

deponent. In the absence of this, the court is entitled to come to its own finding.¹³⁹

Affidavits should be confined to such facts as the deponent is able to prove to his personal knowledge, except on interlocutory applications, on which statements of his belief may be admitted.¹⁴⁰ Where an averment is not based on personal knowledge, the source of information should be clearly disclosed.¹⁴¹

There is always a duty on the part of the counsel to advise his client as to the verification of the affidavit. The client should be told to swear only to what he knows to be true. What he believes to be true should be mentioned separately.

Unless affidavits are properly verified and are in conformity with the rules, they will be rejected by the court.¹⁴² But, instead of rejecting an affidavit, a court may give an opportunity to a party to file a proper affidavit.

Ordinarily, interlocutory applications, such as an application for attachment before judgment,¹⁴³ interim injunction,¹⁴⁴ appointment of receiver,¹⁴⁵ etc. can be decided on affidavits.¹⁴⁶

(e) False affidavit

Swearing of false affidavit is an offence of perjury punishable under the Indian Penal Code.¹⁴⁷ It is a grave and serious matter and lenient view is not warranted.¹⁴⁸

Where such affidavit is filed by an officer of the Government very strict action should be taken.¹⁴⁹

¹³⁹ Gograj v. State of U.P., (1973) 27 FLR 248 (SC); State of J&K v. Bakshi Gulam Mohammad, AIR 1967 SC 122:1966 Supp SCR 401.

¹⁴⁰ R. 3. See also, State of Bombay v. Purushottam Jog, AIR 1952 SC 317 at p. 319: 1952 SCR 674; Krishan Chander v. Central Tractor Organisation, AIR 1962 SC 602: (1962) 3 SCR 187; M. Veerabhadra Rao v. Tek Chand, supra.

¹⁴¹ Barium Chemicals Ltd. v. Company Law Board, AIR 1967 SC 295 at p. 319:1966 Supp SCR 311; Virendra Kumar v. Jagjiwan, (1972) 1 SCC 826 at p. 831: AIR 1974 SC 1957 at p. 1961; Sukhwinder Pal v. State of Punjab, (1982) 1 SCC 31 at p. 38: AIR 1982 SC 65 at p. 70; Indian Aluminium Cables Ltd. v. Union of India, (1985) 3 SCC 284 at pp. 290-91: AIR 1985 SC 1201 at pp. 1205-06; Shivajirao Nilangekar v. Dr. Mahesh Madhav, (1987) 1 SCC 227: AIR 1987 SC 294.

¹⁴² Ibid, see also, A.K.K. Nambiar v. Union of India, (1969) 3 SCC 864 at p. 867: AIR 1970 SC 652 at pp. 653-54; Savithramma v. Cecil Naronha, 1988 Supp SCC 655: AIR 1988 SC 1987.

¹⁴³ See infra, Chap. 11.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Seeli Tirupati v. Bhupathiraju Janikamma, AIR 1963 AP 445; Bai Zabukhima v. Amardas Balakdas, AIR 1967 Guj 214; Mithailal Gupta v. Inland Auto Finance, AIR 1968 MP 33.

¹⁴⁷ S. 191, IPC.

¹⁴⁸ State v. Shingara Singh, AIR 1963 Punj 185: (1963) 1 Cri LJ 478.

¹⁴⁹ Nanguneri Sri Vanamomalai Ramanuja v. State of T.N., 1996 AIHC 204.

PART II
11
Interim Orders

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1. GENERAL

ACCORDING to the dictionary meaning, "interim" means "for the time being", "in the meantime", "meanwhile", "temporary", "provisional", "not final", "intervening".¹ The word "interim" when used as a noun means "intervening" and when used as an adjective, it means "temporary" or "provisional".² Thus, interim 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.

"Interlocutory" means, not that which decides the cause but that which only settles some intervening matter relating to the cause; a decree or judgment given provisionally during the course of a suit.³

1 Concise Oxford English Dictionary (1991) at p. 814; P.R. Aiyar, Advanced Law Lexicon (2005) Vol. II at p. 2411.
2 Bank of Maharashtra v. Union Carbide Corporation, AIR 1983 SC 1046.
3 P.R. Aiyar, Advanced Law Lexicon (2005) Vol. II at p. 2411.

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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.⁴ They 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. Courts are constituted for the purpose of doing justice and must be deemed to possess all such powers as may be necessary to do the right and undo the wrong in the course of administration of justice.⁵

Interim orders are necessary to deal with and protect rights of the parties in the interval between the commencement of the proceedings and final adjudication. They enable the court to grant such relief or to pass such order as may be necessary, just or equitable. They also prevent any abuse of process during the pendency of proceedings. Hence, interim or interlocutory proceedings play a crucial role in the conduct of litigation between parties.⁶

Such interim orders may be summarised thus:

- (i) Payment in Court: Order 24
- (ii) Security for Costs: Order 25
- (iii) Commissions: Order 26
- (iv) Arrest before Judgment: Order 38
- (v) Attachment before Judgment: Order 38
- (vi) Temporary Injunctions: Order 39
- (vii) Interlocutory Orders: Order 39
- (viii) Receiver: Order 40

Let us discuss these provisions in detail.

2. PAYMENT IN COURT: ORDER 24

As it is open to the plaintiff to abandon his suit, so also it is open to the defendant in a suit for debt or damages to deposit in court at any stage of the suit such sum of money as he considers a satisfaction in full of the plaintiff's claim.⁷ The deposited amount shall be paid to the plaintiff on his application unless the court otherwise directs.⁸ Such deposit, however, must be unconditional.⁹ No interest shall be allowed to the plaintiff on the sum deposited by the defendant.¹⁰ If such amount

⁴ S. 94(e).

⁵ S. 151. For detailed discussion, see *infra*, Pt. V, Chap. 4.

⁶ Halsbury's Laws of England (4th Edn.) para 326, at p. 243.

⁷ Or. 24 Rr. 1 & 2; see also *supra*, Banwari Lal v. Chando Devi, *supra*; Ruby Sales & Services (P) Ltd. v. State of Maharashtra.

⁸ R.2.

⁹ Puran Chand v. Mangal Nanak, AIR 1969 P&H 367.

¹⁰ R. 3; see also State Bank of Bikaner & Jaipur v. Abdul Wahid, AIR 2003 Raj 61.

is deposited at the stage of final arguments only to save payment of interest, the application can be rejected.¹¹

If the plaintiff accepts such sum as payment in full satisfaction of his claim, the court shall record his statement to that effect and pronounce the judgment accordingly.¹² On the other hand, if the plaintiff accepts such payment as satisfaction in part of his claim, he is entitled to prosecute the suit for the balance. But, if ultimately it is found that the deposit was in full satisfaction of the plaintiff's claim, the plaintiff shall pay all costs incurred after such deposit.¹³

Illustration

A sues B to recover Rs 15,000. B deposits Rs 10,000 in full satisfaction of the plaintiff's claim. If A accepts the amount as satisfaction in full of his claim, the Court shall pronounce the judgment to that effect. If, on the other hand, A accepts the amount as satisfaction in part only of his claim, he may prosecute his suit for the balance. But if the Court ultimately decides that A is entitled only to Rs 10,000, he will have to pay the costs incurred by B after depositing Rs 10,000 in the Court.

3. SECURITY FOR COSTS: ORDER 25

(1) Applicability: Rule 1

Rule 1 of Order 25 provides for the taking of security for the costs of the suit. It states that the court may, at any stage of the suit, order the plaintiff to give security for the payment of the costs of the defendant. This is at the discretion of the court.¹⁴

In the following circumstances, however, the court shall make such order:¹⁵

(i) where the plaintiff resides outside India or where there are two or more plaintiffs and all of them reside outside India; and

(ii) where the sole plaintiff or none of the plaintiffs has sufficient immovable property within India other than the suit property.

Rule 10 of Order 41 provides for taking of security for costs of appeal.¹⁶

11 Dinesh Textiles v. State Bank of Bikaner & Jaipur, AIR 1999 Raj 162: (1999) 3 Civ LJ 336.

12 R. 4(2); see also Dinesh Textiles v. State Bank of Bikaner & Jaipur, AIR 1999 Raj 162: (1999) 3 Civ LJ 336.

13 R. 4(1); see also State Bank of Bikaner & Jaipur v. Abdul Wahid, AIR 2003 Raj 61.

14 Premchand Monshee, In the goods of, (1894) 21 Cal 832; Arumugam Chettiar v. K.R.S. Sevugan Chettiar, AIR 1950 Mad 779: (1950) 2 Mad LJ 159; Narasinga Shenoι v. Madhava Prabhu, AIR 1960 Ker 45.

15 Or. 25 Rule 1.

16 See infra, "First Appeals", Pt. III, Chap. 2.

(2) Object

The object of the rule is to provide for the protection of the defendants in certain cases where, in the event of success, they may have difficulty in realizing their costs from the plaintiff.¹⁷ It is a discretionary power which can be exercised only in exceptional circumstances, where it is shown that the exercise of power is necessary for the reasonable protection of the interests of the defendant.¹⁸ An order for security of costs may be passed by the court either suo motu (of its own motion) or on application of the defendant and must be a reasoned one. The provisions of this order apply even to a minor plaintiff.¹⁹

(3) Failure to furnish security: Rule 2

If the security is not furnished within the time fixed or extended, the court shall dismiss the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.²⁰ Sub-rule (2) of Rule 1 empowers the court to restore the suit dismissed under sub-rule (1). The dismissal shall not, however, be set aside without giving notice to the defendant.²¹

4. COMMISSIONS: ORDER 26

(1) Issue of commissions: Section 75

Sections 75 to 78 deal with the powers of the court to issue commissions and detailed provisions have been made in Order 26 of the Code.²² The power of the court to issue commission is discretionary and can be exercised by the court for doing full and complete justice between the parties.²³ It can be exercised by the court either on an application by a party to the suit or of its own motion (suo motu).²⁴

(2) Purposes: Section 75

Section 75 enacts that a court may issue a commission for any of the following purposes:

- (i) to examine witnesses;
- (ii) to make local investigation;
- (iii) to adjust accounts;
- (iv) to make partition;

¹⁷ Premchand Monshee, In the goods of, (1894) 21 Cal 832 at p. 836.

¹⁸ Arumugam Chettiar v. K.R.S. Sevugan Chettiar, AIR 1950 Mad 779: (1950) 2 Mad LJ 159.

¹⁹ Bai Porebai v. Devji Meghji, ILR (1898) 23 Bom 100; Mohd. Kasim v. Haji Rahiman.

²⁰ Or. 25 R. 2(1).

²¹ R. 2(3).

²² For detailed discussion, see, C.K. Thakker, Code of Civil Procedure (Lawyer's Edn.) Vol. I at pp. 1062-73.

²³ Padam Sen v. State of U.P., AIR 1961 SC 218: (1961) 1 SCR 884; Filmistan (P) Ltd. v. Bhagwandas Santprakash, (1970) 3 SCC 258: AIR 1971 SC 61.

²⁴ Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161: AIR 1984 SC 802.

- (v) to hold investigation;
- (vi) to conduct sale; or
- (vii) to perform ministerial act.

(a) To examine witnesses: Sections 76-78; Order 26 Rules 1-8 As a general rule, the evidence of a witness in an action, whether he is a party to the suit or not, should be taken in open court and tested by cross-examination. Inability to attend the court on grounds of sickness or infirmity or detriment to the public interest may justify issue of a commission. The court has a discretion to relax the rule of attendance in court where the person sought to be examined as a witness resides beyond the local limits of the jurisdiction of the court²⁵ or on any other ground which the court thinks sufficient²⁵, e.g., a witness, who being a paramhansa, always remained in naked condition, can be examined on commission.²⁷ Similarly, if a party or a witness apprehends danger to his life if he appears before the court, he can be examined on commission.²⁸

On the other hand, where a party accused of fraud seeks to examine himself on commission, the court may refuse the prayer since the opportunity of noting his demeanour would be lost.²⁹ The power, however, should not be exercised on the ground that the witness is a man of rank or having social status and it will be derogatory for him to appear in person in court.³⁰ Sections 75 to 78 deal with the powers of the court to issue commissions and detailed provisions have been made in Order 26 of the Code.

The court may issue a commission for the examination on interrogatories or otherwise of any person in the following circumstances:

- (i) if the person to be examined as a witness resides within the local limits of the court's jurisdiction, and (i) is exempted under the Code from attending court; or
- (ii) is from sickness or infirmity unable to attend court, or (iii) in the interest of justice, or for expeditious disposal of the case, or for any other reason, his examination on commission will be proper;³¹ or

²⁵ Ramakrishna Kulvant Rai v. F.E. Hardcastle & Co. (P) Ltd., AIR 1963 Mad 103 at p. 104; Filmistan (P) Ltd. v. Bhagwandas Santprakash, (1970) 3 SCC 258; AIR 1971 SC 61. See also *infra*, Chap. 14.

²⁶ Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 (paras 14, 69, 80): AIR 1984 SC 802 (paras 14, 70, 81).

²⁷ Paramhansa Ramkrishna v. Trimbak Rajaram, AIR 1978 Bom 176.

²⁸ Vinayak Trading Co. v. Sham Sunder & Co., AIR 1987 AP 236.

²⁹ Satish Chandra v. Kumar Satish Kantha, AIR 1923 PC 73:171 IC 391: (1924) 39 Cal LJ 165 (PC)

³⁰ A. Marcalline Fernando v. St. Francis Xavier Church, AIR 1961 Mad 31; Panachand Chhotalal v. Manoharlal Nandlal, AIR 1917 Bom 155.

³¹ Or. 26 Rr. 1, 3, 4-A; Ss. 76, 77, 78.

- (ii) if he resides beyond the local limits of the jurisdiction of the court;³² or
- (iii) if he is about to leave the jurisdiction of the court;³² or
- (iv) if he is a government servant and cannot, in the opinion of the court, attend without detriment to the public service;³² or
- (v) if he is residing out of India and the court is satisfied that his evidence is necessary ³³

The court may issue such a commission either suo motu (of its own motion) or on the application of any party to the suit or of the witness to be examined.³⁴ The evidence taken on commission shall form part of the record.³⁵ It shall, however, not be read in evidence in the suit without the consent of the party against whom it is offered, unless (a) the person, who gave the evidence, is beyond the jurisdiction of the court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in court, or is a person in the service of the government who cannot, in the opinion of the court, attend without detriment to the public service, or (b) the court in its discretion dispenses with the proof of any of such circumstances.³⁶

(b) To make local investigation: Rules 9 & 10

The court may, in any suit, issue a commission to such person as it thinks fit directing him to make local investigation and to report thereon for the purpose of (a) elucidating any matter in dispute, or (b) ascertaining the market value of any property or the amount of any mesne profits or damages or annual net profits.³⁷

The object of local investigation is not to collect evidence which can be taken in court but to obtain evidence which from its very peculiar nature can be had only on the spot.³⁸ Such evidence enables the court to properly and correctly understand and assess the evidence on record and clarify any point which is left doubtful.³⁹ It also helps the court in deciding the question in controversy pending before it, e.g., whether the suit premises is really occupied by the tenant or by strangers.⁴⁰

³² R.4.

³³ R.5.

³⁴ Rr. 2 & 6.

³⁵ R. 7.

³⁶ R.8.

³⁷ R.9.

³⁸ Padam Sen v. State of U.P., AIR 1961 SC 218: (1961) 1 SCR 884; P. Moosa Kutty, In re, AIR 1953 Mad 717 at p. 718; Debendranath v. Natha Bhuyian, AIR 1973 Ori 240 at p. 241.

³⁹ Ibid.

⁴⁰ Southern Command Military Engg. Services Employees Coop. Credit Society v. V.K.K. Nambiar, (1988) 2 SCC 292: AIR 1988 SC 2126.

(c) To adjust accounts: Rules 11 & 12

In any suit in which an examination or adjustment of accounts is necessary the court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.⁴¹ The court, for this purpose, shall issue necessary instructions to the Commissioner. The proceedings and the report (if any) of the Commissioner shall be evidence in the suit.⁴²

(d) To make partition: Rules 13 & 14

Where a preliminary decree for partition of immovable property has been passed, the court may issue a commission to such person as it thinks fit to make a partition or separation according to the rights declared in such decree.⁴³ The Commissioner shall, after such inquiry as may be necessary, divide the property into the required number of shares and allot them to the parties. He will then prepare a report appointing the share of each party and distinguishing the same by metes and bounds and transmit it to the court. The court shall, after hearing the objections of different parties, make the final allotment.⁴⁴

(e) To hold investigation: Ride 10-A

Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the court, be conveniently conducted before the court, the court may, if it thinks it necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the court.⁴⁵

(J) To sell property: Rule 10-C

Where, in any suit, it becomes necessary to sell any movable property which is in the custody of the court pending the determination of the suit and which cannot be conveniently preserved, the court may, if, for reasons to be recorded, is of opinion that it is necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit, directing him to conduct such sale and report thereon to the court.⁴⁶

(g) To perform ministerial act: Rule 10-B

Where any question arising in a suit involves the performance of any ministerial act which cannot, in the opinion of the court, be conveniently performed before the court, the court may, if, for reasons to be

⁴¹ R. 11.

⁴² R. 12.

⁴³ R. 13.

⁴⁴ R. 14; see also *Tushar Kanti v. Savitri Devi*, (1996) 10 SCC 96: AIR 1996 SC 2752.

⁴⁵ R. 10-A.

⁴⁶ R. 10-C.

recorded, is of opinion that it is necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit, directing him to perform that ministerial act and report thereon to the court.⁴⁷

By the Amendment Act of 1976, Rules 10-A to 10-C have been inserted to provide for issue of commissions for scientific investigation, sale of movable property or performance of a ministerial act. Ministerial work means not the office work of the court but work like accounting, calculation and other work of a like nature which courts are not likely to take up without unnecessary waste of time. The Commissioner appointed by the court does not perform any judicial function.⁴⁸

The provisions to issue commissions under the Code of Civil Procedure are exhaustive and, hence, the court cannot exercise inherent powers under Section 151 for the purpose⁴⁹ The Supreme Court or High Courts under the Constitution can exercise plenary powers to issue a commission for any purpose.⁵⁰

(3) Powers: Rules 16-18

The Commissioner may (i) summon and procure the attendance of parties and their witnesses and examine them;⁵¹ (ii) call for and examine documents;⁵² (iii) enter into any land or building mentioned in the order;⁵² (iv) proceed ex parte if the parties do not appear before him in spite of the order of the court.⁵³ Rule 18-B empowers the court to fix the date for return of a commission.

(4) Expenses: Rule 15

Rule 15 provides that the court may, if it thinks fit, order the party requiring the commission to deposit the necessary expenses within the fixed period.

(5) Commissions for foreign tribunals: Rules 19-22

Rules 19 to 22 provide that if a High Court is satisfied that a foreign court wishes to obtain the evidence of a witness residing within its

⁴⁷ R. 10-B; Jagatbhai Punjabhai Palkhiwala v. Vikrambhai Punjabhai Palkhiwala, AIR 1985 Guj 34.

⁴⁸ Jagatbhai v. Vikrambhai (ibid.); Tushar Kanti v. Savitri Devi, (1996) 10 SCC 96: AIR 1996 SC 2752.

⁴⁹ Padam Sen v. State of U.P., AIR 1961 SC 218: (1961) 1 SCR 884; Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161: AIR 1984 SC 802; Jaiswal Coal Co. v. Fatehganj Coop. Mktg. Society Ltd., AIR 1975 Cal 303. For inherent powers of courts see infra, Pt. V, Chap.

⁵⁰ Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161: AIR 1984 SC 802.

⁵¹ Rr. 16 and 17.

⁵² R. 16.

⁵³ R. 18.

appellate jurisdiction in a proceeding of a civil nature, it may issue a commission for the examination of such witness.

(6) Limitations

A judicial function of a court cannot be delegated to a commission. Thus, no commission can be issued to value the property in dispute as it is the function of the court. But commission can be appointed to gather data to help such determination by court.⁵⁴ Similarly, commission cannot be appointed to scrutinise votes at the election, but it can be entrusted work of separating undisputed votes from disputed votes or of counting votes as it is merely a ministerial work.⁵⁵

Again, it is not the business of the court to collect evidence for a party nor to protect the rival party from the evil consequences. A civil court, hence, cannot appoint a commission to seize account books in possession of any party on the ground that an opposite party has an apprehension that they would be tampered with.⁵⁶

(7) Report of Commissioner: Evidentiary value

The report of the Commissioner would furnish prima facie evidence of the facts and data collected by the Commissioner. It will constitute an important piece of evidence and cannot be rejected except on sufficient grounds.⁵⁷ It would, however, be open to the court to consider what weight to be attached to the data collected by the Commissioner and reflected in the report and to what extent act upon them.⁵⁸

(8) Issuance of commission by Supreme Court and High Courts

The limitations for the issue of commission set out in Section 79 and Order 26 of the Code do not apply to issuance of commission by the Supreme Court or by High Courts in exercise of powers under the Constitution of India.⁵⁹

5. ARREST BEFORE JUDGMENT: ORDER 38 RULES 1-4

(1) Nature and scope

Generally, a creditor having a claim against his debtor has first to obtain a decree against him and then execute the said decree by having him arrested or his property attached in execution under the

⁵⁴ Narayana Menoki v. Raman Nair, 1967 KLT 200; V.V. Dravid v. State, AIR 1982 MP 159; Kershaji Dhanjibhai v. Kaikhushru Kolhabhai, AIR 1929 Bom 478; (1929) 31 Bom LR 1081.

⁵⁵ Ibid, see also Habibbhai v. Maganbhai, (1995) 1 Guj LR 871; (1995) 2 Guj CD 16.

⁵⁶ Padam Sen v. State of U.P., AIR 1961 SC 218; (1961) 1 SCR 884.

⁵⁷ Tushar Kanti v. Savitri Devi, (1996) 10 SCC 96; AIR 1996 SC 2752.

⁵⁸ Ibid; Roy & Co. v. Nani Bala, AIR 1979 Cal 50.

⁵⁹ For detailed discussion and case law, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. 1 at pp. 1068-70.

provisions of Order 21.50 Under the special circumstances, however, the creditor can move for the arrest of the debtor or for the attachment of his property even before the judgment.

(2) Object

The object underlying these provisions is to enable the plaintiff to realise the amount of decree if one is eventually passed in his favour and to prevent any attempt on the part of the defendant to defeat the execution of such decree passed against him.⁶¹

(3) Grounds: Rule 1

Where at any stage of the suit, the court is satisfied, either by affidavit or otherwise, (a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him, (/) has absconded or left the local limits of the jurisdiction of the court, or (ii) is about to abscond or leave the local limits of the jurisdiction of the court, or (iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof, or (b) that the defendant is about to leave India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance.⁶² The defendant shall not, however, be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim.⁶³

(4) Discretion of court

The power to arrest the defendant and that too before a decree in favour of the plaintiff is a drastic action and must be taken after due care, caution and circumspection. Before a court acts under this rule, it must have reason to believe on adequate material that unless the power is exercised, there is a real danger that the defendant will remove himself or his property from the jurisdiction of the court.⁶⁴

⁶⁰ For detailed discussion, see *infra*, Pt. IV .

⁶¹ Chandrika Prashad Singh v. Hira Lal, AIR 1924 Pat 312; V.K. Nataraja Gounder v. S.A. Bangaru Reddiar, AIR 1965 Mad 212.

⁶² Or. 38 R. 1.

⁶³ Proviso to R. 1.

⁶⁴ Vareed Jacob v. Sosamma Greevarghese, (2004) 6 SCC 378; S. Selvarathinam v. Rajasekharam Nnir, AIR 2001 Ker 1: (2000) 1 KLJ 966: (2000) 2 KLT 372; R.B.M. Patil Joint Venture v. Bengal Builders, AIR 2004 Cal 136: (2004) 2 Mah LJ 696.

Hence, the power of arrest cannot be exercised to secure easy execution of decree.⁶⁵

(5) Conditions

An application for arrest may be made by the plaintiff at any time after the plaint is presented, even before the service of summons is effected on the defendant.

However, before this extraordinary power can be exercised, the court must be satisfied about the following two conditions:⁶⁶

(a) The plaintiff's suit must be bona fide and his cause of action must be prima facie unimpeachable subject to his proving the allegations in the plaint; and

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

(6) Security: Rules 2-4

Where the defendant fails to show cause why he should not furnish security for his appearance, the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon.⁶⁷ The court has discretion as to the manner as also the amount of security⁶⁸

Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.⁶⁹

Where the defendant fails to furnish security or to find fresh security after the original surety has been discharged from his obligation by the court⁷⁰, the court may commit him to civil prison until the decision of the suit, or, where a decree is passed against him, until the decree has been executed.⁷¹

(7) Where arrest before judgment not allowed?

An order for arrest of a defendant before judgment cannot be obtained in any suit for land or immovable property specified in clauses (a) to

⁶⁵ (1870) 13 Suth WR 278.

⁶⁶ Seth Chand Mull v. Purushottamdoss, AIR 1926 Mad 584; (1927) 50 Mad 27; 94 IC 512; Probode Chunder v. M. Dowey, ILR (1887) 14 Cal 695; Vareed Jacob v. Sosamma Greevarghese, supra; V. Balakrishnan v. J.M. Gowrieshan, AIR 2001 Mad 20.

⁶⁷ R. 2(1).

⁶⁸ Stephen Commerce (P) Ltd. v. Vessel M.T. Zaima Navard, AIR 1999 Cal 64.

⁶⁹ R. 2(2).

⁷⁰ R.3.

⁷¹ R.4.

(d) of Section 16 of the Code.⁷² Thus, no arrest can be effected to ensure execution.⁷³

(8) Appeal

An order passed under Rule 2, 3 or 6 of Order 38 is appealable.⁷⁴

(9) Revision

An order of arrest made under Rule 1 of Order 38 can be said to be a "case decided" under Section 115 of the Code and is revisable.⁷⁵

(10) Arrest on insufficient grounds: Section 95

Where in any suit in which an order of arrest of the defendant has been obtained on insufficient grounds by the plaintiff, or where the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting it, on application being made by the defendant, the court may order the plaintiff to pay as compensation such amount, not exceeding fifty thousand rupees, as seems reasonable to the defendant for the expense or injury including injury to reputation caused to him.⁷⁶

6. ATTACHMENT BEFORE JUDGMENT: ORDER 38 RULES 5-12

(1) Nature and scope

Like arrest before judgment, in certain circumstances, an attachment before judgment may be ordered by the court. Rules 5-13 of Order 38 deal with attachment before judgment.

(2) Object

The primary object of attachment before judgment is to prevent any attempt on the part of the defendant to defeat the realisation of the decree that may be passed against him.⁷⁷ It thus prevents any attempt on the part of the defendant to defeat realisation of the decree passed in favour of the plaintiff.⁷⁸

In *Sardar Govindrao v. Devi Sahai*⁷⁹, the Supreme Court observed: "Attachment before judgment is levied where the court on an application of the plaintiff is satisfied that the defendant, with

⁷² R.1.

⁷³ (1870) 13 Suth WR 298.

⁷⁴ Or. 43 R. (q).

⁷⁵ *S. Selvarathinam v. Rajasekharam Nair*, AIR 2001 Ker 1: (2000) 1 KLJ 966: (2000) 2 KLT 372.

⁷⁶ S. 95.

⁷⁷ *Padam Sen v. State of U.P.*, AIR 1961 SC 218 at p. 220: (1961) 1 SCR 884. See also, S. 94(b).

⁷⁸ *Ibid.*, see also *Sardar Govindrao v. Devi Sahai*, *infra*.

⁷⁹ *Sardar Govindrao v. Devi Sahai*, (1982) 1 SCC 237: AIR 1982 SC 989

intent to obstruct or delay the execution of any decree that may be passed against him, (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of a guarantee against the decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree."80 (emphasis supplied)

(3) Grounds: Rule 5

Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court; the court may direct the defendant, within a time to be fixed by it, either to furnish security, of such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.81

Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.82

The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.83 The court may also in the order direct conditional attachment and the estimated value thereof.84 If an order of attachment is made without complying with the provisions of Rule 5(1), such attachment shall be void.85 The provisions of Order 21 (execution proceedings) will also apply to attachment before judgment.86

80 Ibid, at p. 268 (SCC): at p. 1006 (AIR).

81 R. 5(1). See also N. Pappammal v. L. Chidambaram, AIR 1984 Mad 70.

82 R. 6(1).

83 R. 5(2).

84 R. 5(3).

85 R. 5(4). See also N. Pappammal v. L. Chidambaram, supra; Y. Vijayalakshamma v. Sakinala Lakshmaiah and Sons, AIR 1980 AP 176 at p. 179; G. Subramania Mudaliar v. Murugesan, AIR 1982 Mad 49 at pp. 50-51; T. Srinivasan v. V. Srinivasan, AIR 1985 Mad 269.

86 R. 11-A.

(4) Principles

The remedy of attachment before judgment is an extraordinary remedy and must be exercised sparingly and strictly in accordance with law and with utmost care and caution so that it may not become an engine of oppression.⁸⁷ Before an order of attachment can be made, the court must be satisfied about the following two conditions:

- (i) that the defendant is about to dispose of the whole or any part of his property; and
- (ii) that the disposal is with the intention of obstructing or delaying the execution of any decree that may be passed against him.⁸⁸

An attachment practically takes away the power of alienation and such a restriction on the exercise of the undoubted rights of ownership ought not to be imposed upon an individual except upon clear and convincing proof that the order is needed for the protection of the plaintiff.⁸⁹ A man is not debarred from dealing with his property just because a suit has been filed against him. Otherwise in every case in which a suit is brought against a man if during the pendency of the proceedings he sells some of his properties that would be at once a sufficient ground to satisfy the court that he is disposing his property with intent to defraud the plaintiff. Clearly, there must be additional circumstances before the court can be satisfied that such an intention exists.⁹⁰ This process is never meant as a weapon for the plaintiff to coerce the defendant to come to terms. Hence, utmost caution and circumspection should guide the court. The court must advert to the provisions of the Code in this regard, advert to and investigate the allegations thrown against the defendant, satisfy itself that a case for attachment before judgment has been made out and then pass the requisite order. These principles have come to be recognised as mandates to the court and if the court acts in breach thereof, such an order of the court will have to be ignored as the result of dereliction of duty⁹¹

In *Bharat Tobacco Co. v. Mania Saheb*⁹², the High Court of Gujarat has rightly observed, "In order to invoke the jurisdiction of the court under Order 38 Rule 5 of the Code, it is not sufficient to reproduce the language of that rule but the party seeking the order must establish by affidavit or otherwise facts which would satisfy the court that

⁸⁷ *Ratan Kumar v. Howrah Motor Co. (P) Ltd.*, AIR 1975 Cal 180 at p. 181; *Premraj Mundra v. Mohd. Maneck Gazi*, *infra*.

⁸⁸ *Ibid*, see also *Hari Sankar v. Bhoori Devi*, (1975) 77 PLR 133; *Bharat Tobacco Co. v. Maula Saheb*, AIR 1980 Guj 202 at pp. 203-04.

⁸⁹ *Jai Prakash v. Basanta Kumari*, (1911) 15 IC 604 (Cal).

⁹⁰ *Nowroji Pudumjee v. Deccan Bank Ltd.*, AIR 1921 Bom 69.

⁹¹ *T. Srinivasan v. V. Srinivasan*, AIR 1985 Mad 269.

⁹² AIR 1980 Guj 202: (1981) 22 Guj LR 343.

the opposite party is about to dispose of the whole or any part of his property with a view to obstructing or delaying the execution of the decree that may be passed in the suit. An order of attachment before judgment is a drastic order and ordinarily the court would be slow in exercising the power conferred upon it under Order 38 Rule 5 of the Code for the simple reason that, if the power is not exercised with utmost care and caution, it may ruin the reputation and business of the party against whom the power is exercised. The court must act with utmost circumspection before issuing an order of attachment so that the power vested in the court is not abused by an unscrupulous litigant as a weapon of oppression against the opposite party. It is the duty of the court to take care to see that it is not used as an instrument to coerce the opposite party to settle the matter with the party armed with an order of attachment before judgment on the latter's terms."⁹³ (emphasis supplied) The following powerful observations of Dawson Miller, C.J.⁹⁴ are worth quoting:

"The power given to the court to attach a defendant's property before judgment is never meant to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule.

To attach a defendant's property before a defendant's liability is established by a decree, may have the effect of seriously embarrassing him in the conduct of the defence, as the properties could not be alienated even for the purpose of putting him in funds for defending the suit, which may eventually prove to have been entirely devoid of merit. Such a poioer is only given when the court is satisfied not only that the defendant is about to dispose of his properties or to remove it from the jurisdiction of the court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him, and so deprive the plaintiff, successful, of the fruits of victory."⁹⁵ (emphasis supplied)

Suffice to say that in the leading case of Premraj Mundra v. Mohd. Maneck Gazi⁹⁶, after referring to several authorities, Justice Sinha had deduced the following principles relating to passing of an order of attachment before judgment:

- (1) That an order under Order 38, Rules 5 and 6 can only be issued if circumstances exist as are stated therein.
- (2) Whether such circumstances exist is a question of fact which must be proved to the satisfaction of the court.

⁹³ Bharat Tobacco Co. v. Maula Saheb, AIR 1980 Guj 202 at p. 204: (1981) 22 Guj LR 343 at p. 345.

⁹⁴ Chandrika Prashad Singh v. Hira Lal, AIR 1924 Pat 312: 73 IC 721.

⁹⁵ Ibid, at p. 314 (AIR).

⁹⁶ AIR 1951 Cal 156: 87 Cal LJ 41.

- (3) That the court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the defendants would not be prejudiced.
- (4) That the affidavits in support of the contentions of the applicant must not be vague, and must be properly verified. Where it is affirmed as true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the source of information should be disclosed, and the grounds for belief should be stated.
- (5) That a mere allegation that the defendant was selling off his properties is not sufficient. Particulars must be stated.
- (6) There is no rule that transactions before a suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation.
- (7) Where only a small portion of the property belonging to the defendant is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the plaintiff's claim.
- (8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit has been filed. There must be additional circumstances to show that the transfer is with an intention to delay or defeat the plaintiff's claim. It is open to the court to look to the conduct of the parties immediately before the suit and to examine the surrounding circumstances and to draw an inference as to whether the defendant is about to dispose of the property, and if so, with what intention. The court is entitled to consider the nature of the claim and the defence put forward.
- (9) The fact that the defendant is in insolvent circumstances or in acute financial embarrassment is a relevant circumstance, but not by itself sufficient.
- (10) That in the case of running businesses, the strictest caution is necessary and the mere fact that a business has been closed, or that its turnover has diminished, is not enough.
- (11) Where, however, the defendant starts disposing of his properties one by one, immediately upon getting notice of the plaintiff's claim, and/or where he had transferred the major portion of his properties shortly prior to the institution of the suit, and was in an embarrassed financial condition, these were grounds from which an inference could legitimately be drawn that the object of the defendant was to delay and defeat the plaintiff's claim.

(12) Mere removal of properties outside the jurisdiction of the court concerned is not enough, but where the defendant, with notice of the plaintiff's claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate court, and without any satisfactory reason, an adverse inference may be drawn against the defendant. Where the removal is to a foreign country, the inference is greatly strengthened.

(13) The defendant in a suit is under no liability to take any special care in administering his affairs, simply because there is a claim pending against him. Mere neglect or suffering execution by other creditors is not a sufficient reason for an order under Order 38 of the Code.

(14) The sale of properties at a gross undervalue, or benami transfers, are always good indications of an intention to defeat the plaintiff's claim. The court must, however, be very cautious about the evidence on these points and not rely on vague allegations.⁹⁷

(5) Conditional attachment

The court has ample power to direct conditional attachment⁹⁸ No prior notice is necessary in such cases. It is, however, open to the defendant and his right to show cause against attachment has not been affected.⁹⁹

Conditional order of attachment, however is not by itself attachment. Unless the property is actually attached in accordance with the procedure prescribed by the Code, the order is ineffective and no attachment can be made of property.¹⁰⁰

(6) Mode of attachment: Rule 7

Rule 7 enacts that attachment shall be made in the manner provided for attachment of property in execution of a decree.

(7) Exemption from attachment: Rule 12

The court cannot order attachment or production of any agricultural produce in possession of an agriculturist.¹⁰¹

⁹⁷ Premraj Mundra v. Mohd. Maneck Gazi, AIR 1951 Cal 156 at p. 160-61: 87 Cal LJ 41.

⁹⁸ R. 5(3).

⁹⁹ Sardar Govindrao v. Devi Sahai, supra; see also (1969) 19 Raj 701; Shalimar Rope Works Ltd. v. N.C. John and Sons Ltd., (1986) Ker LT 1366; Sohanraj Ganeshmal Shah v. Gulabrao B. Kate, AIR 1972 Bom 377: (1972) 74 Bom LR 107.

¹⁰⁰ Mahadev Vasudev v. Janaksingh, AIR 1954 Bom 251; Vasavamba (Smt.) v. Parasuram Sait and Sons, AIR 1973 Mys 291; Sri Krishna Gupta v. Shri Ram Babu, AIR 1967 All 136.

¹⁰¹ R. 12.

(8) Rights of third party: Rule 10

An attachment before judgment does not affect the rights of persons, existing prior to the attachment, if they are not parties to the suit.¹⁰²

(9) Adjudication of claims: Rule 8

Rule 8 provides that any claim preferred to the property, attached before judgment, shall be adjudicated upon in the manner provided for adjudication of claims to property attached in execution of a decree for the payment of money.

(10) Reattachment in execution: Rule 11

Where the property is under attachment, and a decree is subsequently passed in favour of the plaintiff, it is not necessary to apply for fresh attachment of the property in execution.¹⁰³ The provisions of Order 21 applicable to an attachment made in execution of a decree will also apply to an attachment before judgment continuing after judgment.¹⁰⁴

(11) Effect of attachment

An order of attachment before judgment is a sort of guarantee against decree becoming infructuous for want of property available for satisfaction of such decree. The plaintiff, however, does not get title by effecting attachment before judgment.¹⁰⁵

(12) Removal of attachment: Rule 9

An order of attachment will be withdrawn if the defendant furnishes security or the suit is dismissed.¹⁰⁶

(13) Appeal

An order passed under Order 38 Rule 5 is appealable.¹⁰⁷

(14) Revision

An order granting or refusing attachment before judgment is a case decided within the meaning of Section 115 of the Code and is revisable by the High Court.¹⁰⁸

102 R. 10.

103 R. 11.

104 R. 11-A.

105 Sardar Govindrao v. Devi Sahai, supra; Firm Amin Chand Hakam Chand v. Noshah Begum, AIR 1954 Punj 235.

106 R. 9.

107 Or. 43 R. 1(q).

108 International Air Transport Assn. v. Hansa Travels (P) Ltd., AIR 1998 Ker 80.

(15) Wrongful attachment

A suit for damages is maintainable for wrongful attachment of property.¹⁰⁹

(16) Attachment on insufficient grounds: Section 95

Where in any suit in which an order of attachment of the property of a defendant has been obtained on insufficient grounds by the plaintiff, or where the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting it, on application being made by the defendant, the court may order the plaintiff to pay as compensation such amount, not exceeding fifty thousand rupees, as it deems reasonable to the defendant for the expense or injury including injury to reputation caused to him.¹¹⁰

7. TEMPORARY INJUNCTIONS: ORDER 39 RULES 1-5

(1) General

Every court is constituted for the purpose of administering justice among parties and, therefore, must be deemed to possess all such powers as may be necessary to do full and complete justice to the parties before it.

(2) Meaning

An injunction is a judicial process whereby a party is required to do, or to refrain from doing, any particular act. It is a remedy in the form of an order of the court addressed to a particular person that either prohibits him from doing or continuing to do a particular act (prohibitory injunction); or orders him to carry out a certain act (mandatory injunction).¹¹¹

(3) Doctrine explained

It is well-settled principle of law that interim order can always be granted in the aid of and as ancillary to the main relief available to the party on final determination of his rights in a suit or any other proceeding. Therefore, a court undoubtedly possesses the power to grant interim

¹⁰⁹ For detailed discussion, see *infra*, "Attachment on insufficient grounds: Section 95".

¹¹⁰ S. 95; See also *Ananda v. Shariatullah*, AIR 1932 Cal 92: 35 CWN 546; *Gyan Prakash v. Kishori Lal*, AIR 1942 All 261: ILR 1942 All 360; *Mudhun Mohun v. Gokul Dass*, (1866)

¹¹⁰ MIA 563; *Brahmasuriah v. Amba Bai*, AIR 1964 Mys 41; *Bank of India v. Shital Chandra*, AIR 1986 Cal 313.

¹¹¹ Halsbury's Laws of England (4th Edn.) Vol. 24, para 901. See also, Author's Lectures on Administrative Law (2008) Lecture X.

relief during the pendency of the suit.¹¹² Temporary injunctions are thus injunctions issued during the pendency of proceedings.

(4) Object

The primary purpose of granting interim relief is the preservation of property in dispute till legal rights and conflicting claims of the parties before the court are adjudicated. In other words, the object of making an order regarding interim relief is to evolve a workable formula to the extent called for by the demands of the situation, keeping in mind the pros and cons of the matter and striking a delicate balance between two conflicting interests, i.e., injury and prejudice, likely to be caused to the plaintiff if the relief is refused; and injury and prejudice likely to be caused to the defendant if the relief is granted. The court in the exercise of sound judicial discretion can grant or refuse to grant interim relief.¹¹³

The underlying object of granting temporary injunction is to maintain and preserve status quo at the time of institution of the proceedings and to prevent any change in it until the final determination of the suit. It is in the nature of protective relief granted in favour of a party to prevent future possible injury.¹¹⁴

The need for such protection, however, has to be judged against the corresponding need of the defendant to be protected against injury resulting from exercising his own legal rights. The court must weigh one need against another and determine where the balance of convenience lies and may pass an appropriate order in exercise of its discretionary power.¹¹⁵

(5) Types

Injunctions are of two kinds: (i) temporary; and (ii) permanent. A permanent injunction restrains a party forever from doing the specified act and can be granted only on merits at the conclusion of the trial after hearing both the parties to the suit.¹¹⁶ It is governed by Sections 38 to

¹¹² State of Orissa v. Madan Gopal, AIR 1952 SC 12 at p. 14: 1952 SCR 28; Premier Automobiles v. Kamlekar Shantaram, (1976) 1 SCC 496: AIR 1975 SC 2238; Dorab Cowasji Warden v. Coomi Sorab Warden, (1990) 2 SCC 117: AIR 1990 SC 867; Shiv Kumar v. MCD, (1993) 3 SCC 161.

¹¹³ Dorab Cowasji Warden v. Coomi Sorab Warden, supra; CCE v. Dunlop India Ltd., (1985) 1 SCC 260 at pp. 266-67: AIR 1985 SC 330; Shiv Kumar v. MCD, supra; Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan, (2002) 5 SCC 760; Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd., (2006) 1 SCC 540.

¹¹⁴ Ibid, see also Polins v. Gray, (1879) 12 Ch D 438; ITO v. M.K. Mohd. Kunhi, AIR 1969 SC 430: (1969) 2 SCR 65; Manohar Lal v. Seth Hiralal, AIR 1962 SC 527:1962 Supp (1) SCR 450.

¹¹⁵ Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545: AIR 1995 SC 2372 at p. 2389.

¹¹⁶ S. 37(2), Specific Relief Act, 1963.

42 of the Specific Relief Act, 1963. A temporary or interim injunction, on the other hand, restrains a party temporarily from doing the specified act and can be granted only until the disposal of the suit or until the further orders of the court. It is regulated by the provisions of Order 39 of the Code of Civil Procedure, 1908 and may be granted at any stage of the suit.¹¹⁷

Injunctions are also (i) preventive, prohibitive or restrictive, i.e. when they prevent, prohibit or restrain someone from doing something; or

(ii) mandatory, i.e. when they compel, command or order some person to do something.

(6) Who may apply?

It is not the plaintiff alone who can apply for an interim injunction. A defendant may also make an application for grant of an injunction against the plaintiff.¹¹⁸

(7) Against whom injunction may be issued

An injunction may be issued only against a party and not against a stranger or a third party.¹¹⁹ It also cannot be issued against a court or judicial officer.¹²⁰

Normally, injunction can be granted against persons within the jurisdiction of the court concerned.¹²¹

(8) Grounds: Rule 1

Temporary injunction may be granted by a court in the following cases:

(a) where any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree;¹²² or

(b) where a defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors;¹²³ or

¹¹⁷ S. 37(1), Specific Relief Act, 1963.

¹¹⁸ Rattu v. Mala, AIR 1968 Raj 212; B.F. Varghese v. Joseph Thomas, AIR 1957 TC 286; Municipal Corpn. of Greater Bombay v. Bhagwan Sakharam Salaskar, AIR 1974 Bom 272; Ganga Bricks Udhyog v. Jai Bhagwan Swarup, AIR 1982 All 333; Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545: AIR 1995 SC 2372.

¹¹⁹ L.D. Meston School Society v. Kashi Nath, AIR 1951 All 558; Fakira v. Rumsukhibai, AIR 1946 Nag 428: ILR 1946 Nag 908; Marxuari Sabha v. Kanhaya Lal, AIR 1973 All 298.

¹²⁰ Ibid, see also Kalia v. Gram Sabha Manas, AIR 1973 P&H 479; Mahanth Ramkeshwar v. Baldeo Singh, AIR 1938 Pat 606; Varanasaya Sanskrit Vishwavidyalaya v. Rajkishore, (1977) 1 SCC 279: AIR 1977 SC 615.

¹²¹ P. Venkatachalam v. Rajagopala Naidu, AIR 1932 Mad 705; T.A. Menon v. K.P. Parvathi Ammal, AIR 1950 Mad 373.

¹²² Or. 39 R. 1(a).

¹²³ R. 1 (b).

(c) where a defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit;¹²⁴ or (id) where a defendant is about to commit a breach of contract, or other injury of any kind;¹²⁵ or

(e) where a court is of the opinion that the interest of justice so requires.¹²⁶

(9) Principles

The power to grant a temporary injunction is at the discretion of the court. This discretion, however, should be exercised reasonably, judiciously and on sound legal principles. Injunction should not be lightly granted as it adversely affects the other side. The grant of injunction is in the nature of equitable relief, and the court has undoubtedly power to impose such terms and conditions as it thinks fit.¹²⁷ Such conditions, however, must be reasonable so as not to make it impossible for the party to comply with the same and thereby virtually denying the relief which he would otherwise be ordinarily entitled to. Generally, before granting the injunction, the court must be satisfied about the following aspects:¹²⁸

(a) Prima facie case

The first rule is that the applicant must make out a prima facie case in support of the right claimed by him. The court must be satisfied that there is a bona fide dispute raised by the applicant, that there is a strong case for trial which needs investigation and a decision on merits and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him. The existence of a prima facie right and infraction of such right is a condition precedent for grant of temporary injunction. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a prima facie case in his favour.¹²⁹

¹²⁴ 1 (c).

¹²⁵ R. 2(1).

¹²⁶ Ss. 94(c), 151. See also *Manohar Lal v. Seth Hiralal*, AIR 1962 SC 527:1962 Supp (1) SCR 450; *Cotton Corpn. of India Ltd. v. United Industrial Bank Ltd.*, (1983) 4 SCC 625: AIR 1983 SC 1272.

¹²⁷ R. 2(2).

¹²⁸ *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719 at p. 721: AIR 1993 SC 276; *Dorab Cowasji Warden v. Coomi Sorab Warden*, (1990) 2 SCC 117: AIR 1990 SC 867; *Wander Ltd. v. Antox India (P) Ltd.*, 1990 Supp SCC 727 at pp. 731-32: AIR 1990 SC 867 at pp. 876-77; *United Commercial Bank v. Bank of India*, (1981) 2 SCC 766 at pp. 787-88: AIR 1981 SC 1426 at p. 1440; *Gangubai v. Sitaram*, (1983) 4 SCC 31 at p. 33: AIR 1983 SC 742 at p. 743; *Shiv Kumar v. MCD*, supra; *Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan*, (2002) 5 SCC 760; *Transmission Corpn. Of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd.*, (2006) 1 SCC 540.

¹²⁹ *Dalpat Kumar v. Prahlad Singh*, (1992) 1 SCC 719 at p. 721: AIR 1993 SC 276.

Prima facie case, however, should not be confused with a case proved to the hilt. It is no part of the court's function at that stage to try to resolve a conflict of evidence nor to decide complicated questions of fact and of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial?³⁰ (emphasis supplied) In other words, the court should not examine the merits of the case closely at that stage because it is not expected to decide the suit finally. In deciding a prima facie case, the court is to be guided by the plaintiff's case as revealed in the plaint, affidavits or other materials produced by him.

Explaining the ambit and scope of the connotation "prima facie" case, in *Martin Burn Ltd. v. R.N. Banerjee*¹³¹, the Supreme Court observed:

"A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record."¹³²

(emphasis supplied)

(b) Irreparable injury

The existence of the prima facie case alone does not entitle the applicant for a temporary injunction.¹³³ The applicant must further satisfy the court about the second condition by showing that he will suffer irreparable injury if the injunction as prayed is not granted, and that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury. In other words, the court must be satisfied that refusal to grant injunction would result in

¹³⁰ *American Cyanamid Co. v. Ethicon Ltd.*, (1975) 1 All ER 504 at p. 510:1975 AC 396 at p. 407: (1975) 2 WLR 316 at p. 323 (per Lord Diplock).

¹³¹ AIR 1958 SC 79:1958 SCR 514.

¹³² Ibid, at p. 85 (AIR). See also *Buckingham & Carnatic Co. Ltd. v. Workers*, AIR 1953 SC 47 at p. 49:1953 SCR 219:1952 Lab AC 490; *American Cyanamid Co. v. Ethicon Ltd.*, *infra*; *Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan*, (2002) 5 SCC 760; *Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd.*, (2006) 1 SCC 540.

¹³³ *CCE v. Dunlop India Ltd.*, (1985) 1 SCC 260 at pp. 266-67: AIR 1985 SC 330; *Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd.*, (2006) 1 SCC 540; *Barkat Ali v. Zulfiquar*, AIR 1975 AP 187 at p. 190; *Shayak Mohammad, v. Iqbal Ahmed*, AIR 1973 Raj 115; *S. Radhakrishna Murthy v. K. Narayanadas*, AIR 1982 AP 384 at p. 388; *U.P. Avas Evam Vikas Parishad v. N.V. Rajgopalan*, AIR 1989 All 125.

"irreparable injury" to the party seeking relief and he needs to be protected from the consequences of apprehended injury. Granting of injunction is an equitable relief and such a power can be exercised when judicial intervention is absolutely necessary to protect rights and interests of the applicant. The expression irreparable injury however does not mean that there should be no possibility of repairing the injury. It only means that the injury must be a material one, i.e., which cannot be adequately compensated by damages.¹³⁴ An injury will be regarded as irreparable where there exists no certain pecuniary standard for measuring damages.

In the leading case of *American Cyanamid Co. v. Ethicon Ltd*¹³⁵, the House of Lords has rightly pronounced the principle thus:

"[T]he governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction."¹³⁶

(c) Balance of (in) convenience

The third condition for granting interim injunction is that the balance of convenience must be in favour of the applicant. In other words, the

¹³⁴ *Manohar Lal v. Seth Hiralal*, AIR 1962 SC 527; 1962 Supp (1) SCR 450; *Cotton Corpn. of India Ltd. v. United Industrial Bank Ltd.*, (1983) 4 SCC 625; AIR 1983 SC 1272.

¹³⁵ (1975) 1 All ER 504; 1975 AC 396; (1975) 2 WLR 316.

¹³⁶ *American Cyanamid Co. v. Ethicon Ltd.*, (1975) 1 All ER 504 at p. 510; 1975 AC 396 at p. 407; (1975) 2 WLR 316.

court must be satisfied that the comparative mischief, hardship or inconvenience which is likely to be caused to the applicant by refusing the injunction will be greater than that which is likely to be caused to the opposite party by granting it.

The court while exercising discretion in granting or refusing injunction should exercise sound judicial discretion and should attempt to weigh substantial mischief or injury likely to be caused to the parties, if the injunction is refused, and compare it with that which is likely to be caused to the opposite party if the injunction is granted. If on weighing conflicting probabilities, the court is of the opinion that the balance of convenience is in favour of the applicant, it would grant injunction, otherwise refuse to grant it.¹³⁷

Again, to quote the remarkable observations of Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd*¹³⁸:

"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies."m (emphasis supplied)

Though English and Indian Courts have used the phrase "balance of convenience", it is submitted that proper expression should be "balance of inconvenience". It is further submitted that once the plaintiff establishes prima facie case, the court will consider the question of granting or refusing interim injunction. If the court thinks that by refusing interim injunction, more or greater inconvenience will be caused to the plaintiff, it will grant injunction. If, on the other hand, it finds that by granting interim injunction, greater inconvenience will be caused to the defendant, it will refuse the relief. It is by considering comparative inconvenience that the court will exercise the discretion.

In the opinion of the authors, the concept is similar to "greater hardship" under Rent Laws. Several Rent Acts allow eviction decree against a tenant if the tenanted property is required by the landlord for bona fide use and occupation. Those Acts, however, require Rent

¹³⁷ Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719 at p. 721: AIR 1993 SC 276.

¹³⁸ (1975) 1 All ER 504:1975 AC 396: (1975) 2 WLR 316.

¹³⁹ Ibid, at p. 509 (AER): at p. 406 (AC): at pp. 321-22 (WLR).

Court to consider the question of "greater hardship". Once the landlord proves his bona fide requirement, the court will consider whether greater hardship will be caused to the landlord by refusing to pass decree or to the tenant by passing such decree. And on the basis of such consideration and finding thereon, the court will make an appropriate order evicting or refusing to evict tenant. The same principle applies in granting or refusing to grant temporary or interim injunction.

(id) Other factors

The above principles and guidelines are merely illustrative and neither exhaustive nor absolute rules. It should not be forgotten that grant of injunction is a discretionary power and such a power must be exercised in accordance with sound judicial principles. It is an equitable relief and even if all the above conditions are satisfied there may be other circumstances leading to a refusal to grant such a relief.¹⁴⁰

As Lord Diplock stated, "I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in particular circumstances of individual cases."¹⁴¹

Thus a relief of injunction may be refused on the ground of delay, laches or acquiescence,¹⁴² or where the applicant has not come with clean hands,¹⁴³ or has suppressed material facts,¹⁴⁴ or where monetary compensation is adequate relief.¹⁴⁵

(10) Discretion of court

Power to grant injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as a matter of right or course. Grant of injunction is at the discretion of the court and such discretion must be exercised in favour of the plaintiff only if the court is satisfied that, unless the defendant is restrained by an order of injunction, irreparable loss or damage will be caused to the plaintiff. The Court grants such relief *ex debito justitiae*, i.e., to meet the ends of justice.¹⁴⁶

It is a matter of common knowledge that on many occasions even public interest suffers in view of such interim orders of injunction,

¹⁴⁰ Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545; AIR 1995 SC 2372.

¹⁴¹ American Cyanamid Co. v. Ethicon Ltd., (1975) 1 All ER 504 at p. 511 (AER).

¹⁴² Bharat Starch & Chemicals Ltd. v. (Ahmedabad) Ltd. Mill Stores, AIR 1949 Cal 357.

¹⁴³ First Proviso to R. 4, see also Mahua v. Union of India, AIR 1971 Cal 507; Transmission Corpn. of A. P. Ltd. v. Lanco Kondapalli Power (P) Ltd., (2006) 1 SCC 540.

¹⁴⁴ Ibid, see also Vellakutty v. Karthyayani, AIR 1968 Ker 179.

¹⁴⁵ V.D. Tripathy v. V.S. Dwivedi, AIR 1976 All 97.

¹⁴⁶ Shiv Kumar v. MCD, (1993) 3 SCC 161; Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719; Mahadeo Savlaram v. Pune Municipal Corpn., (1995) 3 SCC 333; Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan, (2002) 5 SCC 760.

because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of property without any authority of law or without following procedures which are fundamental and vital in nature. But at the same time, judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court.¹⁴⁷

In *Dalpat Kumar v. Prahlad Singh*¹⁴⁸, the Supreme Court stated, "The court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused, and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that, pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."¹⁴⁹ (emphasis supplied)

The same considerations apply to the defendant seeking vacation of interim relief. In *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*¹⁵⁰ the defendant committed a breach of agreement by transferring shares of the plaintiff to a third party without obtaining consent or even without informing the plaintiff. The plaintiff, therefore, terminated the agreement and obtained interim injunction against the defendant restraining him from entering into an agreement with the third party. The defendant applied for vacating the interim injunction.

Rejecting the prayer, the Supreme Court observed:

"Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was

¹⁴⁷ *Shiv Kumar v. MCD*, (1993) 3 SCC 161 at p. 175.

¹⁴⁸ (1992) 1 SCC 719; AIR 1993 SC 276.

¹⁴⁹ *Ibid*, at p. 721 (SCC): at p. 277 (AIR).

¹⁵⁰ (1995) 5 SCC 545; AIR 1995 SC 2372.

seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings "151 (emphasis supplied)

(11) Injunction which may be granted

In accordance with the above principles, interim injunction of maintaining status quo, against transfer of property, disposal of goods, making construction, effecting recovery of dues, attachment of property, appointment of receiver or commission, against prosecution, etc., can be granted by a court.

(12) Injunction which may not be granted

Since the power can be exercised judicially and in the public interest, no interim injunction causing administrative inconvenience or resulting in public mischief should be granted. Thus, ordinarily no injunction should be granted against recovery of tax or octroi, enforcement of contractual rights and liabilities, transfer or suspension of employees, delaying election process, interfering with inquiry or investigation, etc.

(13) Inherent power to grant injunction

Rule 1 of Order 39, no doubt, enumerates circumstances in which a court may grant interim injunction. It, however, nowhere provides that no temporary injunction can be granted by the court unless the case falls within the said provision. Hence, where the case is not covered by Order 39, interim injunction can be granted by the court in exercise of inherent powers under Section 151 of the Code.¹⁵²

(14) Notice: Rule 3

The court shall, before granting an injunction, give notice to the opposite party, except where it appears that the object of granting the injunction would be defeated by delay.¹⁵³ But the proviso added by the Amendment Act of 1976 lays down that when an ex parte injunction is proposed to be given, the court has to record reasons for coming to the conclusion that the object of granting injunction would be defeated by delay. In such a situation, the court shall order the applicant to send a copy of the application and other documents immediately to the

¹⁵¹ Ibid, at p. 576 (SCC): at p. 2389 (AIR).

¹⁵² Manohar Lal v. Seth Hiralal, AIR 1962 SC 527 at p. 532; 1962 Supp (1) SCR 450; ITO v. M.K. Mohd. Kunhi, AIR 1969 SC 430: (1969) 2 SCR 65; Tanusree v. Ishani Prasad, (2008) 4 SCC 791: AIR 2008 SC 1909.

¹⁵³ R. 3; see also supra, Shiv Kumar v. MCD.

opposite party. In such a case, the court shall make an endeavour to finally dispose of the application within 30 days from the date on which the ex parte injunction was granted. Where the court finds it difficult to dispose of the application within the period of 30 days, reasons are required to be recorded.¹⁵⁴

An order of injunction may be discharged, varied or set aside by the court on an application being made by any party dissatisfied with such order, or where such discharge, variation or setting aside has been necessitated by a change in circumstances, or where the court is satisfied that such order has caused undue hardship to the other side.¹⁵⁵

(15) Ex parte injunction

Rule 3 of Order 39 requires the applicant to issue a notice to the opposite party before an injunction is granted. Though the Court has the power to grant an ex parte injunction without issuing a notice or granting a hearing to the party, who will be affected by such order, the said power is to be exercised sparingly and under exceptional circumstances.

In *Morgan Stanley Mutual Fund v. Kartick Das*¹⁵⁶, the Supreme Court indicated the factors which should weigh with a court in the grant of an ex parte injunction:

- (i) whether irreparable or serious mischief will ensue to the plaintiff;
- (ii) whether the refusal of ex parte injunction would involve greater injustice than grant of it would involve;
- (iii) the court will also consider the time at which the plaintiff first had notice of the act complained of so that the making of an improper order against a party in his absence is prevented;
- (iv) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;
- (v) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application;
- (vi) even if granted, the ex parte injunction would be for a limited period of time;
- (vii) general principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court.¹⁵⁷

¹⁵⁴ R. 3-A.

¹⁵⁵ R. 4.

¹⁵⁶ (1994) 4 scc 225 at p. 241-42.

¹⁵⁷ Ibid, at pp. 241-42.

(16) Recording of reasons

When the court purposes to grant ex parte injunction without issuing notice to the opposite party, proviso to Rule 3 enjoins the court to record reasons. The requirement of recording reasons is not a mere formality but a mandatory requirement.

Dealing with this aspect, in *Shiv Kumar v. MCD*¹⁵⁸, the Supreme Court stated, "[T]he requirement for recording the reasons for grant of ex parte injunction cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why, instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and the court has to consider briefly these factors in the ex parte order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order. If it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code attracts the principle that, if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all."¹⁵⁹(emphasis supplied)

(17) Imposition of conditions

Even when the court is satisfied with the case of the applicant, and is inclined to grant interim relief, it must consider the interest of the other side. The party at whose instance interim order is passed, should be made accountable for the consequences of such order. In appropriate cases, the applicant may be asked to furnish security for any increase in cost as a result of delay or damage suffered due to such interim

¹⁵⁸ (1993) 3 SCC 161.

¹⁵⁹ Ibid, at pp. 176-77 (SCC).

relief. "Stay order or injunction order, if issued, must be moulded to provide for restitution."160

(18) Doctrine of precedent

Interim orders have no precedential value and an applicant cannot claim grant of interim relief on the ground that in similar matters interim relief has been granted by the court.161 Judicial comity, however, requires that in similar matters, similar interim orders should normally be made.162

(19) Public projects

In many cases, injunction is sought to prevent public authorities from implementing public projects. In such cases, public interest is one of the material and relevant considerations in granting or refusing the prayer for injunction. The court must consider this aspect, and even if a case is made out to grant equitable relief of granting injunction, it must adequately protect the public authority by imposing appropriate conditions on the plaintiff, including payment of compensation by him in the event of his failure in the suit.163

The need of such protection has, however, to be weighed against the corresponding need of the defendant to be protected against an injunction resulting from the exercise of his own legal rights. The court must weigh one need against another and determine where the balance of convenience lies and may pass an appropriate order in exercise of its discretionary power. Public detriment should not outweigh public interest and public benefit in granting interim orders.164

(20) Res judicata

The doctrine of resjudicata applies to different stages of the same suit or proceeding.165 Hence, if interim injunction is once granted or refused by the court, the said order will operate till the disposal of the suit or

160 Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492 at p. 503: AIR 1999 SC 393 at p. 398.

161 Empire Industries Ltd. v. Union of India, (1985) 3 SCC 314: AIR 1986 SC 662.

162 Ibid, at p. 344 (SCC): at p. 679 (AIR) (per Mukherji, J. for himself and Fazl Ali, J.; Varadrajan, J. contra); see also Siliguri Municipality v. Amalendu Dass, (1984) 2 SCC 436: AIR 1984 SC 653: Bir Bajrang Kumar v. State of Bihar, AIR 1987 SC 1345; State of Gujarat v. Prabhat Solvent Extraction Industries (P) Ltd., (1982) 1 SCC 624.

163 Winki Dilawari v. Amritsar Improvement Trust, (1996) 11 SCC 644; Gujarat Bottling Co. Ltd. v. Coca Coin Co., (1995) 5 SCC 545: AIR 1995 SC 2372; Ramniklal N. Bhutta v. State of Maharashtra, (1997) 1 SCC 134 at p. 140: AIR 1997 SC 1236 at pp. 1239-40.

164 Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492 at p. 503: AIR 1999 SC 393 at p. 398.

165 For detailed discussion, see supra, Chap. V.

throughout the proceeding. An application for granting or vacating injunction will lie if there are changed circumstances.¹⁶⁶

(21) Interim relief for limited period: Effect

Where a court grants interim injunction or relief for a limited period, it comes to an end on the expiry of that period. Normally, in such cases, the plaintiff or his advocate requests the court for extension or continuation of such relief. But in absence of specific order, it expires.¹⁶⁷

(22) Continuation of interim relief to approach higher court

If the object of granting interim injunction or relief is to maintain and preserve status quo of the position which was there at the time of institution of suit, there is no reason why such position should not be allowed to be continued if the aggrieved party wants to approach higher or superior court after the matter is decided by the lower court. The court at the time of deciding the matter has power to continue interim relief till the party aggrieved gets an opportunity to approach higher forum.¹⁶⁸

(23) Restoration of benefits

Where a court grants interim injunction which results in injustice to the opposite party, it is not only the right but the duty of the court at the time of passing a final order to undo injustice and to restore the status quo ante⁶⁹

In *Director of Inspection (Intelligence) v. Vinod Kumar*¹⁷⁰, against the prohibitory orders, issued by the Income Tax Authorities, the petitioner filed a writ petition and obtained an ex parte interim order prohibiting the authorities from enforcing the orders. The petitioner then removed his goods under the ex parte order and withdrew the petition.

Holding that the process of law was completely abused for the purpose of gaining an undeserved benefit, the Supreme Court held that the petitioner could not be allowed to derive an undue advantage from the situation.

¹⁶⁶ Ibid, see also *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993: (1964) 5 SCR 946; *Satyadhyan Ghosal v. Deorjin Debi*, AIR 1960 SC 941: (1960) 3 SCR 590.

¹⁶⁷ *Luis Proto (Dr.) v. Union of India*, 1992 Supp (2) SCC 644: AIR 1992 SC 1812.

¹⁶⁸ *Defence Research & Development Laboratories v. C. Pandu*, AIR 1977 AP 7; *Chandigarh Admn. v. Manpreet Singh*, (1992) 1 SCC 380: AIR 1992 SC 435; *Polini v. Gray*, (1879) 12 Ch D 438: 41 LT 173 (CA).

¹⁶⁹ *Prabodh Verma v. State of U.P.*, (1984) 4 SCC 251: AIR 1985 SC 167; *Jethabhai Khatau & Co. v. Luxmi Narayan Cotton Mills Ltd.*, (1981) 3 SCC 61: AIR 1981 SC 1201; *Dorab Cowasji Warden v. Coomi Sorab Warden*, (1990) 2 SCC 117: AIR 1990 SC 867; *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.*, (1996) 4 SCC 622: AIR 1996 SC 2005.

¹⁷⁰ AIR 1987 SC 1260.

Restoration of benefits, in appropriate cases, may include payment of costs, difference of price, damages, etc.¹⁷¹

(24) Appeal

An order granting or refusing to grant injunction is subject to appeal.¹⁷² Where ex parte relief is granted by the court and the application is not decided within thirty days, the aggrieved party may prefer an appeal against such an order.¹⁷³

(25) Revision

An order granting or refusing an injunction is a "case decided" within the meaning of Section 115 of the Code and, hence, a revision lies against such an order.¹⁷⁴

(26) Breach of injunction: Rule 2-A

Section 94(c) and Rule 2-A of Order 39 provide for the consequences resulting from a disobedience or breach of an order of injunction issued by the court. The penalty may be either arrest of the opponent or attachment of his property or both. However, the detention in civil prison shall not exceed three months and the attachment of property shall not remain in force for more than one year.¹⁷⁵ If the disobedience or breach continues, the property attached may be sold and, out of the proceeds, the court may award such compensation as it thinks fit to the injured party.¹⁷⁶ The transferee court can also exercise this power and can punish for breach of injunction granted by the transferor court¹⁷⁷

(27) Injunction on insufficient grounds: Section 95

Where in any suit in which an order of temporary injunction has been obtained by the plaintiff on insufficient grounds, or where the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting it, on application being made by the defendant, the court may order the plaintiff to pay such amount,

¹⁷¹ Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492 at p. 503: AIR 1999 SC 393 at p. 398.

¹⁷² Or. 43 R. 1 (r).

¹⁷³ A. Venkatasubbiah Naidu v. S. Chellappan, (2000) 7 SCC 695: AIR 2000 SC 3032.

¹⁷⁴ Firm Ishardass Devi Chand v. R.B. Parkash Chand, AIR 1969 SC 938; Saharanpur Coop. Cane Development Union Ltd. v. Lord Krishna Sugar Mills Ltd., (1973) 3 SCC 719: AIR 1973 SC 1451; Hindustan Lever Ltd. v. Colgate Palmolive (I) Ltd., (1998) 1 SCC 720; Bina Murlidhar v. Kanhaiyalal Lokram, (1999) 5 SCC 222: AIR 1999 SC 2171. For detailed discussion, see *infra*, "Revision".

¹⁷⁵ R. 2-A(l); see also Tayabbhai M. Bagasarwalla v. Hind Rubber Industries (P) Ltd., (1997) 3 SCC 443: AIR 1997 SC 1240; Patel Rajnikant v. Patel Chandrakant.

¹⁷⁶ R. 2-A(2).

¹⁷⁷ R. 2-A(l).

not exceeding fifty thousand rupees, as it deems to be a reasonable compensation to the defendant for the expense or injury including injury to reputation caused to him.¹⁷⁸

8. INTERLOCUTORY ORDERS: ORDER 39 RULES 6-10

Rules 6 to 10 of Order 39 provide for making certain interlocutory orders. The court has power to order sale of any movable property, which is the subject-matter of the suit or attached before judgment in such suit, which is perishable, or for any just and sufficient cause desirable to be sold at once.¹⁷⁹

It can also order for detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein.

For that purpose it can authorise any person to enter upon or into any land or building in the possession of any other party to such suit or authorise any samples to be taken or observation to be made or experiment to be tried for the purpose of obtaining full information.¹⁸⁰ However, before making such orders the court shall give notice to the opposite party except where it appears that the object of making such orders would be defeated by the delay.¹⁸¹

Where the suit land is liable to payment of revenue to government or a tenure liable to sale and the party in possession of such land or tenure neglects to pay revenue or rent, any other party to the suit claiming an interest in such land or tenure may, on payment of the revenue or rent due, be put in immediate possession of the property. The court may award in the decree the amount so paid with interest thereon against the defaulter.¹⁸²

Where the subject-matter of a suit is money or some other thing capable of delivery and a party to a suit admits that he holds such money or thing as a trustee for another party or that it belongs or is due to that party, the court may order it to be deposited in court or delivered to that party with or without security.¹⁸³

9. RECEIVER: ORDER 40

(1) Meaning

The term "receiver" is not defined in the Code of Civil Procedure. Stated simply, a receiver is one who receives money of another and

¹⁷⁸ S. 95.

¹⁷⁹ R. 6.

¹⁸⁰ R. 7.

¹⁸¹ R. 8.

¹⁸² R. 9.

¹⁸³ R. 10.

renders account.¹⁸⁴ According to Kerr¹⁸⁵, he is "an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues and profits of land, or personal estate, which it does not seem reasonable to the court that either party should collect or receive, or for enabling the same to be distributed among the persons entitled". In other words, he is an independent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation pendente lite, when it does not seem reasonable to the court that either party should hold it.¹⁸⁶

(2) Object

The primary object of appointment of receiver is to protect, preserve and manage the property during the pendency of the litigation. A receiver is an officer and is an extended arm and hand of the court, a part of court machinery by which the rights of the parties are protected. The purpose of appointment of receiver is to preserve the suit property and safeguard interests of both the parties to the suit.¹⁸⁷

(3) Discretion of court

Appointment of receiver is in the discretion of the court. But the mode of appointment of receiver is recognised as one of the harshest remedies for the protection and enforcement of rights of the parties and it should be allowed in extreme cases and in the circumstances where the interests of justice require such power to be exercised.¹⁸⁸

(4) Appointment: Rule 1(a)

Where it appears to the court to be just and convenient, it may appoint a receiver.¹⁸⁹ The principles followed by the Chancery Courts in England for the appointment of receivers are adopted by Indian courts also. Courts in India have very wide jurisdiction to appoint as well as to remove a receiver in the exercise of their discretion. The discretion, however, is not absolute, arbitrary and unregulated. It is a sound and judicial discretion and must be exercised cautiously, judicially and after taking into account all the circumstances of the case for the pur

¹⁸⁴ Concise Oxford English Dictionary (2002) at p. 1195; P. R. Aiyar, Advanced Law Lexicon (2005) Vol. IV at p. 3980.

¹⁸⁵ Kerr on Receivers (2001) at p. 3.

¹⁸⁶ T. Krishnaswamy Chetty v. C. Thangavelu Chetty, AIR 1955 Mad 430 at p. 432; K.T. Thomas v. Indian Bank, 1984 Supp SCC 703; Maharaj Jagat Singh v. Lt. Col. Sawai Bhawani Singh, 1993 Supp (2) SCC 313; AIR 1993 SC 1721.

¹⁸⁷ P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314; 1957 SCR 195; Ma Hnin Yeik v. K.A.R.K. Chettyar Firm, AIR 1939 Rang 321 (FB); Narayandas v. Taraben Kalimuddin Mulla Fakhri Society, AIR 1998 Guj 12.

¹⁸⁸ Benoy Krishna v. Satish Chandra, AIR 1928 PC 49; ILR 1951 Mys 55 (FB).

¹⁸⁹ Or. 40 R. 1(1)(a); see also, S. 94(d).

pose of serving the ends of justice and protecting the rights of all the parties interested in the controversy.190

(5) Principles

The following principles must be borne in mind before a receiver is appointed by a court:191

(i) The appointment of a receiver is a discretionary power of the court.

(ii) It is a protective relief. The object is preservation of the property in dispute pending a judicial determination of the rights of the parties to it.

(iii) A receiver should not be appointed unless the plaintiff prima facie proves that he has very excellent chance of succeeding in the suit.

(iv) It is one of the harshest remedies which the law provides for the enforcement of rights, and therefore, should not be lightly resorted to. Since it deprives the opposite party possession of property before a final judgment is pronounced, it should only be granted for the prevention of a manifest wrong or injury. A court will never appoint a receiver merely on the ground that it will do no harm.

(v) Generally, an order appointing a receiver will not be made where it has the effect of depriving the defendant of a de facto possession, since that might cause irreparable loss to him. But if the property is shown to be in medio, that is to say, in enjoyment of no one, it will be in the common interest of all the parties to appoint a receiver.

(vi) The court should look at the conduct of the party who makes an application for appointment of a receiver. He must come with clean hands and should not have disintitiled himself to this equitable relief by laches, delay or acquiescence.

(6) Who may appoint receiver?

A receiver may be appointed by the court before which the proceedings are pending. Thus, in case of a suit, receiver can be appointed by the trial court. Where an appeal is preferred against the decree passed by the trial court, it is the appellate court which has power to appoint receiver.

190 T. Krishnaswamy Chetty v. C. Thangavelu Chetty, supra, at p. 434; Hiralal Patini v. Loonkaran Sethiya, AIR 1962 SC 21: (1962) 1 SCR 868.

191 T. Krishnasivamy Chetty v. C. Thangavelu Chetty, supra, at pp. 434-35; Srinivasa Rao v. Bahurao, AIR 1970 Mys 141; Bokaro & Ramgur Ltd. v. State of Bihar, AIR 1966 Pat 154; S.B. Industries v. United Bank of India, AIR 1978 All 189 at p. 190-91; Krishna Kumar v. Grindlays Bank P.L.C., (1990) 3 SCC 669: AIR 1991 SC 899.

A court, however, cannot appoint a receiver suo motu?⁹²

(7) Who may be appointed as receiver?

A person who is independent, impartial and totally disinterested should normally be appointed as receiver. Generally, a party to the suit (plaintiff or defendant) should not be appointed as receiver by the court. But the rule is not rigid or inflexible. In exceptional circumstances or for special reasons, a party to a suit or proceeding can also be appointed as receiver.¹⁹³

(8) Powers: Rule 1(d)

A receiver is an officer or representative of the court and he functions under its directions.¹⁹⁴ The court may confer upon the receiver any of the following powers:

- (i) to institute and defend suits;
- (ii) to realize, manage, protect, preserve and improve the property;
- (iii) to collect, apply and dispose of the rents and profits;
- (iv) to execute documents; and
- (v) such other powers as it thinks fit.¹⁹⁵

But he has no power except such as are conferred upon him by the order by which he was appointed. It is open to a court not to confer all of the above powers. They are conditioned by the terms of his appointment.¹⁹⁶ But even when full powers are conferred on him, he should take the advice of the court in all important matters if he wants to protect himself.¹⁹⁷

A receiver cannot sue or be sued without the leave of the court.¹⁹⁸ However, grant of leave is the rule and refusal an exception.¹⁹⁶ But if the suit is filed without such leave/it is liable to be dismissed. If the

¹⁹² Mahendra H. Patel v. Ram Narayan, (2000) 9 SCC 190: AIR 2000 SC 3569 (1): 2000 AIR SCW 3688; Ramchandra Jeetmal v. Jeetmal Ganpat Porwal, AIR 1962 MP 380; Parshotam Das v. Prem Narain, AIR 1956 All 665.

¹⁹³ Kasturi Bai v. Anguri Chaudhary, (2001) 3 SCC 176: AIR 2001 SC 1361; Indira Transport v. Rattan Lal, AIR 1998 Del 2; Ganpat v. Prahlad, AIR 1952 Nag 253; Jasoda v. Satyabhama, AIR 1965 Ori 28.

¹⁹⁴ Hiralal Patni v. Loonkaran Sethiya, AIR 1962 SC 21: (1962) 1 SCR 868; P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314: 1957 SCR 195; Sadharam Bansal v. Pulin Behari, (1984) 3 SCC 410: AIR 1984 SC 1471; Balkrishan Gupta v. Swadeshi Polytex Ltd., (1985) 2 SCC 167 at pp. 192-93: AIR 1985 SC 520 at p. 534.

¹⁹⁵ R. 1(1)(d). Harinagar Sugar Mills Co. Ltd. v. High Court of Bombay, AIR 1966 SC 1707: (1966) 3 SCR 948.

¹⁹⁶ S.B. Industries v. United Bank of India, supra; Krishna Kumar v. Grindlays Bank P.L.C., (1990) 3 SCC 669: AIR 1991 SC 899.

¹⁹⁷ Balbir Anand v. Ram Jawaya, AIR 1960 Raj 192 at p. 195.

¹⁹⁸ Kanhaiyalal v. Dr. D.R. Banaji, AIR 1958 SC 725:1959 SCR 333; Everest Coal Co. (P) Ltd. v. State of Bihar, (1978) 1 SCC 12.: AIR 1977 SC 2304.

decree is passed in such suit, it can be set aside.¹⁹⁶ No such sanction is, however, necessary to prosecute the receiver for a criminal offence alleged to have been committed by him by abusing his authority as receiver.¹⁹⁹ Since he is custodia legis, any obstruction or interference by anyone with his possession without the leave of the court is interference with the court's proceedings and is liable for contempt of court.²⁰⁰ Property in the hands of a receiver cannot be attached without the leave of the court.²⁰¹ A receiver is entitled to the remuneration fixed by the court for the services rendered by him.²⁰² A receiver is entitled to be indemnified for the debts incurred on contracts entered into by him in the course of management of the estate. The status of a receiver has been appropriately explained in the leading case of *Jagat Tarini Dasi v. Naba Gopal Chaki*²⁰³ in the following words: "The receiver is appointed for the benefit of all concerned; he is the representative of the court, and of all parties interested in the litigation, wherein he is appointed. He is the right arm of the court in exercising the jurisdiction invoked in such cases for administering the property; the court can only administer through a receiver. For this reason, all suits to collect or obtain possession of the property must be prosecuted by the receiver, and the proceeds received and controlled by him alone."²⁰⁴

(9) Duties: Rule 3

A receiver has to furnish such security, as the court thinks fit, duly to account for what he shall receive in respect of the property. He has to submit accounts for such period and in such forms as the court directs. He has to pay the amount due from him as per the direction of the court.²⁰⁵ Being a representative of the court, he is bound to discharge his duties personally and cannot delegate or assign any of his rights or duties entrusted to him by the court.²⁰⁶

- 199
- Khimchand Narottam Bhavsar, In re, AIR 1928 Bom 493; K. Shyamalambal v. M.S. Ramamurthi, AIR 1948 Mad 318.
- 200
- S.B. Industries v. United Bank of India, supra; Krishna Kumar v. Grindlays Bank P.L.C., (1990) 3 SCC 669; AIR 1991 SC 899.
- 201
- Kanhaiyalal v. Dr. D.R. Banaji, supra.
- 202
- R. 2.
- 203
- ILR (1907) 34 Cal 305.
- 204
- See also Kurapati Venkata v. Thondepu Ramaswami & Co., AIR 1964 SC 818; 1963 Supp (2) SCR 995; Balkrishan v. Swadeshi Polytex Ltd., supra.
- 205
- R. 3.
- 206
- Balaji v. Ramchandra, ILR (1895) 19 Bom 660.

(10) Liabilities: Rule 4

If the receiver fails to submit accounts, or fails to pay the amount due, or occasions loss to the property by his wilful default or negligence, the court may direct his property to be attached and sold and make good any amount found to be due from him.²⁰⁷ A receiver is bound to exercise the same diligence in keeping down expenses and in caring for the estate in his possession as a prudent man would observe in connection with his own property under similar circumstances.²⁰⁸ Thus, he is not responsible for sums actually received by him but also for all sums which he might have received but for his default or negligence. Where he fails to pay the amount ordered by the court, the court would be justified in directing the attachment and sale of his property. The court has also an inherent power to remove the receiver appointed by it, when he does not comply with the orders of the court or abuses his powers or authority.²⁰⁹

(11) Appeal

An order appointing or refusing to appoint a receiver is appealable.²¹⁰

(12) Revision

An order passed on an application for appointment of receiver by allowing the application or rejecting such application is a "case decided" within the meaning of Section 115 of the Code. Hence, where no appeal lies, a revision is competent and maintainable.²¹¹

²⁰⁷ R. 4.

²⁰⁸ Mohini v. Sarkar, AIR 1941 Cal 144.

²⁰⁹ Rani Mathusri Jijai Amba, Ex p., (1890) 13 Mad 390 (PC); K.T. Thomas v. Indian Bank, supra; see also supra, Krishna Kumar v. Grindlays Bank P.L.C.

²¹⁰ Or. 43 R. 1(s).

²¹¹ Kanhaiya v. Kanhaiya Lal, AIR 1924 All 376; ILR (1924) 46 All 372: 79 IC 363; Global Plastics and Chemicals India (P) Ltd. v. Gian Kaur, (1993) 2 Punj LR 477.

PART II
12
Withdrawal and
Compromise of Suits
SYNOPSIS

1. GENERAL

ORDER 23 deals with withdrawal and compromise of suits. It provides for two types of withdrawals:

- (i) Absolute withdrawal, i.e. withdrawal without the leave of the court; and
- (if) Qualified withdrawal, i.e. withdrawal with the leave of the court.

It declares the effect of withdrawals. The Order also provides for compromise of suits and effect thereof.

2. WITHDRAWAL OF SUIT: ORDER 23 RULES 1 & 2

(a) Withdrawal without leave of court: Rule 1(1), (4)
At any time after the institution of a suit, a plaintiff may withdraw the suit or any claim against all or any of the defendants

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without the leave of the court.¹ This right is absolute and unqualified and the court cannot refuse permission to withdraw a suit and compel the plaintiff to proceed with it², unless any vested right comes into existence before such prayer is made.³ However, in case of such abandonment or withdrawal of a suit or part of a claim without the leave of the court, the plaintiff will be precluded from instituting a fresh suit in respect of the same cause of action.⁴ The principle underlying Order 23 Rule 1 is that once a plaintiff invokes the jurisdiction of the court and institutes a suit, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again if he abandons such suit without the permission of the court to file fresh suit. "The law confers, upon a man no rights or benefits which he does not desire" (*Invito beneficium non datur*). The plaintiff also becomes liable for such costs as the court may award to the defendant.⁶ Rule 1-A of Order 23 as added by the Amendment Act of 1976 provides for the circumstances under which the defendant may be allowed to be transposed as a plaintiff where the suit is withdrawn by the plaintiff.⁷

(b) Withdrawal with leave of court: Rule 1(3)

(i) Grounds

Where the court is satisfied that a suit must fail by reason of some formal defect, or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may grant permission to withdraw such suit or such part of the claim with liberty to file a fresh suit in respect of the subject-matter of such suit or such part of the claim on such terms as it thinks fit.⁸

Such permission may be granted by the court on the following grounds:

(1) Formal defect.—Though the expression "formal defect" has not been defined in the Code, it connotes some defect of form or procedure not affecting the merits of the case⁹; such as want of statutory

¹ Or. 23 R. 1(1).

² *Bijayananda Patnaik v. Satrughna Sabu*, AIR 1963 SC 1566 at p. 1571; (1964) 2 SCR 538; *Hulas Rai v. Finn K.B. Bass & Co.*, AIR 1968 SC 111 at p. 113; (1967) 3 SCR 886.

³ *R. Ramamurthi v. V. Rajeswara*, (1972) 2 SCC 721; AIR 1973 SC 643.

⁴ R. 1(4); see also *Sarguja Transport Service v. STAT*, (1987) 1 SCC 5; AIR 1987 SC 88; *Upadhyay & Co. v. State of U.P.*, (1999) 1 SCC 81; AIR 1999 SC 509.

⁵ *Sarguja Transport Service v. STAT*, *supra*, at pp. 10-11 (SCC).

⁶ R. 1(4); see also *Konkan Trading Co. v. Suresh Govind*, (1986) 2 SCC 424; AIR 1986 SC 1009.

⁷ R. 1-A; see also *R. Rathinavel Chettiar v. Sivaraman*, (1999) 4 SCC 89.

⁸ R. 1(3).

⁹ *Ramrao Bhagwantrao v. Babu Appanna*, AIR 1940 Bom 121 (FB); *Khatuna v. Ramsewak Kashinath*, AIR 1986 Ori 1.

notice under Section 80 of the Code, misjoinder of parties or of causes of action, non-payment of proper court fee or stamp fee, failure to disclose cause of action, mistake in not seeking proper relief, improper or erroneous valuation of the subject-matter of the suit, absence of territorial jurisdiction of the court, defect in prayer clause, etc.¹⁰

But a defect affecting the merits of the case, or a defect which goes to the root of the plaintiff's case cannot be said to be a formal defect;¹¹ e.g. non-joinder of a necessary party, omission to substitute heirs, omission to include all the causes of action in the plaint, non-registration of a partnership firm, bar of limitation, deliberate undervaluation of the subject-matter of the suit, addition of a new factual plea, failure to bring legal representatives on record, non-examination of material witnesses, insufficiency of evidence, filing of representative suit without following procedure prescribed by Order 1 Rule 8 etc.¹²

(2) Sufficient grounds.— The expression "sufficient grounds" need not generally be construed ejusdem generis (of the same kind or nature) with formal defect.¹³ For instance, where the suit was premature, or it had become infructuous, or where the plaintiff felt that the defendant was absent and even if the decree was passed, it could not be executed, or where two suits were filed and due to mistake both were withdrawn, or there was omission to file Power of Attorney, it was held to be a sufficient ground. Wide and liberal meaning should be given to the expression "sufficient grounds" by exercising power in the interest of justice (ex debito justitiae).¹⁴

¹⁰ Certificate Officer v. Kasturi Chand, AIR 1970 Ori 239; Brajamohan Sabato v. Sarojini Panigeahi, AIR 1975 Ori 39; Atul Krushma v. Rajukishore, AIR 1956 Ori 77; Tata Iron & Steel Co. v. Arun Chandra, AIR 1967 AP 246; S.H. Kelkar v. Mandakini Bai, AIR 1970 Mys 163; Beniram v. Gaiind, (1981) 4 SCC 209; AIR 1982 SC 789.

¹¹ Robert Watson & Co. v. Collector of Zillah Rajashahye, 13 MIA 160 (PC); Dwarka Agarwalla v. Sashi Babha, (1966) 32 Cut LT 864; Harikrishna v. State of Orissa, (1976) 42 Cut LT 339; Raja Srinath Roy v. Dinabandhu Sen, AIR 1914 PC 48.

¹² Ramrao Bhagwantrao v. Babu Appanna, supra; Khatuna v. Ramsewak Kashinath, supra; Haridas v. Giridhari, AIR 1934 Cal 59; Muktanath Tewari v. Vidyashanker Dube, AIR 1943 All 67; Asian Assurance Co. Ltd. v. Madholal Sindhu, AIR 1950 Bom 378; Tarachand v. Gaibihaji Ahmed, AIR 1956 Bom 632; Trinath Parida v. Sobha Bholaini, AIR 1973 Ori 37; Savitri Devi v. Hira Lal, AIR 1977 HP 91; T.K. Prabhawati (Dr.) v. C.P. Umma Kunhathabi, AIR 1981 Ker 170; Khatuna v. Ramsewak, AIR 1986 Ori 1; Kannuswami Pillai v. Jagathambal, ILR (1918) 41 Mad 701; Prabhat Chandra Saikia v. Rajani Bala, AIR 1972 Gau 85; (1997) 99 Bom LR 450; Santosh Kumar v. Khedkar Mota and Co., 2001 AIHC 2840.

¹³ Tarachand case, supra; Sukhain v. Liquidator, Coop. Society, AIR 1944 Nag 183; Eleavarthi Nadipatha v. Eleavarthi Pedda Venkataraju, AIR 1966 Mad 346; Radha Krishna v. State of Rajasthan, AIR 1977 Raj 131; Atul v. Raj Kishore, supra; Brij Mohan v. Sarojini, supra.

¹⁴ Beniram v. Gaiind, (1981) 4 SCC 209; AIR 1982 SC 789; Konkan Trading Co. v. Suresh Govind, (1986) 2 SCC 424; AIR 1986 SC 1009; K.S. Bhoopathy v. Kokila, (2000) 5 SCC 458; AIR 2000 SC 2132.

But, the power cannot be exercised where the plaintiff was not ready to conduct the suit; or where no notice was served to the defendant due to death, etc.

(ii) Effect of leave

It is in the discretion of the court to grant such permission and it can be granted by the court either on an application of the plaintiff or even suo motu. Such permission may be granted on such terms as to costs, etc. as the court thinks fit. The granting of permission to withdraw a suit with liberty to file a fresh suit removes the bar of *res judicata*. It restores the plaintiff to the position which he would have occupied had he brought no suit at all.

(c) Suit by minor: Rule 1(2)

By the Amendment Act of 1976, a specific provision has been made that where the plaintiff is a minor, neither the suit nor any part of the claim can be abandoned without the leave of the court.¹⁵ Sub-rule (2) of Rule 1 enacts that an application for leave under the proviso to sub-rule (1) of Rule 1 must be accompanied by an affidavit of the next friend and also, if the minor of such person is represented by a pleader, by a certificate of the pleader to the effect that the proposed abandonment is, in his opinion, for the minor's benefit.

(d) Withdrawal by one of the plaintiffs: Rule 1(5)

Where there are two or more plaintiffs in a suit, the suit or part of the claim cannot be abandoned or withdrawn without the consent of all the plaintiffs.¹⁶ One of such plaintiffs, however, may abandon or withdraw from the suit to the extent of his own interest in it.

(e) Limitation: Rule 2

A plaintiff withdrawing a suit with liberty to file a fresh suit is bound by the law of limitation in the same manner as if the first suit has not been filed at all.¹⁷

(f) Applicability to other proceedings

(i) Appeals

Appeal is a continuation of suit.¹⁸ The provisions of this Order therefore, apply to withdrawal of appeals.¹⁹ The appellant has a right to withdraw his appeal unconditionally and if he makes such an application,

¹⁵ Proviso to R. 1(1). See also *infra*, Chap. 16.

¹⁶ R. 1(5).

¹⁷ R. 2. See also, S. 14(3), Limitation Act, 1963.

¹⁸ For detailed discussion, see *infra*, Pt. III, Chap. 2.

¹⁹ *Bijayananda Patnaik v. Satrughna Sabu*, AIR 1963 SC 1566 at p. 1964; (1964) 2 SCR 538; *Ammini Kutty v. George Abraham*, AIR 1987 Ker 246.

the court must grant it, subject to costs, and has no power to say that it will not permit the withdrawal and will go on with the hearing of the appeal.²⁰ Similarly, in appropriate cases, an appellate court can grant permission to withdraw a suit with liberty to file a fresh suit.²¹ Such power, however, has to be exercised sparingly and cautiously.²²

(ii) Revisions

The revisional jurisdiction of a High Court is a part of appellate jurisdiction of the High Court. Basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense.²³

So far as the provisions of Order 23 of the Code are concerned, it has been held in some cases that they apply to withdrawal proceedings²⁴ but a contrary view has also been taken.²⁵

(iii) Representative suits

Where the plaintiff sues in a representative character, he cannot abandon or withdraw the suit or a part of the claim. He may, however, get out of the suit, but that does not put an end to the litigation where other persons are interested in it and have a right to come in and continue the litigation.²⁶

(iv) Writ petitions

The general principles for withdrawal of suits also apply to petitions under Article 226 or Article 32 of the Constitution. Ordinarily, therefore, a High Court or the Supreme Court would not refuse the prayer of the petitioner or his advocate to allow him to withdraw the petition, if such withdrawal is unconditional.²⁷ But he cannot thereafter institute a fresh petition on the same cause of action.²⁸

²⁰ *Bijayananda Patnaik v. Satrugna Sabu*, AIR 1963 SC 1566 at p. 1571: (1964) 2 SCR 538.

²¹ *Suraj Pal Singh v. Gharam Singh*, AIR 1973 All 466. See also *infra*, S. 107(2), Pt. III, Chaps. 2, 3.

²² *Eleavarthi Nadipatha v. Eleavarthi Pedda Venkataraju*, AIR 1966 Mad 346.

²³ *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74: AIR 1970 SC 1. For detailed discussion, see *infra*, Pt. III, Chaps. 2, 9.

²⁴ *Moosa Suleman v. Hanuman Idol.*, 1979 Bom CR 214.

²⁵ *Manhor Lal v. Meena Agencies*, (1986) 2 Guj LR 1079: 1986 Bom Rent Cas 106; *Mahabir Prasad v. Ramchandra Prasad*, AIR 1979 NOC 57 (Pat): 1978 BLJ 390.

²⁶ *Asian Assurance Co. Ltd. v. Madholal Sindhu*, AIR 1950 Bom 378; *Sheela Barse v. Union of India*, (1988) 4 SCC 226: AIR 1988 SC 2211. For detailed discussion of "Representative suit", see *supra*, Chap. 5.

²⁷ *Daryao v. State of U.P.*, AIR 1961 SC 1457: (1962) 1 SCR 574; *Gulabchand Chhotalal Parikh v. State of Gujarat*, AIR 1965 SC 1153: (1965) 1 SCR 547. For detailed discussion, see *supra*, "Withdrawal of petitions".

²⁸ *Sarguja Transport Service v. STAT*, (1987) 1 SCC 5: AIR 1987 SC 88; *Sahdeo Jha v. Union of India*, (1992) 2 SCC 190: (1992) 20 ATC 207; *Upadhyay & Co. v. State of U.P.*, (1999) 1 SCC 81: AIR 1999 SC 509.

But if such writ petition is withdrawn on some technical defect or logistic problem or availability of alternative remedy or such formal objection, fresh petition will not be barred.²⁹

(v) Execution proceedings

The provisions of Order 23 do not apply to execution proceedings.³⁰ The court has no power to allow an application for execution to be withdrawn with liberty to file a fresh application. Withdrawal of an application without the permission of the court to bring a fresh application, hence is no bar to a fresh application for execution within the period of limitation.³¹

(g) Appeal

An order granting or refusing permission to withdraw the suit with permission to file fresh suit on the same cause of action is neither a "decree" nor an appealable order. Hence, no appeal lies against such order.

(h) Revision

An order granting or refusing permission to withdraw the suit with permission to file fresh suit on the same cause of action can be said to be a "case decided" under Section 115 of the Code. Such order is, therefore, revisable.

3. COMPROMISE OF SUIT: RULES 3 - 3-B

(a) General

After the institution of the suit, it is open to the parties to compromise, adjust or settle it by an agreement or compromise.³² The general principle is that all matters which can be decided in a suit can also be settled by means of a compromise.³³

Rule 3 of Order 23 lays down that (i) where the court is satisfied that a suit has been adjusted wholly or in part by any lawful agreement in writing and signed by the parties; or (ii) where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of

²⁹ Haryana State Coop. Land Development Bank v. Neelam, (2005) 5 SCC 91: AIR 2005 SC 1843. For detailed discussion and case law, see, V.G. Ramachandran, Law of Writs (2006) Vol. I, Pt. II, Chap. 6.

³⁰ R.4.

³¹ Palaniandi Pillai v. Papathi Ammal, AIR 1914 Mad 1:15 Mad LT 100; Hardit Singh v. Surinder Nath, AIR 1982 Del 588; Jai Prakash v. Khimraj, AIR 1991 Raj 136; (1999) 2 Mad LJ 781.

³² Moti Lal Banker v. Maharaj Kumar Mahmood Hasan Khan, AIR 1968 SC 1087: (1968) 3 SCR 158.

³³ K.K. Chari v. R.M. Seshadri, (1973) 1 SCC 761 at p. 777: AIR 1973 SC 1311 at p. 1323; Hiralal Moolchand v. Barot Raman Lal, (1993) 2 SCC 458: AIR 1993 SC 1449; Prithvichand v. S.Y. Shinde, (1993) 3 SCC 271: AIR 1993 SC 1929.

the suit, the court shall record such agreement, compromise or satisfaction and pass a compromise decree accordingly.³⁴

(b) Satisfaction of court

It is the duty of the court to satisfy itself with regard to the terms of agreement. The court must be satisfied that the agreement is lawful and it can pass a decree in accordance with it. The court should also consider whether such a decree can be enforced against all the parties to the compromise.

A court passing a compromise decree performs a judicial act and not a ministerial act. Therefore, the court must satisfy itself by taking evidence or on affidavits or otherwise that the agreement is lawful. If the compromise is not lawful, an order recording compromise can be recalled by the court.³⁵ In case of any dispute between the parties to the compromise, it is the duty of the court to inquire into and decide whether there has been a lawful compromise in terms of which the decree should be passed. An agreement or compromise which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of Rule 3.36

The court in recording compromise should not act in a casual manner. Where it is alleged by one party that a compromise has not been entered into or is not lawful, it is the duty of the court to decide that question.³⁷

(c) Compromise on behalf of minor

No next friend or guardian of a minor shall, without the leave of the court, enter into any agreement or compromise on behalf of the minor with reference to the suit, unless such leave is expressly recorded in the proceedings.³⁸

(d) Compromise by pleader

A pleader stands in the same position as his client with regard to his authority to compromise the suit. An advocate appearing for a party, therefore, has always an implied authority to enter into a compromise on behalf of his client.³⁹

³⁴ Gurpreet Singh v. Chatur Bhuj, (1988) 1 SCC 270: AIR 1998 SC 400; Byram Pestonji v. Union Bank of India, (1992) 1 SCC 31: AIR 1991 SC 2234; Rachakonda Venkat v. R. Satya Bal, (1996) 1 SCC 671.

³⁵ Banwari Lal v. Chando Devi, (1993) 1 SCC 581: AIR 1993 SC 1139.

³⁶ Explanation to R. 3; Banwari Lal v. Chando Devi, supra; Ruby Sales & Services (P) Ltd. v. State of Maharashtra, (1994) 1 SCC 531.

³⁷ Banwari Lal v. Chando Devi, supra.

³⁸ Or. 32 Rr. 6 and 7. See also infra, Chap. 16.

³⁹ For detailed discussion, see supra, Chap. 7.

(e) Representative suit: Rule 3-B

No agreement or compromise in a representative suit can be entered into without the leave of the court. Before granting such leave, notice to the persons interested should be given by the court.⁴⁰

(f) Compromise decree and res judicata

A compromise decree is not a decision of the court. It is acceptance by the court of something to which the parties had agreed. A compromise decree merely sets the seal of the court on the agreement of the parties. The court does not decide anything. Nor can it be said that a decision of the court is implicit in it. Hence, a compromise decree cannot operate as res judicata.⁴¹ In some cases, however, it is held that a consent decree would also operate as res judicata.⁴²

It is submitted that the former view is correct since, in a consent decree, it cannot be said that a suit is heard and finally decided by the court on merits. Such a decree, however, may create an estoppel between the parties⁴³

(g) Compromise decree and estoppel

A compromise decree is not a decision on merits as it cannot be said that the case was "heard and finally decided". Nevertheless, it is based on consent or compromise of parties and, therefore, will operate as an estoppel.⁴⁴

(h) Execution of compromise decree

A consent decree is executable in the same manner as an ordinary decree.⁴⁵ But if the decree gives effect to an unlawful compromise or is passed by the court having no jurisdiction to pass it, it is a nullity and its validity can be set up even in the execution.⁴⁶ The underlying

⁴⁰ R. 3-B; see also *Atma Ram v. Beni Prasad*, AIR 1935 PC 185.

⁴¹ *Pulavarthi Venkata v. Valluri Jagannadha*, AIR 1967 SC 591 at pp. 594-95: (1964) 2 SCR 310.

⁴² *Shankar v. Balkrishna*, AIR 1954 SC 352: (1955) 1 SCR 99; *Kumar Sudhendu Narain v. Renuka Biswas*, (1992) 1 SCC 206 at pp. 214-15: AIR 1992 SC 385 at p. 391; *Byram Pestonji v. Union Bank of India*, (1992) 1 SCC 31 at p. 48.

⁴³ *Pulavarthi Venkata v. Valluri Jagannadha*, AIR 1967 SC 591 at pp. 594-95: (1964) 2 SCR 310; *Sailendra Narayan Bhanja Deo v. State of Orissa*, AIR 1956 SC 346:1956 SCR 72; *Mohanlal Goenka v. Benoy Krishna*, AIR 1953 SC 65:1953 SCR 377; *Byram Pestonji v. Union Bank of India* (ibid.).

⁴⁴ *Shankar v. Balkrishna*, AIR 1954 SC 352: (1955) 1 SCR 99; *Sunderabai v. Devaji Shankar Deshpande*, AIR 1954 SC 82; *Sailendra Narayan Bhanja Deo v. State of Orissa*, AIR 1956 SC 346:1956 SCR 72; *Prithvichand v. S.Y. Shinde*, (1993) 3 SCC 271: AIR 1993 SC 1929.

⁴⁵ *Moti Lal Banker v. Maliaraj Kumar Mahmood Hasan Khan*, AIR 1968 SC 1087: (1968)

³ SCR 158; *Byram Pestonji v. Union Bank of India*, (1992) 1 SCC 31: AIR 1991 SC 2234.

⁴⁶ *Ferozi Lal Jain v. Man Mal*, (1970) 3 SCC 181: AIR 1970 SC 794; *Roshan Lal v. Madan Lal*, (1975) 2 SCC 785: AIR 1975 SC 2130; *Nai Bahu v. Lala Ramnarayan*, (1978) 1 SCC 58 at pp. 61-62: AIR 1978 SC 22 at p. 25.

principle is that a defect of jurisdiction strikes at the very authority of the court to pass a decree and such a defect cannot be cured even by the consent of parties.⁴⁷ Prior to the Amendment Act of 1976, a compromise decree could be passed only so far as it related to the suit. The Amendment Act, 1976 now specifically provided that whether or not the subject-matter of the agreement, compromise or satisfaction is identical with the subject-matter of the suit, if it is between the parties and the compromise is a lawful one, the court can pass such a decree.⁴⁸

(i) Bar to suit: Rule 3-A

No suit can be filed to set aside a compromise decree on the ground that it is not lawful⁴⁹

(j) Appeal

No appeal lies against a decree passed by the court with consent of parties,⁵⁰ nor a suit can be instituted to set aside a compromise decree on the ground that such compromise is not lawful,⁵¹ though such order was appealable before the Amendment Act, 1976.⁵²

Rule 1-A(2) of Order 43, however, lays down that in an appeal against a decree passed after recording or refusing to record a compromise, the order recording or refusing to record a compromise can also be questioned. A party challenging the compromise can file an appeal under Section 96(1) of the Code and Section 96(3) shall not bar such an appeal.⁵³ Likewise, such a decree can be challenged by filing a suit on the ground of fraud, undue influence or coercion.⁵⁴

A compromise decree is a creature of an agreement and does not stand on a higher footing than the agreement which preceded it. It is, therefore, liable to be set aside on any of the grounds which may invalidate an agreement.⁵⁵

⁴⁷ For detailed discussion, see *supra*, Chap. 1.

⁴⁸ R. 3. See also *S.G. Thimmappa v. T. Anantha*, AIR 1986 Kant 1; *Union Carbide Corpn. v. Union of India*, (1991) 4 SCC 584; AIR 1992 SC 248.

⁴⁹ R. 3-A. See also *S.G. Thimmappa v. T. Anantha*, *supra*; *Banwari Lal v. Chando Devi*, *supra*; *Ruby Sales & Services (P) Ltd. v. State of Maharashtra*, *supra*.

⁵⁰ S. 96(3). See also *infra*, Pt. III, Chap. 2.

⁵¹ R. 3-A.

⁵² Or. 43 R. 1 (m) (since deleted).

⁵³ *Banwari Lal v. Chando Devi*, (1993) 1 SCC 581; AIR 1993 SC 1139.

⁵⁴ *Thimmappa v. Anantha*, AIR 1986 Kant 1; *Gosto Behari Pramanik v. Malati Sen*, AIR 1985 Cal 379; *Banwari Lal v. Chando Devi*, *supra*; *Ruby Sales & Services (P) Ltd. v. State of Maharashtra*, *supra*; see also *infra*, Pt. III, Chap. 2.

⁵⁵ *Ruby Sales & Services (P) Ltd. v. State of Maharashtra*, (1994) 1 SCC 531 at p. 535.

(k) Revision

An order recording or refusing to record compromise is a "case decided" within the meaning of Section 115 of the Code. A High Court can revise such order provided the conditions laid down in the said section are satisfied.⁵⁶

⁵⁶ For detailed discussion of "revisional jurisdiction of High Courts", see *infra*, Pt. III, Chap. 9.

PART II
Death, Marriage and Insolvency of Parties

SYNOPSIS

1. GENERAL

ORDER 22 deals with the creation, assignment or devolution of interest during the pendency of suits. It also applies to appeals¹, but not to execution proceedings.²

The provisions of Order 22 are exhaustive.³ They should, however, be liberally construed to serve the ends of justice.⁴

Such creation, assignment or devolution may arise in the following circumstances:

- (i) Death of a party (Rules 1 to 6);
- (ii) Marriage of a party (Rule 7);
- (iii) Insolvency of a party (Rule 8); or
- (iv) Assignment of interest (Rules 9 to 10).

- 1 Or. 22 R. 11.
- 2 R. 12.
- 3 Bhagwan Swaroop v. M
- Co. (P) Ltd., AIR 1984 Del 138;
- 4 Sardar Amarjit Singh v.

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irja, AIR 1961 Raj 72; Grindlays Bank Ltd. v. C.R.E., Wood & Andh LT 779.

2. DEATH OF PARTY: RULES 1-6

(a) Death of plaintiff

Where the sole plaintiff dies, the suit will not abate, if the right to sue survives. It can be continued by the heirs and legal representatives of the deceased plaintiff. If the right to sue does not survive, the suit will come to an end.⁵

Where one of the several plaintiffs dies and the right to sue survives to the surviving plaintiff or plaintiffs, the court will make an entry to that effect and proceed with the suit by the surviving plaintiff or plaintiffs.⁶

Where one of the several plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs or where the sole plaintiff dies and the right to sue survives, the court on an application by the legal representative of the deceased plaintiff will make him a party and proceed with the suit.⁷

Where no such application is made within the period of limitation (ninety days), the suit shall abate so far as the deceased plaintiff is concerned. On an application by the defendant, the court may award costs, which might have been incurred by him in defending the suit, from the estate of the deceased plaintiff.⁸

Where the plaintiff dies after hearing and before pronouncement of judgment, the suit shall not abate.⁹

The same principle will apply in case of death of the plaintiff after passing of preliminary decree and before final decree.¹⁰

(b) Death of defendant

Where the sole defendant dies, the suit shall not abate if the right to sue survives. It can be continued against the heirs and legal representatives of the deceased defendant.¹¹

Where one of the several defendants dies and the right to sue survives against the surviving defendant or defendants, or where the sole surviving defendant dies and the right to sue survives, the court, on an application by the legal representatives of the deceased defendant, will make him a party and proceed with the suit.¹²

⁵ R. 1. For detailed discussion, see infra, "Right to sue".

⁶ R. 2.

⁷ R. 3(1).

⁸ R. 3(2).

⁹ R. 6. See also *N.P. Thirugnanam v. Dr. R. Jagan Mohan*, (1995) 5 SCC 115; AIR 1996 SC 116.

¹⁰ *Jitendra Ballav v. Dhirendranath*, AIR 2004 Ori 148.

¹¹ R. 1. For detailed discussion, see infra, "Right to sue".

¹² R.2.

Where no such application is made within the period of limitation (ninety days), the suit shall abate as against the deceased defendant.¹³

The court may, if it thinks fit, exempt the plaintiff from substituting the legal representative of a non-contesting or pro forma defendant and pronounce judgment notwithstanding the death of such defendant.¹⁴

Where the plaintiff is ignorant of the death of the defendant and for that reason is unable to make an application for substitution of the legal representative of the deceased defendant within the period of limitation, and the suit stands abated, he may make an application for setting aside such abatement within the period of limitation (ninety days), stating that due to ignorance of the death of the defendant he could not make an application within time. The court shall consider the application, having due regard to the fact of such circumstance.¹⁵

Where the defendant dies after hearing and before the pronouncement of judgment, the suit shall not abate.¹⁶ The suit also does not abate on account of the death of an unnecessary party.¹⁷

(c) Right to sue

When a party to a suit dies, the first question to be decided is whether the right to sue survives or not. If it does not, there is an end to the suit. If it does, the suit will not abate. It can be continued by or against the heirs and legal representatives of the deceased party.¹⁸

The expression "right to sue" has not been defined in the Code, but it may be interpreted to mean "right to seek relief".¹⁹ In other words, "right to sue" survives if the cause of action survives or continues.

The general rule is that all rights of action and all demands whatsoever, existing in favour of or against a person at the time of his death, survive to or against his representatives.²⁰ But in cases of personal actions, i.e. actions where the relief sought is personal to the deceased or the rights intimately connected with the individuality of the deceased,

¹³ R. 4(1).

¹⁴ R. 4(4).

¹⁵ R. 4(5).

¹⁶ R.6.

¹⁷ Radha Rani v. Hanuman Prasad, AIR 1966 SC 216: (1966) 1 SCR 1; Sri Chand v. Jagdish Pershad, AIR 1966 SC 1427: (1966) 3 SCR 451; Mangal Singh v. Rattno, AIR 1967 SC 1786: (1967) 3 SCR 454; Kanhaiyalal v. Rameshwar, (1983) 2 SCC 260: AIR 1983 SC 503; Union of India v. Avtar Singh, (1984) 3 SCC 589: AIR 1984 SC 1048.

¹⁸ R. 1. See also Jayaram Reddy v. Revenue Divisional Officer, (1979) 3 SCC 578 at p. 583: AIR 1979 SC 1393 at p. 1396; Shri Krishna Singh v. Mathura Ahir, (1981) 3 SCC 689 at p. 720: AIR 1980 SC 707.

¹⁹ Ibrahimhai v. State of Gujarat, AIR 1968 Guj 202 at p. 207: (1967) 8 Guj LR 793 at p. 801; Phool Rani v. Naubat Rai, (1973) 1 SCC 688 at p. 692: AIR 1973 SC 2110 at p. 2111.

²⁰ Shri Krishna Singh v. Mathura Ahir, (1981) 3 SCC 689 at p. 720: AIR 1980 SC 707 at p. 726; Ambalika Padhi v. Radhakrishna Padhi, (1992) 1 SCC 667: AIR 1992 SC 431; M. Veerappa v. Evelyn Sequeira, (1988) 1 SCC 556: AIR 1988 SC 506.

the right to sue will not survive to or against his representatives. In these cases, the maxim actio personalis moritur cum persona (a personal action dies with the person) applies.²¹

This principle is found in Section 37 of the Indian Contract Act, 1872²² and Section 306 of the Indian Succession Act, 1925.²³

Thus, it has been held that the right to sue survives in a suit by a landlord against his tenant for the possession of the rented house after the death of the landlord; or in a suit for rendition of accounts against a trustee where the trustee died; or in a suit for specific performance of the contract after the death of the plaintiff; or in a suit for partition of ancestral property by a coparcener after his death; or in a suit for preemption. On the other hand, it has been held that the right to sue does not survive in the following cases: in a suit for damages for assault, personal injuries or for malicious prosecution; or for defamation; or for breach of contract of betrothal; or for dissolution of marriage; or

²¹ Girijanandini Devi v. Bijendra Narain, AIR 1967 SC 1124: (1967) 1 SCR 93; Hazari v. Neki, AIR 1968 SC 1205: (1968) 2 SCR 833; Phool Rani case, supra; Melepurath Sankunni v. Thekittil Geopalankutty, (1986) 1 SCC 118: AIR 1986 SC 411; M. Veerappa v. Evelyn Sequeira, (1988) 1 SCC 556: AIR 1988 SC 506; Puran Singh v. State of Punjab, (1996) 2 SCC 205: AIR 1996 SC 1092; Koodalmanickam v. Thachudaya Kaimal, (1996) 2 SCC 680.

²² S. 37, Contract Act, 1872 reads as under:

"Obligation of parties to contracts.-The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

(a) A promises to deliver goods to B on certain day on payment of Rs 1000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay Rs 1000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before that day. The contract cannot be enforced either by A's representatives or by B."

²³ S. 306, the Succession Act, 1925 reads:

"Demands and rights of action of or against deceased survive to and against executor or administrator. All demands whatsoever and all rights to prosecute or defend any action or special proceedings existing in favour of or against a person at the time of his decease, survive to and against his executors and administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

Illustrations

(a) A collision takes place on a railway station in consequence of some neglect or default of an official, and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

(b) A sues B for divorce. A dies. The cause of action does not survive to his representative." See also Melepurath v. Thekittil, (1986) 1 SCC 118: AIR 1986 SC 411.

in a suit for specific performance of a contract involving exercise of special skill like a promise to paint a picture, or to sing a song.

(d) Nature of inquiry

A personal action dies with the death of the person (*actio personalis moritur cum persona*). This doctrine, however, operates in a limited class of actions *ex delicto*, discussed above. In other actions, where the right to sue survives in spite of the death of the person, the suit does not abate. Hence, whenever a party to a suit dies, the first question to be decided is as to whether the right to sue survives or not. If the right is held to be a personal right which extinguishes with the death of the person concerned and does not devolve on the legal representatives, there is an end to the suit. But if the right to sue survives against the legal representatives of the plaintiff, the suit can continue.²⁴

In *M. Veerappa v. Evelyn Sequeira*²⁵, the Supreme Court rightly stated:

"If the entire suit claim is founded on torts the suit would undoubtedly abate. If the action is founded partly on torts and partly on contract then such part of the claim as relates to torts would stand abated and the other part would survive. If the suit claim is founded entirely on contract then the suit has to proceed to trial in its entirety and be adjudicated upon."²⁶

In *Melepurath Sankunni v. Thekittil Geopalankutty*²⁷, the Supreme Court held that where a suit for defamation is dismissed and the plaintiff files an appeal, the plaintiff-appellant seeks to enforce his right to sue for damages against the defendant. The right to sue, therefore, does not survive on the death of the plaintiff. But where such suit is decreed, even on the death of the plaintiff, the legal representatives are entitled to continue the appeal since the question relates to benefit or detriment to the estate of the deceased. In such case, the cause of action merges with the decree.

(e) Applicability to other proceedings: Rules 11-12

The maxim *actio personalis moritur cum persona* (a personal action dies with the person) does not apply only to suits in those cases where the plaintiff dies during the pendency of a suit but also to cases where the plaintiff dies during the pendency of appeal or appeals. This is on the footing that by reason of the dismissal of the suit by the trial court or the first

²⁴ *Puran Singh v. State of Punjab*, (1996) 2 SCC 205 at p. 210: AIR 1996 SC 1092.

²⁵ (1988) 1 SCC 556: AIR 1988 SC 506.

²⁶ *Ibid*, at p. 568 (SCC): at p. 512 (AIR).

²⁷ (1986) 1 SCC 118: AIR 1986 SC 411; see also *Yallawwa v. Shantavva*, (1997) 11 SCC 159: AIR 1997 SC 35.

appellate court, as the case may be, the plaintiff stands relegated to his original position before the trial court.²⁸ (emphasis supplied)

This principle is, however, subject to the rule laid down in *Melepurath Sankunni v. Thekittil Geopalankutty*²⁹.

The provisions of Order 22 of the Code in terms do not apply to execution proceedings,³⁰ to writ petitions under Article 226 or 32 of the Constitution,³¹ or to revisions.³²

A representative suit or appeal does not abate on the death of one of the plaintiffs or appellants. The remaining plaintiff/plaintiffs or appellant/appellants may continue the proceedings.³³

(f) Partial abatement

An abatement of suit may be total or partial. If the entire suit is founded on tort or on personal action, the suit would debate as a whole on the death of the plaintiff or the defendant, as the case may be. But if the action is founded partly on tort and partly on contract, the claim relating to tort will abate whereas the claim relating to contract will survive.³⁴

Thus, if A files a suit against B, a trustee under Section 92 of the Code for his removal as also for settlement of scheme and B dies during the pendency of suit; the suit will abate as regards his removal, but it can be continued as regards settlement of scheme.³⁵

(g) Determination of question as to legal representative

Rule 5 deals with the determination of the question as to legal representatives. It provides that where the question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, it is the duty of the court to decide such question. Wherever there is a dispute as to who is the legal representative of the deceased plaintiff or the deceased defendant, the court may hold an inquiry and determine the question. A lengthy or elaborate inquiry is, however, not necessary. Where such question arises before the appellate court, that court may direct the subordinate court to inquire into

²⁸ *M. Veerappa v. Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506.

²⁹ (1986) 1 SCC 118: AIR 1986 SC 411.

³⁰ Or. 22 R. 12; see also *Ghantesher v. Madan Mohan*, (1996) 11 SCC 446: AIR 1997 SC 471.

³¹ *Puran Singh v. State of Punjab*, (1996) 2 SCC 205: AIR 1996 SC 1092.

³² *Swastik Oil Mills Ltd. v. CST*, AIR 1968 SC 843: (1968) 2 SCR 492; *Mohd. Sadaat Ali v. Corpn. of City of Lahore*, AIR 1949 Lah 186 (FB); *Narpatsingh v. Gokuldas*, AIR 1966 AP 384.

³³ *Charan Singh v. Darshan Singh*, (1975) 1 SCC 298: AIR 1975 SC 371; *Gujarat SRTC v. Valji Mulji Soneji*, (1979) 3 SCC 202: AIR 1980 SC 64.

³⁴ *M. Veerappa v. Evelyn Sequeira*, (1988) 1 SCC 556: AIR 1988 SC 506.

³⁵ *Anand Rao v. Ramdas*, (1920-21) 48 IA 12: AIR 1921 PC 123.

and give its findings on the dispute as to who is the legal representative of a deceased party.³⁶

(h) Duty of pleader to communicate death of party: Rule 10-A Rule 10-A as inserted by the Amendment Act of 1976 imposes an obligation on the pleader of the parties to communicate to the court the fact of the death of the party represented by him.³⁷

As a general rule, on the death of the client, his contract with the pleader comes to an end and so the authority of the pleader to act on behalf of his client expires. Such a situation, however, creates many complications. A provision is, therefore, made which imposes a duty on the part of the pleader to inform the court of the death of his client. It also enacts that for the said purpose the contract between the pleader and the party shall be deemed to subsist.³⁸

The legislative intention of casting burden on the advocate of a party to give intimation of death of the party represented by him and for this limited purpose to introduce a deeming fiction of the contract being kept subsisting between the advocate and the deceased party through his legal representative/representatives was that the other party may not be taken unaware at the time of hearing of appeal.³⁹ As observed in *Gangadhar v. Raj Kumar*⁴⁰, this rule has been introduced "in order to avoid procedural justice scoring a march over substantial justice".

(i) Procedure where there is no legal representative

Rule 4-A has been added by the Amendment Act of 1976. It lays down the procedure where there is no legal representative of a party who has died during the pendency of the suit or a legal representative is not found. The underlying object of this provision is that the other side should not suffer because of the absence of the legal representative of the deceased party.

(j) Effect of abatement: Rule 9

Where the suit abates or is dismissed due to failure of the plaintiff to bring the legal representative or representatives of the deceased party, no fresh suit will lie on the same cause of action. The only remedy available to the plaintiff or the person claiming to be the legal representative is to get the abatement set aside.⁴¹

³⁶ Proviso to R. 5.

³⁷ *O.P. Kathpalia v. Lakhmir Singh*, (1984) 4 SCC 66 at p. 82: AIR 1984 SC 1744 at p. 1755; *Gangadhar v. Raj Kumar*, (1984) 1 SCC 121 at p. 125: AIR 1983 SC 1202 at p. 1205.

³⁸ Statement of Objects and Reasons.

³⁹ *Gangadhar v. Raj Kumar*, *infra*. See also *Bhagwan Swaroop v. Mool Chand*, (1983) 2 SCC 132: AIR 1983 SC 355.

⁴⁰ (1984) 1 SCC 121 at p. 125: AIR 1983 SC 1202 at p. 1205.

⁴¹ R. 9.

Such abatement or dismissal of the suit, however, does not operate as res judicata.⁴²

(k) Suit against dead person

No suit can be filed against a dead person. Such a suit is non est and has no legal effect. Likewise, a decree passed against a dead man is a nullity.⁴³

But where a suit is filed against a dead person by the plaintiff without knowledge of such death, on the application by the plaintiff, the court may permit the legal representatives of the defendant to be brought on record. On such impleadment, the suit shall be deemed to have been instituted on the day the plaint was presented.

The court’s satisfaction breathes life into the suit⁴⁴ (emphasis supplied)

(1) Consequences

On the death of a party to the suit, the following consequences ensue;

1. (a) Where one of the several plaintiffs dies and the right to sue survives in favour of the surviving plaintiff or plaintiffs alone; or
- (b) where one of the several defendants dies and the right to sue survives against the surviving defendant or defendants alone,
- the Court shall record such fact and proceed with the suit.⁴⁵

2. (a) Where one of the several plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone; or
- on an application being made, the court shall make the legal representatives of the deceased plaintiff a party and proceed with the suit.⁴⁶

(b) where a sole surviving plaintiff dies and the right to sue survives,

If no such application is made within the prescribed period, the suit shall abate so far as the deceased plaintiff is concerned.⁴⁷

⁴² Ibid, see also supra, "Res judicata", Chap. 2.

⁴³ Hira Lal v. Kali Nath, AIR 1962 SC 199 at p. 201: (1961) 2 SCR 747; see also Amba Bai v. Gopal, (2001) 5 SCC 570: AIR 2001 SC 2003.

⁴⁴ Karuppaswamy v. C. Ramamurthy, (1993) 4 SCC 41 at p. 45: AIR 1993 SC 2324 at p. 2326.

⁴⁵ R.2.

⁴⁶ R. 3(1).

⁴⁷ R. 3(2).

In such case, on an application by the defendant, the court may award to him the costs which he may have incurred in defending the suit from the estate of the deceased plaintiff.⁴⁸

3.(a) Where one of the several defendants dies and the right to sue does not survive against surviving defendant or defendants alone; or
— on an application being made, the court shall make the legal representatives of the deceased defendant a party and proceed with the suit.⁴⁹

(b) where a sole surviving defendant dies and the right to sue survives,
If no such application is made within the prescribed period, the suit shall abate against the deceased defendant.⁵⁰

The court may, however, at its discretion exempt a plaintiff from substituting the legal representatives of a non-contesting or pro forma defendant and pronounce the judgment notwithstanding the death of such defendant.⁵¹

Where the plaintiff was ignorant of the death of a defendant and could not, for that reason, make an application for the substitution of legal representative of such defendant within the prescribed period, and the suit is abated, he (plaintiff) may make an application for such abatement within the prescribed period, and in considering the said application, the court shall have due regard to the fact of such ignorance of the plaintiff.⁵²

4. Where either party dies between the conclusion of the hearing and the pronouncement of the judgment,
— suit shall not abate whether the cause of action survives or not.⁵³

48 R. 3(2).

49 R. 4(1).

50 R. 4(3).

51 R. 4(4).

52 R. 4(5).

53 R. 6

(m) General principles

With regard to the death of a party to a proceeding, from the various judgments of the Supreme Court, the following general principles emerge:

- (1) If an application is not made within the time allowed by law to bring the legal representatives of the deceased on record, the suit will abate so far as the deceased plaintiff or the deceased defendant is concerned.⁵⁴ Such abatement is automatic and no specific order is envisaged by the Code.⁵⁵
- (2) When once a suit or appeal is abated, a specific order setting aside such abatement is necessary.⁵⁶
- (3) Where in a proceeding, a party dies and one of the legal representatives is already on record in another capacity, what is necessary is that he should be described also as an heir and legal representative of the deceased party. Failure to describe him as such would not, however, abate the proceeding.⁵⁷
- (4) If there are two or more heirs and legal representatives of the deceased party and one or more have been brought on record within time, a suit or an appeal will not abate on the ground that all the legal representatives have not been brought on record in time.⁵⁸
- (5) If the legal representatives of the deceased plaintiff or the deceased defendant are brought on record within the prescribed period at one stage of the suit, it will ensure for the benefit of the subsequent stages of the suit.⁵⁹
- (6) Where a plaintiff or an appellant after diligent and bona fide inquiry ascertains who the legal representatives of a deceased defendant or respondent are, and brings them on record within the prescribed period, there is no abatement of the suit or appeal if the impleaded legal representatives sufficiently

- ⁵⁴ Union of India v. Ram Charan, AIR 1964 SC 215: (1964) 3 SCR 467; Jayaram Reddy v. Revenue Divisional Officer, (1979) 3 SCC 578: AIR 1979 SC 1393; Zilla Singh v. Chandgi, 1991 Supp (2) SCC 430: AIR 1991 SC 263; Chaudhry Ram v. State of Haryana, 1994 Supp
- ⁽³⁾ SCC 675.
- ⁵⁵ Madan Naik v. Hansubala Devi, (1983) 3 SCC 15 at pp. 18-19: AIR 1983 SC 676 at p. 679; Jayaram Reddy v. Revenue Divisional Officer (ibid).
- ⁵⁶ Ibid, see also, R. 9.
- ⁵⁷ Mahabir Prasad v. Jage Ram, (1971) 1 SCC 265: AIR 1971 SC 742; Jayaram Reddy v. Revenue Divisional Officer, (1979) 3 SCC 578: AIR 1979 SC 1393; Mohd. Arif v. Allah Rabbul, (1982) 2 SCC 455: AIR 1982 SC 948.
- ⁵⁸ Mahabir Prasad v. Jage Ram, supra; Ramdass v. Director of Consolidation, (1971) 1 SCC 460: AIR 1971 SC 673; Jayaram Reddy v. Revenue Divisional Officer, supra; BANCO National Ultramarino v. Nalini Bai Naique, 1989 Supp (2) SCC 275: AIR 1989 SC 1589.
- ⁵⁹ Rangubai Kom Sankar v. Sunderabai Bhratar, AIR 1965 SC 1794: (1965) 3 SCR 211; Jayaram Reddy v. Revenue Divisional Officer, supra.

represent the estate of the deceased. The decree passed by the court in such a case will bind not only those impleaded but the entire estate too.⁶⁰

(7) The above rule, however, does not apply where the impleading of a person as a legal representative is not found to be bona fide or where there has been fraud or collusion between the creditor and the heir impleaded or there are other circumstances which indicate that there has not been a fair or real trial.⁶⁰

(8) The doctrine of abatement applies to an appeal also.⁶¹

(9) No suit can be filed against a dead person. But if a suit is filed against a dead man without the knowledge that he is dead, it is not non est. On an application by the plaintiff, the court may permit to implead the right defendant in the place of the deceased defendant.⁶² The court's satisfaction breathes life into the suit.⁶³ (emphasis supplied)

(10) Legal representatives of the deceased are entitled to take all the contentions available to the deceased. But if they intend to take personal or individual defences, they must get themselves impleaded in their personal capacity.⁶⁴

(11) On the death of the plaintiff/appellant, whether or not the suit/appeal abates depends upon whether the suit/appeal is founded entirely on torts or on contract, or partly on torts and partly on contract.⁶⁵

⁶⁰ Harihar Prasad v. Balmiki Prasad, (1975) 1 SCC 212: AIR 1975 SC 733; Jayaram Reddy v. Revenue Divisional Officer, supra; Daya Ram v. Shyam Sundari, AIR 1965 SC 1049: (1965) 1 SCR 231; N.K. Mohd. Sulaiman v. N.C. Mohd. Ismail, AIR 1966 SC 792: (1966) 1 SCR 937; Dolai Maliko v. Krushna Chandra, AIR 1967 SC 49: 1966 Supp SCR 22; Collector of 24 Parganas v. Lalith Mohan, 1988 Supp SCC 578: AIR 1988 SC 2121; BANCO National Ultramarino v. Nalini Bai Naique, supra; Raj Rajeshwari Prasad v. Shashi Bhushan, (1995) 5 SCC 579.

⁶¹ R. 11. See also Ramagya Prasad v. Murli Prasad, (1973) 2 SCC 9: AIR 1972 SC 1181; Jayaram Reddy v. Revenue Divisional Officer, supra, at p. 589 (SCC): at p. 1401 (AIR); Madan Naik v. Hansubala Devi, (1983) 3 SCC 15: AIR 1983 SC 676; Bhagwan Sawaroop v. Mool Chand, (1983) 2 SCC 132: AIR 1983 SC 355; M. Veerappa v. Evelyn Sequeira, (1988) 1 SCC 556: AIR 1988 SC 506.

⁶² Ramprasad v. Vijaykumar, AIR 1967 SC 278:1966 Supp SCR 188; Cuttack Municipality v. Shyamsundar Behera, AIR 1977 Ori 137; Sisir Kumar v. Manindra Kumar, AIR 1958 Cal 681; C. Mutu v. Bharath Match Works, AIR 1964 Mys 293.

⁶³ Karuppaswamy v. C. Ramamurthy, (1993) 4 SCC 41 at p. 45: AIR 1993 SC 2324 at p. 2326.

⁶⁴ Bal Kishan v. Om Parkash, (1986) 4 SCC 155: AIR 1986 SC 1952; Vidyawati v. Man Mohan, (1995) 5 SCC 431: AIR 1995 SC 1653.

⁶⁵ M. Veerappa v. Evelyn Sequeira, (1988) 1 SCC 556: AIR 1988 SC 506; Kanta Rani v. Rama Rani, (1988) 2 SCC 109: AIR 1988 SC 726; Collector of 24 Parganas v. Lalith Mohan, 1988 Supp SCC 578: AIR 1988 SC 2121.

- (12) No decree can be passed in favour of or against a dead person. But such a decree is not necessarily a nullity. In certain circumstances, it is permissible for the court to reopen the proceedings or to remand the case and to decide the case after hearing the parties likely to be affected thereby.⁶⁶
- (13) Where a joint and indivisible decree is passed by the court below in favour of two or more plaintiffs and one of them dies and the defendant fails to bring the heirs and legal representatives of the deceased plaintiff on record in time, the appeal against the other respondents also abates.⁶⁷
- (14) In cross-appeals arising from the same decree where parties to a suit adopt rival positions, on the death of a party if his legal representatives are impleaded in one appeal it will not enure for the benefit of cross-appeal and the same would abate.⁶⁸
- (15) If an appeal as well as cross-objections in the appeal are before the court and the respondent dies, substitution of his legal representatives in the cross-objections, being part of the same record, would enure for the benefit of the appeal and the failure of the appellant to implead the legal representatives of the deceased respondent would not have the effect of abating the appeal but not vice versa.
- (16) A suit filed in a representative capacity does not abate on the death of one of the plaintiffs⁶⁹ nor a suit filed by a karta of a Hindu undivided family abates on his death and the succeeding karta can continue the proceedings.⁷⁰
- (17) A suit or appeal does not abate on account of the death of an unnecessary, non-material or pro forma defendant or respondent.⁷¹

⁶⁶ Melepurath Sankunni v. Thekittil Geopalankutty, (1986) 1 SCC 118: AIR 1986 SC 411; M. Veerappa v. Evelyn Sequeira, (1988) 1 SCC 556: AIR 1988 SC 506; Hira Lal v. Kali Nath, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747; Jayaram Reddy v. Revenue Divisional Officer, supra, at p. 583 (SCC): at p. 1396 (AIR); Jiviben Lavji Raganath v. Jadavji Devshanker, AIR 1978 Guj 32: (1977) 18 Guj LR 883; Prempiari v. Dukhi, AIR 1976 All 444; Radhakrishna. Chatur Singh, AIR 1987 Guj 220; Himangshu Bhusan v. Manindra Mohan, AIR 1954 Cal 205; Raddulal v. Mahabirprasad, AIR 1959 Bom 384; Abdul Azeez v. Dhanabagiammal, AIR 1983 Mad 5; Karuppaswamy v. C. Ramamurthy, (1993) 4 SCC 41: AIR 1993 SC 2324.

⁶⁷ State of Punjab v. Nathu Ram, AIR 1962 SC 89: (1962) 2 SCR 636; Harihar Prasad v. Balmiki Prasad, supra; Bibijan v. Murlidhar, (1995) 1 SCC 187; Papanna v. State of Karnataka, (1996) 1 SCC 291.

⁶⁸ Jayaram Reddy case, supra, at p. 595 (SCC): at p. 1406 (AIR); Chaudhry Ram v. State of Haryana, 1994 Supp (3) SCC 675.

⁶⁹ Charan Singh v. Darshan Singh, (1975) 1 SCC 298: AIR 1975 SC 371.

⁷⁰ Gujarat SRTC v. Valji Mulji, (1979) 3 SCC 202: AIR 1980 SC 64.

⁷¹ Mangal Singh v. Rattno, AIR 1967 SC 1786: (1967) 3 SCR 454; Kanhaiyalal v. Rameshwar, (1983) 2 SCC 260: AIR 1983 SC 503; Union of India v. Avtar Singh, (1984) 3

- (18) Neither a suit nor an appeal abates where any party to a suit or an appeal dies between the conclusion of hearing and the pronouncement of the judgment.⁷²
- (19) The court has no inherent power under Section 151 of the Code to implead legal representatives of a deceased respondent if the suit had abated on account of the appellant not taking appropriate steps within time to bring the legal representatives of the deceased party on record.⁷³
- (20) When a suit or appeal abates, a very valuable right accrues to the other party and such a right cannot be ignored or interfered with lightly. In the name of doing substantial justice to one party, no injustice should be done to the other party.⁷⁴
- (21) Laches or negligence furnish no good grounds for setting aside abatement. A party guilty of negligence must bear the consequences and must suffer.⁷⁵ However, if there is a slight negligence or minor laches which is not intentional in not making an application within time, an application for setting aside abatement can be granted for doing substantial justice.⁷⁶ The rural background of the parties can also be taken into account for this purpose.⁷⁷
- (22) If the parties proceed with the matter without raising any objection regarding abatement of suit or appeal, no objection can be allowed at a later stage.⁷⁸
- (23) A mere excuse about the plaintiff not knowing of the death of the opposite party is not sufficient. He has to state reasons, which, according to him, led to his not knowing of the death

SCC 589: AIR 1984 SC 1048; Upper India Cable Co. v. Bal Kishan, (1984) 3 SCC 462: AIR 1984 SC 1381.

⁷¹ R. 6. See also N.P. Thirugnanam v. Dr. R. Jagan Mohan, (1995) 5 SCC 115; Shri Krishna Singh v. Mathura Ahir, (1981) 3 SCC 689 at p. 720: AIR 1980 SC 707 at pp. 726-27; Shiv Dass v. Devki, 1995 Supp (2) SCC 658; Union of India v. Avtar Singh, (1984) 3 SCC 589: AIR 1984 SC 1048.

⁷³ Union of India v. Raw Charan, AIR 1964 SC 215: (1964) 3 SCR 467.

⁷⁴ Bhagwan Swaroop v. Mool Chand, (1983) 2 SCC 132 at p. 139: AIR 1983 SC 355 at p. 358; State of Gujarat v. Sayed Mohd. Baquir, (1981) 4 SCC 1: AIR 1981 SC 1921; Newanness v. Sk. Mohamad., 1995 Supp (2) SCC 529.

⁷⁵ Bhagwan Swaroop v. Mool Chand (ibid) at p. 140 (SCC): at p. 359 (AIR).

⁷⁶ Ibid, Shadi v. Ram Pal, (1983) 2 SCC 255; Bapurao v. Jamunabai, (1983) 2 SCC 253: AIR 1983 SC 186; Harjeet Singh v. Raj Kishore, (1984) 3 SCC 573: AIR 1984 SC 1238; Gangadhar v. Raj Kumar, (1984) 1 SCC 121 at pp. 124-25: AIR 1983 SC 1202 at pp. 1204-05; O.P Kathpalia v. Lakhmir Singh, (1984) 4 SCC 66 at p. 62: AIR 1984 SC 1744 at p. 1755.

⁷⁷ Sital Prasad v. Union of India, (1985) 1 SCC 163: AIR 1985 SC 1; Ram Sumiran v. DDC, (1985) 1 SCC 431: AIR 1985 SC 606; Bhag Singh v. Daljit Singh, 1987 Supp SCC 685.

⁷⁸ Chaya v. Bapusaheb, (1994) 2 SCC 41; Dondapani Sahu v. Arjuna Panda, (1969) 3 SCC 397; Shiv Dass v. Devki, 1995 Supp (2) SCC 658.

of the defendant within a reasonable time and satisfy the court about it.⁷⁹

(24) Where a suit abates or is dismissed for the non-substitution of the legal representative or representatives of the deceased party no fresh suit can be filed on the same cause of action.⁸⁰ However, the cause of action of the abated suit may be invoked as a defence in a subsequent suit.⁸¹

(25) Where a suit abates or is dismissed under Order 22, the plaintiff or his legal representative/representatives may apply for an order to set aside the abatement or dismissal, and if it is proved that the applicant was prevented by any sufficient cause from continuing the suit, the court will set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.⁸²

(26) The expression "sufficient cause" should be construed liberally to advance substantial justice.⁸³ A strict and pedantic approach should not be taken by the Court.⁸⁴

(27) Though "sufficient cause" cannot be construed liberally merely because the defaulting party is the Government,⁸⁵ yet delay in official business requires a public justice approach.⁸⁶ Certain amount of latitude within reasonable limits is permissible having regard to impersonal bureaucratic set-up involving red-tapism.⁸⁷

(28) Considerations for condonation of delay under Section 5 of the Limitation Act and for bringing heirs on record or for setting aside abatement under Order 22 are distinct and different.⁸⁸

(29) Where no sufficient cause for condonation of delay for setting aside an abatement is made out by the applicant, the suit or

⁷⁹ Union of India v. Ram Charan, AIR 1964 SC 215: (1964) 3 SCR 467.

⁸⁰ R. 9(1).

⁸¹ Explanation to R. 9.

⁸² R. 9(2). See also Bhagwan Swaroop v. Mool Chand, supra.

⁸³ Union of India v. Ram Charan, supra; Bhagwan Swaroop v. Mool Chand, supra.

⁸⁴ Ibid, see also Bhag Singh v. Daljit Singh, 1987 Supp SCC 685; Sital Prasad v. Union of India, (1985) 1 SCC 163: AIR 1985 SC 1.

⁸⁵ State of Gujarat v. Sayed Mohd. Baquir, (1981) 4 SCC 1: AIR 1981 SC 1921; Bhagwan Swaroop v. Mool Chand, (1983) 2 SCC 132: AIR 1983 SC 355.

⁸⁶ State of M.P. v. S.S. Akolkar, (1996) 2 SCC 568: AIR 1996 SC 1984.

⁸⁷ State of Haryann v. Chandra Mani, (1996) 3 SCC 132: AIR 1996 SC 1623; Municipal Corpn. of Ahmedabad v. Manish Enterprises Ltd., (1992) 2 Guj LR 1252: (1992) 2 Guj LH 176.

⁸⁸ Ram Bhajan Singh v. Madheshwar Singh, 1995 Supp (2) SCC 757: AIR 1995 SC 1685.

appeal requires to be dismissed. A strong case on merits is not a ground for condonation of delay.⁸⁹

(30) An order refusing to set aside an abatement is not a "decree" within the meaning of Section 2(2). The order, however, has been made appealable⁹⁰ But neither Second Appeal nor Letters Patent Appeal is maintainable against such an order.⁹¹

3. MARRIAGE OF PARTY: RULE 7

The marriage of a female plaintiff or defendant shall not cause the suit to abate. Where the decree is passed against a female defendant, it may be executed against her alone.⁹² A decree in favour of or against a wife, where the husband is legally entitled to the subject-matter of the decree or is liable for the debt of his wife may, with the permission of the court, be executed by or against him⁹³

4. INSOLVENCY OF PARTY: RULE 8

(a) Insolvency of plaintiff

The insolvency of a plaintiff shall not cause the suit to abate and can be continued by his Assignee or Receiver for the benefit of his creditors. But if the Assignee or Receiver declines to continue the suit, or to give security for costs, as ordered by the court, the court may, on the application of the defendant, dismiss the suit on the ground of the plaintiff's insolvency. The court may also award the defendant costs for defending the suit, to be paid as a debt against the plaintiff's estate.⁹⁴

(b) Insolvency of defendant

Rule 8 does not apply where the defendant becomes an insolvent. In such cases, the court may stay the suit or proceeding pending against the defendant who has been adjudged an insolvent.⁹⁵ Rule 10 will also apply in those cases and a receiver will become a representative of the defendant-debtor.

5. DEVOLUTION OF INTEREST: RULE 10

Rule 10 enacts that if, during the pending of the suit, any interest in the suit has passed from the plaintiff or defendant to any other person, the suit may with the leave of the court be continued by or against the

⁸⁹ State of Gujarat v. Sayed Mohd. Baquir, (1981) 4 SCC 1: AIR 1981 SC 1921; Bhagwan Swaroop v. Mool Chand, (1983) 2 SCC 132: AIR 1983 SC 355.

⁹⁰ Or. 43 R. 1 (k).

⁹¹ Madan Naik v. Hansubala Devi, (1983) 3 SCC 15: AIR 1983 SC 676.

⁹² R. 7(1).

⁹⁵ R. 7(2).

⁹¹ R. 8.

⁹⁵ Kala Chand v. Jagannath, AIR 1927 PC 108: (1926-27) 54 IA 190.

person to or upon whom such interest has come or devolved. Rule 10 is based on a principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has devolved upon another during the pendency of the suit, but that the suit may be continued against the person acquiring interest with the leave of the court.⁹⁶

⁹⁶ Rikhu Dev v. Som Dass, (1976) 1 SCC 103 at p. 106; AIR 1975 SC 2159 at p. 2160; Ghafoor Ahmad v. Bashir Ahmad, (1982) 3 SCC 486; AIR 1983 SC 123; Pavitri Devi v. Darbari Singh, (1993) 4 SCC 392; Karuppaswamy v. C. Ramamurthy, (1993) 4 SCC 41; AIR 1993 SC 2324.

PART II

14 Trial
SYNOPSIS

1. GENERAL

AFTER THE plaintiff has been presented by the plaintiff and the written statement by the defendant in court and the issues have been framed by the court, a stage is reached when the parties to the suit are in a position to know what facts and what documents should be proved by them. For this purpose, any party to the suit may apply to the court for summons to persons whom he proposes to call as his witnesses. Sections 30 to 32 and Orders 16 to 18 contain necessary provisions for summoning, attendance and examination of witnesses. Order 16 provides for summoning and attendance of witnesses. Order 16-A makes special provisions for attendance of witnesses confined or detained in

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prisons. Order 17 deals with adjournments whereas Order 18 makes provisions for hearing of suits and examination of witnesses.

2. SUMMONING AND ATTENDANCE OF WITNESSES: ORDER 16

(a) Summons to witnesses: Rule 1

Sub-rule (1) of Rule 1 requires the parties to the suit to submit in court a list of witnesses whom they propose to call either to give evidence or to produce documents and to obtain summonses for their attendance in court. Such list must be filed on or before such date as the court may appoint but not later than fifteen days after the issues are framed.

The object underlying this provision is to give notice to a party about the witnesses which his adversary is to examine in the case so that he could be in a position to know the nature of evidence he has to meet. The legislature has not put total prohibition on a party to produce witnesses for proof of his case. But when he seeks the assistance of the court, he has to give reasons why he has not filed an application within the prescribed time limit.¹ Sub-rule (3) of Rule 1 empowers the court to permit a party to call any witness whose name has not been mentioned in the list filed under sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

Ordinarily, it is for the parties to move the court to issue summonses to witnesses. Rule 1-A enables a party to bring any witness to give evidence or to produce documents without applying for summons. Rules 1 and 1-A operate in two different areas and cater to two different situations. Where a party wants the assistance of the court to ensure presence of a witness on being summoned through the court, it is obligatory for him to follow the procedure laid down in Rule 1. But where he wants to produce his witnesses without the assistance of the court, he can do so under Rule 1-A and the court has no jurisdiction to decline to examine such witnesses.²

The court has also power to summon any person as a witness if it thinks that the ends of justice so require or that the case before it needs that kind of evidence.³ The power of the court to examine a witness suo motu (on its own motion) is discretionary. It should be exercised to secure the attendance of a witness whose evidence appears

¹ Sub-rules (2), (3) of Rule 1, see also *Lalitha J. Rai v. Aithappa Rai*, (1995) 4 SCC 244: AIR 1995 SC 1766.

² *Mange Ram v. Brij Mohan*, (1983) 4 SCC 36 at pp. 41-43: AIR 1983 SC 925; *Lalitha J. Rai v. Aithappa Rai*, supra; *Vidyadhar v. Manikrao*, (1999) 3 SCC 573: AIR 1999 SC 1441.

³ S. 30(b), Or. 16 R. 14; *R.M. Seshadri v. G. Vasantha Pai*, (1969) 1 SCC 27: AIR 1969 SC 692; *Lalitha J. Rai v. Aithappa Rai*, supra.

to the court to be necessary.⁴ The court, however, should not exercise suo motu power unless there are compelling reasons to do so.⁵ Rules 2 to 4 provide for travelling and other expenses and remuneration of a witness for his attendance in court. A witness cannot be ordered to attend in person unless he resides within the territorial jurisdiction of the court or within certain limits.⁶

(b) Contents of summons

Every summons issued to a witness should contain the following particulars:

(a) the time and place at which he is required to attend;

(b) the purpose of his attendance, i.e. whether his attendance is required for the purpose of giving evidence or to produce a document, or for both the purposes;

(c) the document which he is called upon to produce should be described with reasonable accuracy.⁷

(c) Service of summons: Rule 8

Every summons to a witness should be served as nearly as may be in the same manner as a summons to the defendant as contemplated by Order 5.⁸ It should give a reasonable time to a witness for preparation and for travelling to the place at which his attendance is required.⁹ Rule 7-A provides for direct service of summons (dasti summons) by a party and the procedure for such service.

(d) Failure to comply with summons: Rule 10

The court has power to enforce the attendance of any person to whom a summons has been issued and for that purpose, may (a) issue a warrant for his arrest; (b) attach and sell his property; (c) impose a fine upon him not exceeding five thousand rupees; and (d) order him to furnish security for his appearance and in default commit him to the civil prison.¹⁰

Rule 10 enumerates consequences for non-appearance by a party in spite of service of summons. It states that where a person to whom a summons has been issued, either to attend to give evidence or to produce a document, fails to comply with such summons without lawful

⁴ Ibid, see also Bishwanath Rai v. Sachhidanand Singh, (1972) 4 SCC 707: AIR 1971 SC 1949; K.S. Agha v. Mir Mudassir Shah, AIR 1944 PC 100: (1943-44) 71 IA 171.

⁵ Khaji Khanavar Khadirkhan v. Siddavanballi Nijalingappa, (1969) 1 SCC 636: AIR 1969 SC 1034.

⁶ R. 19.

⁷ R.5.

⁸ R. 8. See also supra, Chap. 7.

⁹ R. 9.

¹⁰ S. 32.

excuse or intentionally avoids service of summons, the court may issue a proclamation requiring him to attend to give evidence or to produce a document at a time and place mentioned therein and a copy of such proclamation should be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.¹¹ The court may also issue a warrant for arrest of such person.¹² Where the person appears after the attachment of his property and satisfies the court that he did not fail to comply with the summons without lawful excuse or did not intentionally avoid service and that he had no notice of the proclamation, the court shall release the property from attachment.¹³ If, however, such person does not appear or appears but fails to satisfy the court, the court may impose upon him a fine not exceeding five hundred rupees as it thinks fit, having regard to his condition of life and all the circumstances of the case and attach and sell the property for recovery of the same.¹⁴

The above provisions enact the machinery for procuring attendance of witnesses. It is the duty of the court to enforce the attendance of witnesses summoned by the parties, if necessary by coercive process.¹⁵ These provisions are essential and have been enacted with a purposeful eye, because the contesting parties in a suit usually have no control over witnesses who may be required to give evidence. The machinery of the court for redress of injustice will be rendered altogether ineffective if a party is not enabled to examine such witnesses as may be necessary in order to procure a just decision from the court on the matter at issue between the parties.¹⁶

All that a litigant can do in regard to a person over whom he has no control is to request him to attend the court. The said person, however, may, either on account of his preoccupation, or on account of his disinclination to take the trouble to attend the court, refuse to oblige the litigant. In such an event, the litigant would be rendered utterly helpless. And if there were no coercive machinery built in the Code, courts themselves would also be equally helpless. That is the reason why the provisions have been made in Order 16 Rule 10 and the court has been empowered to issue summons to a witness and also to secure compliance with the requisition contained in the summons either

11 R. 10 (1), (2).

12 R. 10(2).

13 R. 11.

14 Rr. 12 & 13.

15 National Rice & Dal Mills v. Food Corpn. of India, AIR 1972 P&H 163 at p. 164; Vasant Trading Corpn. v. Dhamanvala Arvind Silk Mills, (1974) 15 Guj LR 869 at pp. 870-71; Dwarka Prasad v. Rajkunwar Bai, AIR 1976 MP 214.

16 National Rice & Dal Mills v. Food Corpn. of India, supra.

to give evidence or to produce documents.¹⁷ Rule 10 thus exhibits the authority of the court.¹⁸

It should not, however be forgotten that a party runs a serious risk by invoking coercive machinery for compelling his witness to remain present. It is quite likely that on account of such process being issued, he may turn hostile and may not support the case of the party at whose instance he is called as a witness.¹⁹

Since the provisions of Rule 10 are of a penal nature, the procedure laid down therein must be strictly followed.²⁰

It is the duty of the person summoned to give evidence or produce or cause to produce a document.²¹ Unless the court otherwise directs, the person summoned should attend the court at each hearing till the suit is disposed of.²² Rule 18 prescribes the procedure where the witness is arrested and is unable to give evidence or produce documents. Where any party to a suit present in the court, without lawful excuse, refuses when required by the court to give evidence or to produce any document there and then in his possession or power, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.²³ Rule 19 deals with cases where a witness cannot be ordered to attend in person unless he is residing within certain limits.

3. ATTENDANCE OF WITNESSES IN PRISON: ORDER 16-A

Order 16-A, added by the Amendment Act of 1976, provides for the attendance of prisoners to give evidence if the court is of the opinion that their evidence is material in the suit except where they are physically unfit to do so. However, if the prison is situated at a distance of more than 25 kilometres from the courthouse, no such order shall be made unless the court is satisfied that the examination of such person on commission will not be adequate.

4. SUMMONS TO PRODUCE DOCUMENTS: SECTION 30

The provisions relating to issue of summons to give evidence will apply to summons to produce documents or other material objects.²⁴

¹⁷ Vasant Trading Corpn. v. Dhamanvala Arvind Silk Mills, *supra*.

¹⁸ Katta Venkatayyagari v. Gowra Lakshmayya, AIR 1937 Mad 811; Suresh Nath v. Jorawarmal, AIR 1999 Raj 357.

¹⁹ Dwarka Prasad v. Rajkunwar Bai, *supra*; Kishan Chand v. Nirmala Devi, (1975) 77 Punj LR 746.

²⁰ Dwarka Prasad v. Rajkunwar Bai, AIR 1976 MP 214 at p. 215.

²¹ R. 15.

²² Rr. 16 &17.

²³ R. 20.

²⁴ S. 30; Or. 16, 16-A.

5. ADJOURNMENTS: ORDER 17

(a) General rule

After the court starts hearing of a suit, it will be continued till the final disposal of the suit. As a general rule, when hearing of evidence has once begun, such hearing shall be continued day to day and the adjournment should be granted only for unavoidable reasons.²⁵

(b) Discretion of court

A party to the suit, however, may ask for an adjournment of the matter. Normally, to grant or refuse adjournment is at the discretion of the court. The power to grant adjournment is not subject to any definite rules, but it should be exercised judicially and reasonably and after considering the facts and circumstances of each case.²⁶ The provision limiting adjournments cannot be held to be ultra vires or unconstitutional.²⁷

(c) When adjournment may be granted?

An adjournment may be granted by a court inter alia on the grounds of sickness of a party, his witness or his advocate; non-service of summons, reasonable time for preparation of case, withdrawal of appearance by a pleader at the last moment, etc.²⁸

(d) When adjournment may be refused?

An adjournment may be refused by a court inter alia on the grounds of engagement of an advocate in another court, unreasonable conduct of a party or his advocate, refusal to examine or cross-examine a witness present in the court, assurance or undertaking by the party or his pleader at the previous hearing to proceed with the case at the next hearing, the case being very old, direction by a superior court to dispose of the matter expeditiously, etc.²⁹

²⁵ Proviso to R. 1, Or. 17. See also *Kishan Lal Gupta v. Dujodwala Industries*, AIR 1977 Del 49 at p. 52.

²⁶ *Thakur Sukhpal Singh v. Thakur Kalyan Singh*, AIR 1963 SC 146 at p. 150: (1963) 2 SCR 733; *Jwala Prasad v. Ajodhya Prasad*, AIR 1983 SC 304; *Savithri Amma Seethamma v. Aratha Karthy*, (1983) 1 SCC 401: AIR 1983 SC 318; *Nirankar Nath v. Vth ADJ*, (1984) 3 SCC 531 at p. 537: AIR 1984 SC 1268; *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul*, AIR 1963 SC 1: (1963) 3 SCR 22; *Nanik Awtraï Chainani v. Union of India*, (1970) 2 SCC 321: (1971) 1 SCR 650; *Lachi Tewari v. Director of Land Records*, 1984 Supp SCC 431: AIR 1984 SC 41; *Ranjodh Singh v. State of Punjab*, 1988 Supp SCC 170; *Priddle v. Fisher & Sons*, (1968) 1 WLR 1478: 1969 Lab IC 384 at p. 386 (QB); *Shyam Kishore v. MCD*, (1993) 1 SCC 22: AIR 1992 SC 2279; *CIT v. Express Newspapers Ltd.*, (1994) 2 SCC 374 at p. 377: AIR 1994 SC 1389.

²⁷ *Salem Advocate Bar Assn. v. Union of India*, (2003) 1 SCC 49: AIR 2003 SC 189; *Salem Advocate Bar Assn. (II) v. Union of India*, (2005) 6 SCC 344: AIR 2005 SC 3353.

²⁸ For leading cases, see, C.K. Thakker, *Code of Civil Procedure (Lawyers' Edn.)* Vol. IV, Or. 17.

²⁹ *Ibid.*

(e) Power and duty of court

In allowing or refusing adjournment, the court has first to ascertain whether the ground on which adjournment is sought is factually correct and then to decide whether that ground is sufficient to grant adjournment.³⁰

Past conduct of a person may well be taken into account as a circumstance in judging whether what he is now saying is true or false, but the fact that a party has applied for adjournment of the hearing of a case in the past and the adjournment was granted on his application, could be no ground for refusing an adjournment if it is again sought on a ground which could reasonably be said to have prevented or disabled that party from producing his evidence or doing something else which is necessary to be done for the hearing of the case on that particular day.³¹

On the one hand, the court should not be too technical in the matter of granting an adjournment and it should not refuse to grant it if sufficient cause is shown. On the other hand, the court should not grant an adjournment if sufficient cause is not shown even on condition of payment of costs. What is a sufficient cause is a question of fact to be decided in the facts and circumstances of each case.

No adjournment shall be granted more than three times to a party during hearing of the suit.³²

(f) Maximum adjournments

Proviso to sub-rule (1) of Order 17, as inserted by the Amendment Act, 1999 mandates that maximum three adjournments can be granted by the court to a party during the hearing of the suit.

In *Salem Advocate Bar Assn. v. Union of India (II)*, the Supreme Court held that in extreme and exceptional circumstances, this strict rule does not apply. The court also held that by "reading down" discretionary power to grant adjournment, the validity of the provision can be sustained.³³

(g) Adjournment granted: Illustrative cases

The following are some of the circumstances which have been held to constitute sufficient cause for granting adjournment:

Sickness of a party, his witness or his counsel, non-service of summons, reasonable time for preparation of a case, withdrawal of

³⁰ Haji Abdul Hafiz v. Nasir Khan, AIR 1984 All 16; see also *Maharaja v. Harihar*, AIR 1990 All 49; *Brahma Swaroop v. Shamsheer Bahadur*, AIR 1984 All 14.

³¹ Haji Abdul Hafiz v. Nasir Khan, AIR 1984 All 16 at p. 20; see also *Maharaja v. Harihar*, AIR 1990 All 49.

³² Proviso to Rule 1(1).

³³ (2005) 6 SCC 344 at p. 367; AIR 2005 SC 3353.

appearance by a counsel at the last moment, inability of a counsel to conduct the case, inability of a party to engage another advocate, etc.

(h) Adjournment refused: Illustrative cases

On the other hand, the following are some of the circumstances which have been held not to constitute sufficient cause for granting adjournment:

Engagement of a counsel in another court, dilatory conduct of the party, non-examination of a witness present in the court, abuse of process of court, undertaking by the party on the earlier occasion to proceed with the matter, inconvenience to the opposite party or his witnesses, the case being very old, the matter first on board, the argument of the other side is over, interlocutory proceedings, etc.

(i) Costs of adjournment

While granting an adjournment, the court shall, direct the party seeking an adjournment to pay costs or higher costs to the opposite party.³⁴

Such amount, however, should be reasonable and commensurate with the costs incurred by the other side. No costs should be imposed by way of penalty or punishment.³⁵

(j) Failure to appear: Rule 2

Rule 2 provides that where parties fail to appear even on the adjourned day, the court may either proceed to dispose of the suit in one of the modes mentioned in Order 9, or to proceed with the case even in the absence of a party where evidence or substantial portion thereof of such party has already been recorded as if such party were present, or make such other order as it thinks fit.³⁶ This rule confers on the court a discretion and the court must exercise it.³⁷ When any party to a suit to whom time has been granted, fails (k) to produce his evidence; or (ii) to cause the attendance of his witnesses; or (iii) to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, (a) if the parties are present, proceed to decide the suit forthwith; or (b) if the parties are, or any of them is, absent, proceed under Rule 2.³⁸

³⁴ R. 1(2).

³⁵ Junaram Born v. Saruchoali Kuchuni, AIR 1976 Gau 3; Ram Piyari v. Lala Ram Narain, AIR 1973 All 227:1973 All LJ 257; Gauhati Bank Ltd. v. Bahram Dutta, AIR 1950 Ass 169; Jadavbai v. Shrikisan, AIR 1946 Bom 113: (1945) 47 Bom LR 978: 224 IC 547.

³⁶ R. 2.

³⁷ Sangram Singh v. Election Tribunal, AIR 1955 SC 425: (1955) 2 SCR 1. See also Prakash Chander v. Janki Manchaada, (1986) 4 SCC 699: AIR 1987 SC 42.

³⁸ R.3.

Before an order under Rule 3 can be passed, the following conditions must be satisfied:

(i) the adjournment must have been granted at the instance of a party;

(ii) the adjournment must have been granted to enable such party (a) to produce his evidence; or (b) to cause the attendance of his witnesses; or (c) to perform any other act necessary for the further progress of the suit; and

(iii) the party must have failed to perform any of the acts for which the time had been granted.

6. HEARING OF SUIT: ORDER 18

(a) Trial in open court: Section 153-B

As a general rule, the evidence of witnesses shall be taken orally in open court in the presence and under the personal direction and superintendence of the judge.³⁹

It is well-settled that, in general, all cases brought before the courts, whether civil, criminal or others, must be heard in open court. Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear causes in the open and must permit public admission to the courtroom.

As Bentham⁴⁰ has observed:

"In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the judge himself while trying under trial in the sense that the security of securities is publicity."

(emphasis supplied)

³⁹ Or. 18 R. 19, S. 153-B; see also *Naresh Shridhar v. State of Maharashtra*, AIR 1967 SC 1: (1966) 3 SCR 744; *P.N. Eswara Iyer v. Registrar*, Supreme Court of India, (1980) 4 SCC 680: AIR 1980 SC 808.

⁴⁰ *Scott v. Scott*, 1913 AC 417: (1911-13) All ER Rep 1 at p. 30 (HL). See also, similar observations of Cooley, "The courts could survive only by the strength of public confidence. The public confidence can be fostered by exposing courts more and more to public gaze"; *Constitutional Law* (8th Edn.) Vol. I at p. 647.

(b) Trial in camera

A case may, however, occur where the requirement of the administration of justice itself may make it necessary for the court to hold a trial in camera. If the primary function of the court is to do justice in causes before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal, and it is held that it admits of no exceptions whatever, cases may arise where, by following the principle, justice itself may be defeated.⁴¹

The overriding consideration which must determine the conduct of proceedings before a court is fair administration of justice. Indeed, the principle that all cases must be tried in public is really and ultimately based on the view that it is such public trial of cases that assists the fair and impartial administration of justice. The administration of justice is thus the primary object of the work done in courts; and so, if there is a conflict between the claims of the administration of justice itself and those of public trial, public trial must yield to the administration of justice.⁴²

(emphasis supplied)

(c) Right to begin and reply: Rules 1-3

The right to begin follows from the rules of evidence. Sections 101 to 114 of the Evidence Act, 1872 deal with burden of proof. Section 102 of the Act provides that the burden of proof lies on that party who would fail if no evidence at all were given on either side. Accordingly, as a general rule, the plaintiff has to prove his claim and, therefore, he has right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either on point of law (e.g. res judicata, limitation, etc.) or on some additional facts alleged by him, the plaintiff is not entitled to any relief. In that case, the defendant has right to begin.⁴³

The party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. The other party shall then state his case and produce his evidence, if any, and may then address the court generally on the whole case. The party beginning may then reply generally on the whole case⁴⁴

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either

⁴¹ Naresh Shridhar v. State of Maharashtra, AIR 1967 SC 1 at p. 8: (1966) 3 SCR 744.

⁴² Ibid, at p. 10 (AIR). See also Kehar Singh v. State (Delhi Admn), (1988) 3 SCC 609 at pp. 672-76; A.K. Roy v. Union of India, (1982) 1 SCC 271: AIR 1982 SC 710; see also *infra*, Or. 32-A, Chap. 16.

⁴³ R.1.

⁴⁴ R. 2.

produce his evidence generally on those issues or reserve it by way of answer to the evidence produced by the other party.⁴⁵ But if the plaintiff's counsel is absent at the time of hearing or arrives late, and in the meantime the counsel for the defendant starts his arguments, the counsel for the plaintiff has no right of interruption.⁴⁶ Where a party wishes to be examined as a witness, he should first offer himself for examination before other witnesses are examined.⁴⁷

(d) Recording of evidence: Rules 4-13

(i) General

Radical changes have been made by the Code of Civil Procedure (Amendment) Act, 2002 in relation to recording of oral evidence of witnesses.⁴⁸ Before the amendment, such evidence could be recorded "in open court in the presence and under the personal direction and superintendence of the judge"⁴⁹. A lot of time of the court was consumed in that process which was the main cause of delay in disposal of cases.

Under the new provision, oral evidence can now be recorded by the Court Commissioner. The Court Commissioner may also record remarks respecting demeanour of witnesses. The report of the Commissioner shall be submitted to the court which shall form part of the record of the suit.⁵⁰

(ii) Appealable cases

In appealable cases, the evidence of each witness shall be taken down by the judge in the language of the court or in English if the parties or their pleaders do not object. It should be in the form of a narrative and shall be read over to the witness, interpreted to him and signed by the judge. The court may (a) for any special reason, take down any particular question and answer, or any objection to any question; (b) record such remarks as it thinks material respecting the demeanour of any witness; (c) recall any witness at any stage of the suit who has been examined and put such questions as it thinks fit; (d) permit any party to the suit to produce the evidence which was not within his

⁴⁵ R.3.

⁴⁶ *Sheela Barse v. Union of India*, (1988) 4 SCC 226 at pp. 243-44: AIR 1988 SC 2211.

⁴⁷ R. 3-A.

⁴⁸ Or. 18 R. 4 (as amended by the Amendment Act, 2002) (Act 22 of 2002).

⁴⁹ R. 4 as it stood before the amendment read thus;

"Witness to be examined in open court. The evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal direction and superintendence of the Judge". See also *M.M. Amonkar v. S.A. Johari*, (1984) 2 SCC 354: AIR 1984 SC 931.

⁵⁰ Rule 4(1), (2), (3), (4), (5). For analytical discussion and case law, see, C.K. Thakker, *Code of Civil Procedure (Lawyers' Edn.)* Vol. IV, Or. 18.

knowledge or could not be produced by him despite due diligence; or

(e) make local inspection and make a memorandum of any relevant facts observed at such inspection.⁵¹

(iii) Non-appealable cases

In non-appealable cases, the judge shall make or dictate directly on a typewriter or cause to be mechanically recorded, a memorandum of the substance of the deposition of witnesses.⁵²

(iv) Examination de bene esse⁵³: Rule 16

Generally, witnesses are examined at the hearing of the suit. Rule 16, however, provides for examination of a witness before the hearing, when he is about to leave the jurisdiction of the court or other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately. This is called de bene esse examination and it is permitted to do justice between the parties. A witness may be examined on commission in certain circumstances.⁵⁴

(v) Evidence recorded by another judge: Rule 15

Where a judge is prevented by death, transfer or other cause from conducting the trial of a suit, his successor may deal with the evidence recorded by him and proceed with the suit from the stage at which it was left.⁵⁵

(e) Oral arguments: R. 2 (3-A, 3-D)

A court may permit a party or his pleader to argue a case orally. For such oral arguments, it is open to the court to fix time limits, as it thinks fit.⁵⁶

(f) Written arguments: R. 2 (3-A, 3-B, 3-C)

A court may allow a party or his pleader to submit written arguments in support of his case. Such written arguments shall form part of the record. A copy of such written arguments should be supplied to the other side. Normally, no adjournment should be granted for submitting written arguments.⁵⁷

⁵¹ Ss. 137, 138, Rr. 5-12, 17, 17-A & 18. See also M.M. Amonkar v. S.A. Johari, (1984) 2 SCC 354 at pp. 362-63; AIR 1984 SC 931; Laxman Das v. Deoji Mal, AIR 2003 Raj 74; F.D.C. Ltd. v. Federation of Medical Representatives Assn. India, AIR 2003 Bom 371; Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd., (2004) 1 SCC 702; AIR 2004 SC 355.

⁵² R. 13.

⁵³ R. 16.

⁵⁴ See supra, Chap. 11.

⁵⁵ R. 15.

⁵⁶ For detailed discussion and case law, see, V.G. Ramachandran, Law of Writs (2006) Vol. II, Pt. V, Chap. 2.

⁵⁷ Ibid.

PART II

15

Judgment and Decree

SYNOPSIS

1. GENERAL

AFTER THE hearing is completed, the court will pronounce the judgment. Rules 1 to 5 of Order 20 deal with judgments and Rules 6 to 19 with decrees. Rules 6-B and 20 provide for furnishing of copies of judgment and decree to the parties on application made by them on payment of specified charges. Whereas Sections 34 and 35 relate to interest and costs, Sections 35-A and 35-B make provisions for compensatory costs for false and vexatious claims or defences and for causing delay.

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2. JUDGMENT

(a) Definition: Section 2(9)
"Judgment" means the statement given by the judge of the grounds of a decree or order.¹ In the words of Vivian Bose, J., a judgment may be said to be "the final decision of the court intimated to the parties and to the world at large by formal 'pronouncement' or 'delivery' in open court".²

(b) Essentials³

(c) Judgment and decree⁴

(d) Pronouncement of judgment: Rule 1

After the hearing has been completed, the court shall pronounce the judgment in open court, either at once or on some future day, after giving due notice to the parties or their pleaders.⁵ Once the hearing is over, there should not be a break between the reservation and pronouncement of judgment.

Before the Amendment Act of 1976, no time-limit was provided between the hearing of arguments and the delivery of the judgment. There was a persistent demand all over India for imposing a timelimit for the delivery of a judgment after the conclusion of hearing of a case. Even the Supreme Court had to observe in the case of *R.C. Sharma v. Union of India*⁶ thus:

"The Civil Procedure Code does not provide a time-limit for the period between the hearing of arguments and the delivery of a judgment. Nevertheless, we think that an unreasonable delay between hearing of arguments and delivery of a judgment, unless explained by exceptional or extraordinary circumstances, is highly undesirable even when written arguments are submitted.

It is not unlikely that some points which the litigant considers important may have escaped notice. But, what is more important is that litigants must have complete confidence in the results of litigation. This confidence tends to be shaken if there is excessive delay between hearing of arguments and delivery of judgments.

1 S. 2(9).

2 *Surendra Singh v. State of U.P.*, AIR 1954 SC 194 at p. 196:1954 SCR 330.

3 See *supra*, Pt. I, Chap. 2.

4 See *supra*, Pt. I, Chap. 2.

5 S. 33, Or. 20 R. 1(1). See also *Surendra Singh v. State of U.P.*, AIR 1954 SC 194 at pp. 196-97:1954 SCR 330; *Nirankar Nath v. Vth ADJ*, (1984) 3 SCC 531 at p. 537: AIR 1984 SC 1268; *Anil Rai v. State of Bihar*, (2001) 7 SCC 318: AIR 2001 SC 3173.

6 (1976) 3 SCC 574 at p. 578: AIR 1976 SC 2037 at p. 2041.

Justice, as we have often observed, must not only be done but must manifestly appear to be done." (emphasis supplied)

The Joint Committee, therefore, suggested that a time-limit should be prescribed for delivery of judgments after the conclusion of the hearing of cases.⁷ Accordingly, it is provided that if a judgment is not pronounced at once, it should ordinarily be delivered within thirty days from the conclusion of the hearing. Where, however, it is not practicable to do so due to exceptional and extraordinary circumstances, it may be pronounced within sixty days. Due notice of the day fixed for pronouncement of judgment shall be given to the parties or their pleaders.⁸ The judge need not read out the whole judgment and it would be sufficient if the final order is pronounced.⁹ The judgment must be dated and signed by the judge.¹⁰ Rule 2 enables a judge to pronounce a judgment which is written but not pronounced by his predecessor.

A reference in this connection may be made to a decision of the Supreme Court in *Anil Rai v. State of Bihar*¹¹. In that case, after the arguments of the counsel were over but the judgment was reserved by the High Court which was pronounced after two years. The action was strongly deprecated by the Supreme Court. The Court was conscious that for High Courts no particular period was prescribed for pronouncement of judgment, but the judgment must be pronounced expeditiously. Sethi, J. stated, "In a country like ours where people consider judges only second to God, efforts be made to strengthen that belief of the common man. Delay in disposal of the cases facilitates the people to raise eyebrows, sometime genuinely, which, if not checked, may shake the confidence of the people in the judicial system."¹²

Pronouncement of a judgment is essential for the validity of the judgment. It is a judicial act which must be performed in a judicial way. Small irregularities in the manner of pronouncement or the mode of delivery may not matter much but the substance must be present and it should neither be vague nor left to inference or conjecture.¹³

Moreover, the judgment must be based on the grounds and points in the pleadings and not outside the case put forward by the parties in their pleadings. On the one hand, the court should record findings on

7

Statement of Objects and Reasons.

8

Proviso to R. 1(1).

9

R. 1(2).

10

R.3.

11

(2001) 7 SCC 318: AIR 2001 SC 3173.

12

Ibid, at p. 330 (SCC): at p. 3180 (AIR); see also *S.K. Verma v. M.P. High Court*, (2003)

10

SCC 243.

13

Surendra Singh v. State of U.P., AIR 1954 SC 194 at p. 196:1954 SCR 330.

all the points raised by the parties. And, on the other hand, it should not decide any question which does not arise from the pleadings of the parties or is unnecessary.¹⁴

A statement of fact recorded in the judgment is conclusive of the fact so stated and no one should be allowed to assail it as incorrect or contradict it by filing an affidavit or otherwise. If a party to the proceedings thinks that the happenings in the court have not been correctly recorded in the judgment, a party should approach the same court, to call the attention of the very judge who has recorded the statement and to have it deleted altogether or amended accordingly.¹⁵

Finally, all judicial pronouncements must be truly judicial in nature and should not depart from sobriety, moderation and reserve. The language of the judgment should be dignified and restrained. Disparaging and defamatory remarks should not be made and, even where criticism is justified, it must be in the language of utmost restraint, keeping in mind that the person making the comment is also a human being and fallible.¹⁶

(e) Copy of judgment

After the judgment is pronounced, copies of the judgment should be made available to the parties immediately on payment of charges.¹⁷

(f) Contents of judgment: Rules 4 & 5

Judgments other than those of a Court of Small Causes should contain (i) a concise statement of the case, (ii) the points for determination, (iii) the decision thereon, and (iv) the reasons for such decision. The judgments of a Court of Small Causes need not contain more than the point for determination and the decisions thereon.¹⁸

In suits in which issues have been framed, the court must record its finding on each separate issue with the reasons therefor.¹⁹ Recording

¹⁴ Swaran Lata v. H.K. Banerjee, (1969) 1 SCC 709: AIR 1969 SC 1167; Bhagwati Prasad v. Delhi State Mineral Development Corpn., (1990) 1 SCC 361: AIR 1990 SC 371; Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., (1983) 1 SCC 147: AIR 1983 SC 239; A.R. Antulay v. R.S. Nayak, (1984) 2 SCC 183 at p. 242: AIR 1984 SC 684.

¹⁵ State of Maharashtra v. Ramdas Shrinivas, (1982) 2 SCC 463 at p. 467: AIR 1982 SC 1299; Bhagwati Prasad v. Delhi State Mineral Development Corpn. (ibid.); Poonam Lata v. M.L. Wadhwan, (1987) 4 SCC 48 at p. 51.

¹⁶ Alok Kumar Roy v. Dr. S.N. Sarma, AIR 1968 SC 453 at pp. 456-57: (1968) 1 SCR 813; State of M.P. v. Nandlal, (1986) 4 SCC 615: AIR 1987 SC 251 at p. 287; Ashok Kumar v. State of Haryana, (1985) 4 SCC 417: AIR 1987 SC 454 at pp. 461-63; A.M. Mathur v. Pramod Kumar Gupta, (1990) 2 SCC 533 at p. 539: AIR 1990 SC 1737 at p. 1741.

¹⁷ R.6-B.

¹⁸ Rr. 4 & 6. See also *supra*, Pt. I, Chap. 2.

¹⁹ R. 5. See also *Fomento Resorts and Hotels Ltd. v. G.R. Da Cruz Pinto*, (1985) 2 SCC 152 at p. 162: AIR 1985 SC 736 at p. 741; *State of Punjab v. Hardyal*, (1985) 2 SCC 629 at p. 636: AIR 1985 SC 920 at pp. 923-24.

of reasons in support of a judgment may or may not be considered to be one of the principles of natural justice, but it cannot be denied that recording of reasons in support of a decision is certainly one of the visible safeguards against possible injustice and arbitrariness and affords protection to the person adversely affected.²⁰

A judgment must be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to a particular conclusion and decreed or dismissed the suit should clearly be reflected in the judgment.²¹

Whether it is a case contested by the defendant by filing a written statement, or a case which proceeds ex parte and is ultimately decided in the absence of the defendant, or a case in which no written statement was filed and was decided under Order 8 Rule 10, the court has to write a judgment which must be in conformity with the provisions of the Code.²²

Rule 6-B provides for furnishing of a copy of judgment to the party on payment of charges for preferring an appeal. Rule 5-A states that where the parties are not represented by pleaders, the court should inform the parties as to the court to which an appeal lies against the judgment pronounced and the period of limitation for filing such appeal, and place on record the information so given to the parties. Rule

²⁰ provides for furnishing of certified copies of judgments and decrees to parties.

(g) Alteration in judgment: Rule 3

A judgment once signed cannot afterwards be amended or altered except (i) to correct clerical or arithmetical mistakes, or errors due to accidental slips or omissions (Section 152); or (ii) on review (Section 114).²³

3. DECREE

(a) Definition²⁴

(b) Essentials²⁵

²⁰ For detailed discussion of recording of reasons, see, Author's Lectures on Administrative Law (2008) Lecture VI.

²¹ Balraj Taneja v. Sunil Madan, (1999) 8 SCC 396: AIR 1999 SC 3381 at p. 3390.

²² Ibid, at pp. 414-15 (SCC): at p. 3391 (AIR).

²³ R. 3. See also Samarendra Nath v. Krishna Kumar, AIR 1967 SC 1440: (1967) 2 SCR 18; Kewal Chand v. S.K. Sen, (2001) 6 SCC 512: AIR 2001 SC 2569.

²⁴ S. 2 (2); see also supra, Pt. I, Chap. 2.

²⁵ See supra, Pt. I, Chap. 2.

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- (f) Necessity of decree

The Code requires passing of decree in all suits. A decree is thus an essential part of the ultimate outcome of the suit. Decree is an indispensable requisite. An appeal lies against a decree and not against a judgment.²⁹ Without decree an appeal cannot be "put in motion". A decree is, therefore, an absolute necessity.

- (g) Drawing up of decree: Rule 6-A

A decree should be drawn up within fifteen days from the date of the judgment. If the decree is not drawn up, an appeal can be preferred without filing a copy of the decree.³⁰

- (h) Form of decree

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

- (i) Contents of decree: Rule 6

The decree shall follow the judgment, agree with it and bear (i) the number of the suit; (ii) the names and description of the parties and their registered addresses; (iii) the particulars of the claim; (iv) the relief granted; (v) the amount of costs incurred in the suit, and by whom or out of what property and in what proportions they are to be paid;

- (vi) the date on which the judgment was pronounced; and (vii) the signature of the judge.³¹ Rule 8 authorises a successor judge to sign a decree drawn up by his predecessor.

- (j) Decrees in special cases: Rules 9-19

Rules 9 to 19 deal with decrees in particular cases. In a suit for recovery of immovable property, the decree shall contain a description of such property sufficient to identify it, e.g. boundaries, survey numbers, etc.³² A decree for delivery of movable property must state the amount

- 26 See supra, Pt. I, Chap. 2.
- 27 See supra, Pt. I, Chap. 2.
- 28 See supra, Pt. I, Chap. 2.
- 29 S. 96; see also infra, Pt. III, Chap. 2.
- 30 R. 6-A.
- 31 S. 33, Rr. 6 & 7. See also Jagat Dhish v. Jawahar Lal, AIR 1961 SC 832: (1961) 2 SCR 918.
- 32 R.9.

of money to be paid as an alternative if delivery cannot be had.³³ In a decree for payment of money the court may order that the payment of decretal amount shall be postponed or shall be made by instalments with or without interest.³⁴ In a suit for recovery of possession of immovable property the court may pass a decree (1) for possession of property; (2)(a) for past rent or mesne profits; or (b) direct an inquiry as to such rent or mesne profits; (c) direct an inquiry as to future rent or mesne profits; and (3) final decree in respect of rent or mesne profits in accordance with the result of such inquiry.³⁵

A decree for specific performance of a contract for sale or lease of immovable property shall specify the period within which the purchase money or other sum is to be paid by the purchaser or the lessee.³⁶

In a suit for an account of any property and for its due administration under the decree of the court, before passing a final decree, the court should pass a preliminary decree ordering accounts to be taken and inquiries to be made. Thereafter a final decree shall be passed in accordance with the result of the preliminary inquiry.³⁷ A decree in a pre-emption suit, where the purchase money has not been paid into court, shall specify a day on or before which the purchase money shall be paid and direct that on payment into court of such purchase money, the defendant shall deliver possession of the property to the plaintiff, but that if the payment is not made, the suit shall be dismissed with costs. Where the court has adjudicated upon rival claims to preemption, the decree shall direct (i) if the claims decreed are equal in degree, that the claim of each pre-emptor shall take effect proportionately; and (ii) if the claims decreed are different in degree, the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to make payment.³⁸

In a suit for dissolution of partnership or taking of partnership accounts, the court, before passing a final decree may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved and directing accounts to be taken and other acts to be done.³⁹ In a suit for accounts between a principal and an agent, the court, before passing a final decree, shall pass a preliminary decree directing the accounts to be

- 33 R. 10.
- 34 R. 11.
- 35 R. 12.
- 36 R.12-A.
- 37 R. 13.
- 38 R. 14.
- 39 R. 15.

taken.⁴⁰ The court can give special directions regarding mode of taking accounts⁴¹

In a decree passed in a suit for the partition of property or for the separate possession of a share therein, (i) if the estate is assessed to the payment of revenue to the government, the decree shall declare the rights of several parties interested in the property but shall direct partition or separation to be made by the Collector (Section 54);⁴² (ii) in other cases of immovable property, if the partition or separation cannot conveniently be made without further inquiry, the court may pass a preliminary decree declaring the rights of parties in the property and giving necessary directions and thereafter a final decree shall be passed.⁴³ A decree where the defendant has been allowed a set-off or counterclaim against the claim of the plaintiff shall state what amount is due to the plaintiff and what amount is due to the defendant⁴⁴

4. INTEREST: SECTION 34

(a) Interest: Meaning

The term "interest" is not defined in the Code. It may mean "a charge that is paid to borrow for use of money". It is thus a compensation allowed by law to the person who has been prevented to use the amount to which he was entitled.⁴⁵

(b) Award of interest

Where the decree is for payment of money, the court may award interest at such rate as it thinks reasonable on the "principal sum adjudged".⁴⁶

(c) Divisions of interest

Interest awarded by the court may conveniently be divided under three heads:

(i) Interest prior to filing of suit;

(ii) Interest pendente lite, i.e. from the date of the suit to the date of the decree; and

(iii) Interest from the date of decree till the payment.

Let us consider all the heads:

⁴⁰ R. 16.

⁴¹ R. 17.

⁴² R. 18(1).

⁴³ R. 18(2).

⁴⁴ R. 19.

⁴⁵ Concise Oxford English Dictionary (2002) at p. 737; Union Bank of India v. Dalpat Gaurishankar, AIR 1992 Bom 482 at p. 489; 1992 Mah LJ 686 (FB); Rural Engg. Division, Cuttack v. Surendranath Kanungo, AIR 1980 Ori 119.

⁴⁶ Section 34. For detailed discussion, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. I at pp. 606-41.

(i) Interest prior to suit

Section 34 has no application to interest prior to the institution of the suit since it is a matter of substantive law. It can be awarded only when there is an agreement, express or implied, between the parties; or mercantile usage; or under a statutory provision; or by way of damages.⁴⁷

(ii) Interest pendente lite

The award of interest from the date of the suit to the date of the decree is at the discretion of the court.⁴⁸ The discretion, however, must be exercised on sound judicial principles. As a general rule, the court should award interest at the contractual rate except where it would be inequitable to do so.⁴⁹

(iii) Interest from date of decree

The award of interest from the date of decree to the date of payment is also at the discretion of the court.⁵⁰ The proviso as added by the Amendment Act of 1976 empowers the court to grant further interest at a rate exceeding six per cent per annum but not exceeding the contractual rate of interest, and in the absence of a contract to that effect, at the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions, provided that the liability arises out of a commercial transaction.

(d) Rate of interest

Rate of interest is also at the discretion of the court. If there is an agreement between the parties, normally, the court will adhere to it and will award interest as agreed unless there are reasons to depart therefrom.⁵¹ From the date of the suit such rate would be six per cent per annum.⁵² Where the plaintiff is a bank or financial institution, the

⁴⁷ Union of India v. Watkins Mayor & Co., AIR 1966 SC 275; Mahabir Prasad v. Durga Datta, AIR 1961 SC 990: (1961) 3 SCR 639; Vithaldas v. Rup Chand, AIR 1967 SC 188:1966 Supp SCR 164; E.I.D. Parry (India) Ltd. v. Labour Court, Madras, 1991 Supp (1) SCC 326: AIR 1991 SC 1544; Supdt. Engineer v. Subba Reddy, (1999) 4 SCC 423: AIR 1999 SC 1747.

⁴⁸ Mahabir Prasad case, supra; State of M.P. v. Nathabhai, (1972) 4 SCC 396: AIR 1972 SC 1545; Indian Insurance & Banking Corpn. Ltd. v. Mani Paravathu, (1971) 3 SCC 893; W.B. Financial Corpn. v. Bertram Scott (I) Ltd., AIR 1983 Cal 381; Executive Engineer v. Abhaduta Jena, (1988) 1 SCC 418: AIR 1988 SC 1520: (1988) 1 SCR 253.

⁴⁹ Rangalal v. Utkal Rasterbhasa Prachar Coop. Press & Publishing Society Ltd., AIR 1975 Ori 137 at p. 138; Tika Sao v. Hari Lal, AIR 1941 Pat 276 at p. 280; Abdul Hussain v. Seth Fazalbhair, ILR 1957 Bom 529 at p. 531; K. Appa Rao v. V.L. Varadraj, AIR 1981 Mad 94.

⁵⁰ Amar Chand v. Union of India, AIR 1964 SC 1658; LIC v. Gangadhar, (1989) 4 SCC 297: AIR 1990 SC 185; Trojan & Co. v. RM.N.N. Nagappa Chettiar, AIR 1953 SC 235:1953 SCR 789; Vijaya Bank v. Art. Trend Exports, AIR 1992 Cal 12.

⁵¹ Mahesh Chandra v. Krishna Swaroop, (1997) 10 SCC 681; Union Bank of India v. Narendra Plastics, AIR 1991 Guj 67: (1990) 2 Guj LR 1283: (1990) 2 Guj LH 555; Associated Construction & Engg. Co. v. Dhanlaxmiben, AIR 1997 Guj 39: (1997) 1 Guj LR 256.

⁵² Indian Insurance & Banking Corpn. Ltd. v. Mani Paravathu, (1971) 3 SCC 893.

rate of interest would be that on which advance is made by such an institution.⁵³

(e) Recording of reasons

Where the court grants interest at the agreed rate, it need not record reasons. But where it awards interest at a lesser rate than the agreed rate between the parties, it should record reasons so that it can be considered whether the discretion has been exercised judicially or not.⁵⁴

(f) Commercial transactions

Where the transaction in question is a "commercial transaction", i.e. a transaction connected with industry trade or business, the rate of interest would be that on which moneys are lent or advanced by nationalised banks in relation to commercial transactions.⁵⁵

"In commercial transactions, grant of interest at the contractual rate ought to be the rule and grant of interest at reduced rate is a rare exception."⁵⁶

(g) Compound interest

Compound interest means interest on interest. Normally, compound interest is not allowed by a court under Section 34 of the Code. But if there is an agreement to that effect or it has been charged during the course of transaction, such interest can be awarded.⁵⁷

(h) Inflation

In some cases, judicial notice of inflation has been taken by courts for awarding higher rate of interest. "Inflation is a phenomenon of which this court (Supreme Court) has to strike a balance between the competing equities."⁵⁸

(i) Decree silent as to interest: Effect

Where the decree does not provide for interest, it will be deemed to have been refused.⁵⁹

⁵³ Union Bank of India v. Narendra Plastics, supra. See also infra, "Commercial transactions".

⁵⁴ Vijay a Bank v. Art. Trend Exports, AIR 1992 Cal 12.

⁵⁵ Proviso to S. 34(1).

⁵⁶ Karnataka State Financial Corpn. v. Nithyananda Bhavan, AIR 1982 Kant 179 at p. 181; Bank of Baroda v. Tiger Electric Motors Co., 1985 Guj LH 1021; Gurdev Singh v. Punjab National Bank, AIR 1998 P&H 106: (1998) 2 P&H 116: (1998) 118 Punj LR 537.

⁵⁷ Panna Lal v. Nihai Chand, AIR 1922 PC 46; State of Punjab v. Scheduled Caste Coop. Land Owning Society Ltd., AIR 1988 P&H 192.

⁵⁸ Union of India v. Muffakam Jah (I), 1995 Supp (1) SCC 686: AIR 1995 SC 498 at p. 507; Shree Hanuman Jute Mills v. Brij Kishore, 1987 Supp SCC 61.

⁵⁹ S. 34(2); see also State of Punjab v. Krishan Dayal Sharma, AIR 1990 SC 2177.

(j) Interest by arbitrator

Interest can be awarded by an arbitrator.⁶⁰

(k) Interest in mortgage suits

Interest can be awarded in mortgage suits.⁶¹

(l) Interest in writ petitions

In appropriate cases, interest can be awarded by a writ-court (Supreme Court or High Court) while exercising powers under Articles 32, 226, 227 or 136 of the Constitution.⁶²

5. COSTS: SECTIONS 35, 35-A, 35-B; ORDER 20-A

(a) General rule

As a general rule, to award costs is at the discretion of the court. Normally, in civil proceedings, "costs shall follow the event".⁶³

(b) Kinds of costs

The Code provides for the following kinds of costs:

(i) General costs—Section 35;

(ii) Miscellaneous costs—Order 20-A;

(iii) Compensatory costs for false and vexatious claims or defences—Section 35-A; and

(iv) Costs for causing delay—Section 35-B.

(i) General costs: Section 35

(A) Object—Section 35 deals with general costs. The object of awarding costs to a litigant is to secure to him the expenses incurred by him in the litigation.⁶⁴ It neither enables the successful party to make any profit out of it nor punishes the opposite party.⁶⁵

⁶⁰ For cases see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. I at pp. 630-33.

⁶¹ Or. 34 R. 11.

⁶² For detailed discussion, see, V.G. Ramachandran, Law of Writs (2006) Vol. II, Vol. V, Chap. 2.

⁶³ S. 35. For detailed discussion and case law, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. I at pp. 645-47.

⁶⁴ Nandlal Tanti v. Jagdeo Singh, AIR 1962 Pat 36 at p. 38; Ganesh Das v. Munsif, South Lucknow, AIR 1976 All 111 at pp. 115-16; N. Peddanna Ogeti v. Katta V. Srinivasayya Setti Sons, AIR 1954 SC 26 at p. 28; Mohd. Mahibulla v. Seth Chaman Lal, (1991) 4 SCC 529; AIR 1993 SC 1241; Ashok Kumar v. Ram Kumar, (2009) 2 SCC 656.

⁶⁵ N. Peddanna Ogeti v. Katta V. Srinivasayya Setti Sons, AIR 1954 SC 26 at p. 28; Anandji Haridas and Co. v. State, AIR 1977 Guj 140 at p. 144: (1977) 18 Guj LR 271 (FB); Gajadhar Mahton v. Ambika Prasad Tewari, AIR 1925 PC 169; Vernekar Industries v. Starit Engg. Co. (P) Ltd., AIR 1985 Bom 253.

(B) "Costs shall follow the event".-The general rule relating to costs is that costs should follow the event, i.e. a successful party must get the costs and the losing party should pay to the other side.⁶⁶

(C) Principles.— The primary rules in respect of award of general costs are as under:

(A) Costs are at the discretion of the court. The said discretion, however, must be exercised on sound legal principles and not by caprice, chance or humour. No hard and fast rules can be laid down and the discretion must be exercised considering the facts and circumstances of each case.

(B) Normally, costs should follow the event and the successful party is entitled to costs unless there are good grounds for depriving him of that right.⁶⁷ To put it differently, the loser pays costs to the winner. However, it does not always depend on who wins and who loses in the end. Even a successful party may be deprived of costs if he is guilty of misconduct or there are other reasons to do so.⁶⁸ Sub-section (2) of Section 35, however, expressly provides that when the court orders that costs should not follow the event, it must record reasons for doing so.⁶⁹

(ii) Miscellaneous costs: Order 20-A

Order 20-A makes specific provision with regard to the power of the court to award costs in respect of certain expenses incurred in giving notices, typing charges, inspection of records, obtaining copies and producing witnesses.

(iii) Compensatory costs: Section 35-A

(A) Object.—Section 35-A provides for compensatory costs. This section is an exception to the general rule on which Section 35 is based, viz. that the "costs are only an indemnity, and never more than indemnity".⁷⁰ This section is intended to deal with those cases in which Section 35

⁶⁶ *Tungabhadra Industries Ltd. v. Govt. of A.P.*, AIR 1964 SC 1372: (1964) 5 SCR 174; *Jugraj Singh v. Jaswant Singh*, (1970) 2 SCC 386: AIR 1971 SC 761; *Kali Prasad v. Ram Prasad*, (1974) 1 SCC 182: AIR 1974 SC 148; *Ashok Kumar v. Ram Kumar*, (2009) 2 SCC 656.

⁶⁷ *Jugraj Singh v. Jaswant Singh*, (1970) 2 SCC 386: AIR 1971 SC 761; *Kali Prasad v. Ram Prasad*, (1974) 1 SCC 182: AIR 1974 SC 148; *Tungabhadra Industries Ltd. v. Govt. of A.P.*, AIR 1964 SC 1372: (1964) 5 SCR 174; *Ashok Kumar v. Ram Kumar*, *supra*.

⁶⁸ *Col. A.S. Iyer v. V. Balasubramanyam*, (1980) 1 SCC 634: AIR 1980 SC 452; *Union of India v. Kamal Kumar*, AIR 1974 Cal 231; *Saroj Rani v. Sudarshan Kumar Chadha*, (1984) 4 SCC 90: AIR 1984 SC 1562; *K.N. Guruswamy v. State of Mysore*, AIR 1954 SC 592: (1955) 1 SCR 305.

⁶⁹ *Jugraj Singh v. Jaswant Singh*, (1970) 2 SCC 386: AIR 1971 SC 761; *Ouseph Varghese v. Joseph Aley*, (1969) 2 SCC 539: (1970) 1 SCR 921.

⁷⁰ *Gundry v. Sainsbury*, (1910) 1 KB 645 at p. 650. See also *Anandji case*, *supra*; *Ashok Kumar v. Ram Kumar*, *supra*; *N. Peddanna Ogeti v. Katta V. Srinivasayya Setti Sons*, *supra*.

does not afford sufficient compensation in the opinion of the court. Under this provision, if the court is satisfied that the litigation was inspired by vexatious motive and was altogether groundless, it can take deterrent action.⁷¹ This section applies only to suits and not to appeals or to revisions.

(B) Conditions— The following conditions must exist before this section can be applied:⁷²

(1) the claim or defence must be false or vexatious;

(2) objections must have been taken by the other party that the claim or defence was false or vexatious to the knowledge of the party raising it; and

(3) such claim must have been disallowed or withdrawn or abandoned in whole or in part.

(C) Maximum amount.—The maximum amount that can be awarded by the court is Rs 3000. But a person against whom an order has been passed is not exempt from any criminal liability. In a subsequent suit for damages or compensation for false, frivolous or vexatious claim or defence, the court will take into account the amount of compensation awarded to the plaintiff under this section.⁷³

(D) Other liability.—A person against whom an order of costs is made is not exempted from any other liability in respect of false or vexatious claim or defence made by him.

(E) Appeal.—An order awarding compensatory costs is appealable.⁷⁴ But no appeal lies against an order refusing to award compensatory costs.⁷⁵ Since such an order can be termed as "case decided", a revision lies.⁷⁶

(iv) Costs for causing delay: Section 35-B

Section 35-B is added by the Amendment Act of 1976. It is inserted to put a check upon the delaying tactics of litigating parties. It empowers the court to impose compensatory costs on parties who are responsible for causing delay at any stage of the litigation. Such costs would be

For general principles as to costs, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. I at pp. 655-56.

⁷¹ T. Arivandanam v. T.V. Satyapal, (1977) 4 SCC 467 at p. 470: AIR 1977 SC 2421 at p. 2423; Priya Wart v. State of Haryana, (1982) 2 SCC 142; Milli Talimi Mission v. State of Bihar, (1984) 4 SCC 500 at pp. 513-14: AIR 1984 SC 1757 at p. 1765; Prem Narain v. Vishnu Exchange Charitable Trust, (1984) 4 SCC 375 at p. 376: AIR 1984 SC 1896 at p. 1897; Manmohan Kaur v. Surya Kant, (1988) 4 SCC 698 at p. 704; S. A. Kini v. Union of India, 1985 Supp SCC 122: AIR 1985 SC 893; Morgan Stanley Mutual Fund v. Kartick Das, (1994) 4 SCC 225 at p. 246.

⁷² S. 35-A(l).

⁷³ S. 35-A(3), (4).

⁷⁴ S. 104(1) (ff).

⁷⁵ S. 104(1), Proviso.

⁷⁶ Purna Chandra v. Secy. of State, AIR 1937 Pat 477; see also *infra*, Pt. III, Chap. 9.

irrespective of the ultimate outcome of the litigation.⁷⁷ The payment of costs has been a condition precedent for further prosecution of the suit, if the party concerned is a plaintiff and the defence, if he is a defendant.⁷⁸

The provisions of this section are mandatory in nature and, therefore, the court should not allow prosecution of suit or defence, as the case may be, in the event of a party failing to pay costs as directed by the court. If, however, a party is unable to pay costs due to circumstances beyond his control, such as strike of advocates or staff, declaration of the last day for payment of costs as a holiday, etc. the court can extend the time.⁷⁹

Very recently, in *Ashok Kumar v. Ram Kumar*⁸⁰, the Supreme Court observed that the present system of levying meagre costs in civil matters is wholly unsatisfactory and does not act as a deterrent to vexatious or luxury litigation. More realistic approach relating to costs is the need of the hour.

⁷⁷ Statement of Objects and Reasons.

⁷⁸ *Hakmi v. Pitamber*, AIR 1978 P&H 145 at p. 146; *Vernekar Industries v. Starit Engg. Co. (P) Ltd.*, AIR 1985 Bom 253; *Prem Sagar v. Phul Chand*, AIR 1983 P&H 385 (FB).

⁷⁹ *Anand Parkash v. Bharat Bhushan*, AIR 1981 P&H 269 (FB).

⁸⁰ (2009) 2 SCC 656 at p. 659.

PART II

16

Special Suits

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1. GENERAL

FOR THE purpose of procedure, suits may be divided into two classes, namely, (1) suits in general; and (2) suits in special cases. We have already discussed in the preceding chapters the procedure required to be followed in the former class of suits. Sections 79 to 93 and Orders 27 to 37 deal with suits in particular cases and the procedure to be followed in such suits.

2. SUITS IN SPECIAL CASES

(1) Suits by or against Government or public officers: Sections 79-82; Order 27

(a) General

Sections 79 to 82 and Order 27 of the Code lay down procedure where suits are brought by or against the Government or public officers. The provisions, however, prescribe procedure and machinery and do not deal with rights and liabilities enforceable by or against the Government. Substantive rights are to be determined in accordance with the provisions of the Constitution.¹

(b) Requirement of notice: Section 80(1)

In ordinary suits, i.e. suits between individuals and individuals, notice need not be given to the defendant by the plaintiff before filing a suit. Section 80 of the Code, however, declares that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of:

(i) in the case of a suit against the Central Government, except where it relates to a railway, A Secretary to that Government; (ii) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;

(iii) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government

¹ Bhagchand v. Secy. of State, AIR 1927 PC 176: (1926-27) 54 IA 338; see also State of Seraikella v. Union of India, AIR 1951 SC 253 at p. 266:1951 SCR 474; Sawai Singhai Nirmal Chand v. Union of India, AIR 1966 SC 1068 at pp. 1071-72: (1966) 1 SCR 986; Arts. 294-300, Constitution of India, see also, Authors' Lectures on Administrative Law (2008) Lecture X.

or any other officer authorized by that Government in that behalf;

(iv) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district; and

(v) in the case of a public officer, such public officer.²

(c) Nature and scope

Section 80 of the Code enacts a rule of procedure and mandates that no suit shall be instituted against the Government or against a public officer until a statutory notice required by the section is served.

The section enumerates two types of cases:

(1) Suits against the Government; and

(2) Suits against public officers in respect of acts done or purporting to be done by such public officers in their official capacity

Regarding the first class of cases, the notice must be given in all cases. Regarding the second class of cases, however, notice is necessary only where the suit is in respect of any act "purporting to be done" by such public officer in the discharge of his duty, and not otherwise.³

(d) Object of notice

The primary object underlying Section 80 is to afford an opportunity to the Government or public officer to consider the legal position and to settle the claim put forward by the prospective plaintiff if the same appears to be just and proper. The Government, unlike private parties, is expected to consider the matter objectively and dispassionately and after obtaining proper legal advice, it can take an appropriate decision in the public interest within a period of two months allowed by the section by saving public time and money and without driving a person to avoidable litigation. The legislative intent behind the provision is that public money should not be wasted for unnecessary litigation. The section has been intended to alert the Government or a public officer to negotiate just claims and to settle them if well-founded without adopting an unreasonable attitude by inflicting wasteful expenditure on the public exchequer.⁴

² S. 80.

³ State of Bihar v. Jiwan Das, AIR 1971 Pat 141:1970 Pat LJR 387; Kanailal Karmakar v. Governor General for India in Council, AIR 1948 Pat 164; Amalgamated Electricity Co. (Belgaum) Ltd. v. Municipal Committee, Ajmer, AIR 1969 SC 227 at p. 231: (1969) 1 SCR 430; State of Maharashtra v. Chander Kant, (1977) 1 SCC 257 at pp. 259-60: AIR 1977 SC 148 at p. 150; see also *infra*, "Acts purporting to be done".

⁴ State of Madras v. C.P. Agencies, AIR 1960 SC 1309; Amar Nath v. Union of India, AIR 1963 SC 424: (1963) 1 SCR 657; Raghunath Das v. Union of India, AIR 1969 SC 674: (1969) 1 SCR 450; State of Punjab v. Geeta Iron & Brass Works Ltd., (1978) 1 SCC 68: AIR 1978 SC 1608; Ghanshyam Dass v. Dominion of India, (1984) 3 SCC 46: AIR 1984 SC 1004; Bihari

The provision of notice thus is intended to alert the Government or public officer to negotiate just settlement or at least have the courtesy to tell the "potential outsider" why his claim is being resisted.⁵

In *Bihari Chowdhary v. State of Bihar*⁶, the purpose behind the provision has been highlighted by the Supreme Court thus:

"When we examine the scheme of the section it becomes obvious that the section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinise the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay. The Government, unlike private parties, is expected to consider a matter covered by the notice in a most objective manner, after obtaining such legal advice as they may think fit, and take a decision in public interest within the period of two months allowed by the section as to whether the claim is just and reasonable and the contemplated suit should, therefore, be avoided by speedy negotiations and settlement or whether the claim should be resisted by fighting out the suit if and when it is instituted. There is clearly a public purpose underlying the mandatory provision contained in the section insisting on the issuance of a notice setting out the particulars of the proposed suit and giving two months' time to Government or a public officer before a suit can be instituted against them. The object of the section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation."⁷

(emphasis supplied)

(e) Law Commission's view

The Law Commission did not favour in retaining the provision of issuing notice under Section 80 before filing a suit by the aggrieved party.

Before more than fifty years, it noted that the section has worked hardship in a large number of cases where immediate relief was

Chowdhary v. State of Bihar, (1984) 2 SCC 627: AIR 1984 SC 1043; *Bhagchand v. Secy, of State*, AIR 1927 PC 176: (1926-27) 54 IA 338; *Dhian Singh v. Union of India*, AIR 1958 SC 274:1958 SCR 781; *Beohar Rajendra Sinha v. State of M.P.*, (1969) 1 SCC 796: AIR 1969 SC 1256; *Ratan Lal v. Union of India*, (1989) 3 SCC 537: AIR 1990 SC 104.

⁵ *State of Punjab v. Geeta Iron & Brass Works Ltd.*, (1978) 1 SCC 68: AIR 1978 SC 1608.

⁶ (1984) 2 SCC 627: AIR 1984 SC 1043.

⁷ *Ibid*, at pp. 629-30 (SCC): at p. 1044 (AIR).

needed. The evidence disclosed that in large majority of cases, the Government or the public officer made no use of opportunity afforded by the section. In most cases the notice remained unanswered. In large number of cases, Government and public officers utilised the provision as a "technical defence" and in a number of cases, the objection had been upheld by the court defeating just claims of the citizens.⁸

The Commission again considered the question. It noted that it was unable to find a parallel provision in any other country governed by the Anglo-Saxon system of law. It opined that in a democratic country like ours there should ordinarily be no distinction of the kind envisaged by Section 80 between the citizen and the State.⁹ In spite of the above well-considered reasoning and recommendation, the Joint Committee of Parliament favoured retention of the provision in "public interest".¹⁰ It is, however, submitted that the suggestion of the Law Commission should have been accepted and the provision as to notice ought to have been deleted as virtually it has not achieved the object for which it had been introduced. Moreover, even in absence of such a provision, it is always open to a court of law to issue notice and call upon the Authorities before granting any relief or without causing administrative inconvenience which can be seen from the exercise of extraordinary jurisdiction by the Supreme Court under Article 32 or by the High Courts under Article 226 of the Constitution.¹¹

(f) Essentials

A notice under Section 80 must contain (i) name, description and place of residence of the person giving notice; (ii) a statement of the cause of action; and (iii) relief claimed by him.

In considering whether the essential requirements of the section have been complied with, the court should ask the following questions:¹²

- (i) Whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person giving the notice?
- (ii) Whether the cause of action and the relief which the plaintiff claims have been set out with sufficient particulars?

⁸ Law Commission's Fourteenth Report at pp. 475-76.

⁹ Law Commission's Twenty-seventh Report at pp. 21-22.

¹⁰ Report of the Joint Committee.

¹¹ For detailed discussion, see, V.G. Ramachandran, Law of Writs (2006) Vol. II, Pt. IV, Chap. II.

¹² State of A.P. v. Gundugola Venkata, AIR 1965 SC 11 at p. 15; (1964) 4 SCR 945; Beohar Rajendra Sinha v. State of M.P., (1969) 1 SCC 796: AIR 1969 SC 1256; Ghanshyam Dass v. Dominion of India, (1984) 3 SCC 46: AIR 1984 SC 1004.

(iii) Whether such notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section? and

(iv) Whether the suit has been instituted after the expiration of two months after notice has been served, and the plaint contains a statement that such a notice has been so delivered or left?

(g) Statutory notice whether empty formality

Statutory notice is not an empty formality. The object is to afford an opportunity to the Government or a public officer to reconsider the matter in the light of the settled legal position and take an appropriate decision in accordance with law. Such notice has, however, become an empty formality. The administration is often unresponsive and shows no courtesy even to intimate the aggrieved party why his claim is not accepted.¹³

In *State of Punjab v. Geeta Iron & Brass Works Ltd.*¹⁴, Krishna Iyer, J. also stated, "We like to emphasize that Governments must be made accountable by parliamentary social audit for wasteful litigative expenditure inflicted on the community by inaction. A statutory notice of the proposed action under Section 80 CPC is intended to alert the State to negotiate a just settlement or at least have the courtesy to tell the potential outsider why the claim is being resisted. Now Section 80 has become a ritual because the administration is often unresponsive and hardly lives up to Parliament's expectation in continuing Section 80 in the Code despite the Central Law Commission's recommendations for its deletion. An opportunity for settling the dispute through arbitration was thrown away by sheer inaction. A litigative policy for the State involves settlement of governmental disputes with citizens in a sense of conciliation rather than in a fighting mood. Indeed, it should be a directive on the part of the State to empower its law officer to take steps to compose disputes rather than continue them in Court. We are constrained to make these observations because much of the litigation in which Governments are involved adds to the caseload accumulation in Courts for which there is public criticism. We hope that a more responsive spirit will be brought to bear upon governmental litigation so as to avoid waste of public money and promote expeditious work in Courts of cases which deserve to be attended to." (emphasis supplied)

¹³ Report of the Joint Committee, Gazette of India, dt. 1-4-1976, Pt. II, S. 2, Extra, at pp. 804-09. See also *Ghanshyam Dass v. Dominion of India*, (1984) 3 SCC 46: AIR 1984 SC 1004; *Bihari Chowdhary v. State of Bihar*, (1984) 2 SCC 627: AIR 1984 SC 1043; *State of Punjab v. Geeta Iron & Brass Works Ltd.*, (1978) 1 SCC 68: AIR 1978 SC 1608; *Raghunath Das v. Union of India*, AIR 1969 SC 674: (1969) 1 SCR 450.

¹⁴ (1978) 1 SCC 68 at p. 69: AIR 1978 SC 1608 at p. 1609.