1).A party to the suit who is adversely affected by the decree, or his legal representative.).A person claiming under a title party to the suit or a transferee of interests of such party, who, so far as interest is concerned, is bound by the decree, provided his name is entered on the record of the suit. 3).A guardian ad litem appointed by the Court in a suit by or against a minor. 4).Any other person, with the leave of the Court, if he is adversely affected by the decree. An appeal may lie against an ex- parte decree and no appeal shall lie from a decree passed with consent of parties . The provision of this is based upon principle of Estoppels. Once the decree is shown to have been passed with the consent of parties, Section becomes operative and binds them. It creates Estoppels between the parties as a judgment on consent. There shall be no appeal in petty cases as provided in Section and an appeal lies against preliminary decree as in the case of all decrees, unless a final decree has been passed before the date of filing an appeal, but there shall be no appeal against final decree when there was no appeal against preliminary decree. In fact, final decree owes its existence to the preliminary decree.

Conditions before filing an appeal: An appeal can be filed against every decree passed by any Court in exercise of original jurisdiction upon the satisfaction of the following two conditions:i) The subject matter of the appeal must be a "decree", and ii) The party appealing must. have been adversely affected by such determination.

Appeal from Original Decrees.Form of Appeal: Memorandum of Appeal:Contains the grounds on which the judicial examination is invited. In order that an appeal may be validly presented, the following requirements must be complied with:a). It must be in the form of memorandum setting forth the grounds of objections to the decree appealed from.b). It must be signed by the appellant Court or his pleader.c). It must be presented to the Court.d). The memorandum must be accompanied by a certified copy of the decree.e). The memorandum must be accompanied by a certified copy of the judgment unless the Court dispenses with it; and f.) Where the appeal is against a money decree, the appellant must deposit the decretal amount or furnish the security in respect thereof as per the direction of the Court.

Appeals From Appellate Decrees (Second Appeal Sections) Second Appeal:1). Save as otherwise provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High

Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is, satisfied that the case involves a substantial question of law.2). An appeal may lie under this section from an appellate decree passed ex- parte.3). In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.4). Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate such question.5). The appeal shall be heard on the question so formulated and the respondent shall, after hearing of the appeal, be allowed to argue that the case does not involve such question.

REFERENCE : provides provisions relating to reference and empowers any Court (subordinate Court) to state a case and refer the same for the opinion of the High Court. Such an opinion can be sought when the Court itself feels some doubt about a question of law. The provisions are subject to such conditions and limitations as may be prescribed. **Object:** The object for reference is to enable the subordinate Courts to obtain in non-appealable cases the opinion of the High Court, on a question of law and thereby avoid the commission of an error which could not be remedied later on.

Conditions for Applications :

The following conditions must be fulfilled, before High Court entertains a reference from a sub-ordinate Court, i.e.

1. Pendency: There must be pendency of a suit or appeal in which the decree is not the subject to appeal or a pending proceeding in execution of such decree.
2. Question of law: A question of law or usage having the force of law must arise in the course of such suit, appeal or proceeding ; and
3. Doubt in mind of Court: The Court trying the suit, appeal or executing the decree must entertain a reasonable doubt on such question.

Questions of law:

The subordinate Court may be in doubt relating to the questions of law, which may be-1. Those which relate to the validity of any Act, Ordinance or Regulation and the reference upon such questions of law are obligatory upon the fulfillment of the following conditions:a).It is necessary to decide such question in order to dispose of the case; b).The Sub- ordinate Court is of the view that the impugned Act, Ordinance or Regulation is ultra vires; and c).That there is no determination by the Supreme Court or by the High Court, to which such Court is Subordinate that such Act, Ordinance or Regulation is ultra vires. 2. Other Questions: In this case the reference is optional.

Procedure:

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

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

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

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

Reference to High Court:

Subject to such conditions and limitations as may be prescribed, any court may state a case and refer the same for the opinion of the High Court, and the High Court may make

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

Explanation: In this section, "Regulation" means any Regulation of the Bengal, Bombay or Madras Code of Regulation as defined in the General Clauses Act, 1897 (10 of 1897), or in "the General Clauses Act of a State.

Powers and Duty of Referencing Court:

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

Powers and Duty of High Court:

The High Court entertains the consulting jurisdiction in cases of reference and can neither make any order on merits nor can it make suggestions. In case of reference the High Court may answer the question referred to it and send back the case to the referring Court for disposal in accordance with law.

Where a case is referred to the High Court under Rule or order under the proviso to section , the High Court may return the case for amendment, and may alter, cancel or set-aside any decree or order which the Court making reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit.

REVIEW (Section 114)Meaning: Review means re-examination or reconsideration of the case by the same judge. It is a judicial re-examination of the case by the same Court and by the same Judge. In it, a Judge, who has disposed of the matter, reviews his earlier order in certain circumstances. Section 114 :The provisions relating to review are provided in S. 114 (substantive right) and Order (procedure). The general rule is that once the judgment is signed and pronounced or an order is made by the Court, it has no jurisdiction to alter it. Review is an exception to this general rule.

Section 114:Review: Subject as aforesaid, any person considering himself aggrieved, by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred; b. by a decree or order from which no appeal is allowed by this Code, or by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order and the Court may make such order thereon as it thinks fit.

Who may apply to Review:

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

An 'aggrieved person' means a person who has suffered a legal grievance or against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused in something or wrongfully affected his title to something. A person who is not a

party to the decree or order cannot apply for review since on general principle of B.W, such decree or order is not binding on him and therefore he cannot be said to be an aggrieved person within the meaning of section 114. A party who has a right to appeal but does not file an appeal, may apply for a review of judgment, even if not withstanding the pendency of an appeal by some other party, excepts i. Where the ground of such appeal is common to the applicant and the appellant, or ii. When, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Grounds of Review: i. Discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his (aggrieved person's) knowledge or could not be produced by him (aggrieved person) at the time when the decree was passed or order made; or Review (Section 114)

REVISION (SECTION

115) Meaning:

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

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

Provision U/s 115:

1. The High Court may call for the record of any case which has been decided by any COI subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears a) to have exercised a jurisdiction not vested in it by law, b) to have failed to exercise a jurisdiction so vested, or c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, The High Court may make such order in the case as it thinks fit.

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

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

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

Explanation:

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

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

July 1, 2002, namely: "115. Revision -

1). A superior Court may revise an order passed in a case decided in an

original suit or other proceeding by a subordinate Court where no appeal lies against the order and where the subordinate Court has a) exercised a jurisdiction not vested in it by law; or b) failed to exercise a jurisdiction so vested; or c) acted in exercise of its jurisdiction illegally or with material irregularity. 2). A revision application under sub-section, when filed in the High Court, shall contain a certificate on the first page of such application, below the title, the case, to the effect that no revision in the case lies to the district Court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district Court. 3). The superior Court shall not, under this section, vary or reverse any order made except where, a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made. 4. A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the superior Court.

Explanation 1: In this section, a) the expression "superior Court" means - I. the district Court, where the valuation of a case decided by a Court subordinate to it does not exceed five lakh rupees

MESNE PROFITS

The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. [1] It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

1.1 Ownership & Possession

The concept of ownership is one of the fundamental juristic concepts common to all system of law. Ownership consists of an innumerable number of claims, liberties, powers & immunities with regard to the things owned. According to some jurists there is no point in having the concept of ownership without these claims. From the analysis of aforementioned definitions one can conclude that the ownership is nothing but a right, which is available against every one who is subject to law. Such claim consists of following rights.

1. Right to possess & use,
2. Right to exclude others from possessing & using it,
3. Right to transmit, and;
4. Right to destroy thing owned

1.2 Origin of the Concept of Mesne profits

The concept of mesne profits has its origin in the medieval period. Under the feudal system, the King owned all land. The King would let out a part of these lands to his barons on the condition that they will provide him with soldiers whenever he wanted to raise an army.

1.3 NATURE OF Mesne Profits

All the legal system, which governs the civilized nations of the world agree upon the basic principle of natural justice to obtain reparation for wrongs or infringement of legal rights. [6] In other words, the law of nature gives primary right to a

compensation for injuries. Mesne profit is one such right to compensation granted against injury i.e. breach of legal right. Mesne profit is a positive right available against infringement of private legal right. The main object of awarding mesne profit is to compensate the actual owner of the property for all the loss he has suffered.

In Nataraja Achari v. Balambal Ammal [9], taking into consideration the definition of mesne profits provided under Section 2(12) Hon'ble Madras High Court observed that there are three different types of cases in which question of rights of profits arise:

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

2.1 Interest on Mesne profits

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

2.2 Burden of Proof

It is settled principle of law that in case of mesne profits the burden of proof rests on the claimant i.e. the plaintiff. And mesne profits being in the form of compensation, before claiming mesne profits the plaintiff have to establish before the Hon'ble court that he was lawful owner of the property and he was deprived of it by the unlawful possession of the defendant. The plaintiff having proved the aforementioned facts becomes entitled to mesne profits. Further the onus of proving what profits he might have received with the ordinary diligence lies on the claimant.

CAVEAT:

The caveat in Latin means "let a person be aware" and in law, it may be understood as a notice given asking not to act in a certain manner without informing the person who gave such a notice. Under the Civil Procedure Court, the provision of caveat is dealt with in Section 148A. Even Though CPC does not define caveat in the case of Nirmal Chand v. Girindra Narayan, the court defined caveat as a warning given by an individual to the court that no order or judgment shall be passed without giving notice or without hearing the caveator. The person who files a caveat is called the Caveator and the person who has instituted a suit or is likely to do so is called caveatee. The main object of caveat is to ensure that the court does not pass ex parte orders and that the interests of the caveator are protected. Caveat also reduces the burden of court and brings an end to the litigation as it reduces the multiplicity of proceedings. As the purpose of the caveat was to save the cost and convenience of the court, in Kattil Vayalil Parkkum Koiloth v. Mannil Paadikayil Kadeesa Umma, the court held that no caveat can be lodged by a total stranger to the suit

When to lodge a Caveat?

According to Section 148A, when people apprehend that some case against them is filed or is about to be filed in any court of law in any manner, they have a right to lodge a caveat. The Caveat may be lodged in the form of a petition under the following circumstances:

- a) During an ongoing suit or litigation and in that the application is already been made or is expected to be made;
- b) The suit is about to be instituted and in that suit, an application is expected to be made.

Who may lodge a caveat?

Section 148A further provides that a caveat may be filed by any person, whether a party to the suit or not, as long as the person filing the caveat has the right to appear before the court in regard to the suit in question. Thus caveat can be filed by a third party as well, if they in any manner are connected to the suit in question. Where can a caveat be lodged? As and when the caveator anticipates some legal proceedings to be filed against him in the near future, he can file a petition for a caveat in any Civil Court of original jurisdiction, Appellate Court, High Court as well as Supreme Court. Civil Courts include Courts of Small Causes, Tribunals, Forums, and Commissions.

How to file a caveat?

A caveat under Section 148A shall be signed by the caveator or his advocate. Where the caveator is represented by an advocate, it should be accompanied by his Vakalatnama. The caveat presented shall be registered in a caveat register maintained by the courts in the form of a petition or any other form that may be prescribed.

What does a caveat contain?

A caveat or a notice given to the court that certain actions may not be taken without informing the caveator should contain the following information:

Name of the caveator;

Address of the caveator where the notice would be sent;

The name of the court where such caveat is filed;

The number of the suit and the number of the appeal if applicable;

Brief details about suit or appeal likely to be filed;

Name of the probable plaintiffs or appellants and the respondents.

Limitation of time

As provided by the section in clause 5, the caveat stays in force for a period of 90 days. If within these 90 days an application is filed, then the court, as well as the applicant, has to give notice to the caveator. However, if no caveat is filed within these 90 days, then no one has the duty to inform the caveator, i.e. if the application is filed after the expiration of such period the caveat stands null and void. If the caveator still wants to be informed then a fresh caveat needs to be lodged for the next 90 days.

Common mistakes made while filing a caveat

Some of the common mistakes made while filing caveat are as follows: The caveat is often filed in support of an application, it is important to remember that caveat can be made only against an application; Caveator forgets to serve a notice to the applicant, which is mandatory under Section 148A of CPC Caveators often claim that the order or judgment was incorrect because the notice was given, even after the expiration period. It is important to remember that after 90 days, a fresh caveat needs to be filed.