CONTENTS

UNIT- IV

- Incidental Proceedings
- Commission
    - Letter of Request
- Supplemental Proceedings
    - Arrest before Judgment
    - Attachment before Judgment
- Temporary Injunction
- Receiver
- Appeals
- Reference
- Review
- Revision
- Restitution
- Caveat
- Inherent Powers of Court

Important Questions

References

UNIT- V

- Indian Limitation Act, 1963
- Limitation of Suits, Appeals and Applications
- Effect of Sufficient Cause for not Preferring Appeals or Making Applications within the Period of Limitation
- Legal Disability
- Continuous Running of Time
- Computation of Period of Limitation and Exclusion of Time in Legal Proceeding
- Effect of “Death”, “Fraud”, “Mistake” or “Acknowledgment in Writing”
- Acquisition of Ownership by Possession

Important Questions

Suggested Readings

References

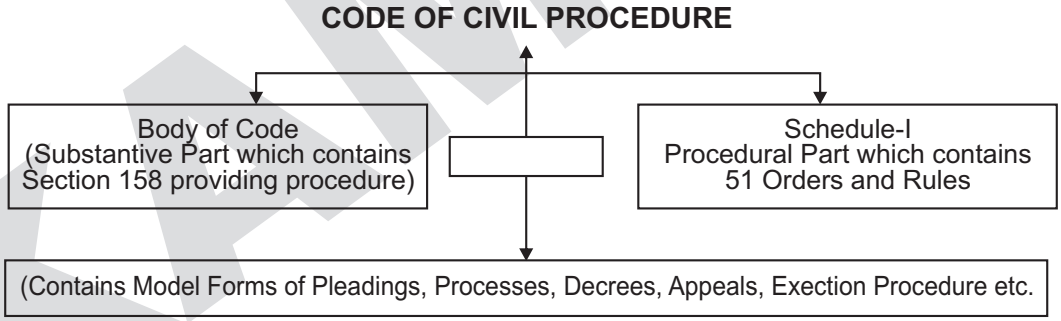
UNIT - I

PRELIMINARY

Introduction: The 'Code of Civil Procedure' is a procedure law, i.e., an adjective law. The Code neither creates nor takes away any right. It only helps in proving or implementing the 'Substantive Law'. The Code contains 158 Sections and 51 Orders. The object of the Code is to consolidate (all the laws relating to the procedure to be adopted by the Civil Courts) and amend the law relating to the procedure of Courts of Civil Procedure. The procedural laws are always retrospective in operation unless there are good reasons to the contrary. The reason is that no one can have a vested right in forms of procedure. The Code of Civil Procedure is not retrospective in operation.- The Code is not exhaustive.

Extent, Applicability and Commencement: It extends to the whole of India, except the State of Jammu & Kashmir, and the State of Nagaland and Tribal Areas. It also extends to the Amindivi Islands, the East Godavari and Vishakhapatnam Agencies in the State of Arunachal Pradesh and the Union Territories of Lakshadweep. The provisions of the Code have also been extended to the Schedule Areas by the amendment Act of 1976. This Act is effective from 01 day of January 1909.

Composition of Code:



The body of the Code containing sections is fundamental and cannot be amended except by the Legislature while the First Schedule of the Code, containing Orders and Rules, can be amended by the High Courts. The sections and Rules must be read together and harmoniously construed, but if rules are inconsistent with the sections, the latter will prevail.

DEFINITIONS

Interpretation Clause: Some of the important words as they have been defined U/s 2 of the Code are as under:

Section -2: In this Act, unless there is anything repugnant in the subject or context-

Section–2 (1) "Code" includes rules.

Section-2(2) "Decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either Preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section-144, but shall not include:-

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

b) any order for dismissal for default.

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

Decree [Section-2 (2)] and Order [Section-2 (14)]

Essential Elements of a decree: The decision of a Court can be termed as a "decree" upon the satisfaction of the following elements:-

I. There must be an adjudication i.

II. Such adjudication must have been given in a suit ii.

III. It must have determined the rights of the parties iii with regard to all or any of the matter in controversy in the suit.

IV. Such determination must be of a conclusive nature iv, and

V. There must be formal expression v of such adjudication.

a) An Adjudication: Adjudication means "the judicial determination of the matter in dispute". If there is no judicial determination of any matter in dispute or such judicial determination is not by a Court, it is not a decree; e.g., an order of dismissal of a suit in default for non appearance of parties, or of dismissal of an appeal for want of prosecution are not decrees because they do not judicially deal with the matter in dispute.

b) **In a Suit:** Suit means a Civil proceeding instituted by the presentation of a Plaint. Thus, every suit is instituted by the presentation of Plaint. Where there is no Civil suit, there is no decree; e.g., Rejection of an application for leave to sue in forma pauper is is not a decree, because there cannot be a plaint in such case until the application is granted.

Exception: But where in an enactment specific provisions have been made to treat the applications as suits, then they are statutory suits and the decision given thereunder are, therefore, decrees; e.g., proceeding under the Indian Succession Act, the Hindu Marriage Act, the Land Acquisition Act, the Arbitration Act, etc.

c) Rights of the parties: The adjudication must have determined the rights i.e., the substantive rights and not merely procedural rights of the parties with regard to all or any of the matter in controversy in the suit.

"Rights of the parties" under section 2(2).

The rights of the parties inter se (between the parties) relating to status, limitation, jurisdictions, frame of

suit. accounts, etc.

"Rights in matters in procedure" are not included in section 2(2); e.g.,

An order of dismissal for non-prosecution of an application for execution, or refusing leave to sue in forma pauperis, or a mere right to sue, are not decrees as they do not determine the rights of the parties.

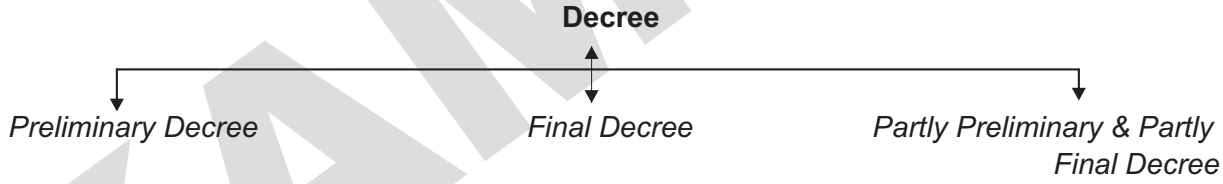
d) Conclusive Determination: The determination must be final and conclusive as regards the Court, which passes it.

An interlocutory order which does not finally decide the rights of the parties is not a decree; e.g., An order refusing an adjournment, or of striking out defence of a tenant under the relevant Rent Act, or an order passed by the appellate Court under Order 41, rule 23 to decide some issues and remitting other issues to the trial Court for determination are not decrees because they do not decide the rights of the parties conclusively.

But,
An order dismissing an appeal summarily under Order-41, or holding it to be not maintainable, or dismissal of a suit for want of evidence or proof are decrees, because they conclusively decide the rights of the parties to the suit.

e) Formal Expression: There must be a formal expression of such adjudication. The formal expression must be deliberate and given in the manner provided by law.

Classes/ Types of Decrees



I. Preliminary Decree: Where an adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit, but does not completely dispose of the suit, it is a ***Preliminary Decree.***

A preliminary decree is only a stage in working out the rights of the parties, which are to be finally adjudicated by a final decree.

Provisions in the Code for passing of the Preliminary Decrees:

a.	Suits for possession and mesne profit;	Order 20 Rule 12
b.	Administrative Suits;	Order 20 Rule 13
c.	Suits for ,Pre-emption;	Order 20 Rule 14
d.	Suits for dissolution of Partnership;	Order 20 Rule 15
e.	Suits for accounts between principal and agent;	Order 20 Rule 16

f. Suits for partition and separate possession; Order 20 Rule 18
g. Suits for foreclosure of a mortgage; Order 34 Rules 2-3

Besides above the Court has a power to pass a preliminary decree in cases not expressly provided in the Code.

In ***Phool Chand Vs Gopal Lal A.I.R. 1967, S.C. 1470,*** the Apex Court has decided that "C.P.C. does not prohibits passing of more that one preliminary decree, if circumstances justify the same and it may be necessary to do so".

II. Final Decree : A decree may be final in two ways-

a. When no appeal is filled against the decree within the prescribed period or the matter has been decided by the decree of the highest Court;

b. When the decree so far as regards the Court passing it, completely dispose of the suit.

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

Under the special circumstances, more than one final decrees can be passed in the same suit, e.g.

Where two or more causes of actions are joined together, there can be more than one final decree.

III.Partly Preliminary and Partly Final Decree: For example, in a suit for possession of immoveable property with mesnes profits, the Court-

a) decrees possession of the property, and
b) directs an enquiry into the mesne profits.

The former part of the decree is finally while the later part is only preliminary because the Final Decree for mesne profits can be drawn only after enquiry and ascertainment of the due amount. In such a case, even though the decree is only one, it is Partly Preliminary and Partly Final.

Order: Section -2 (14)

An order means the formal expression of any decision of a Civil Court which is not a decree.
The adjudication of a court of law may be either Decree or Order; and cannot be both.

Difference Between Decree and Order

Basic of Distinction	Decree	Order
1. Origin	A decree can only be passed in a suit which commenced by presentation of plaint.	An order may originate from a suit, by presentation of a plaint or may arise from a proceeding commenced by a petition or an application.

2. Determination of Rights	A decree is an adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy.	A decree may be Preliminary or Partly Preliminary or Partly Final.
3. Type of Decree	Decree may be Preliminary or Party Preliminary or Party Final.	There cannot be a Preliminary Order.
4. No. of Order/ Decree	In every suit, there can be only one decree, except in certain suits, where two decrees, one Preliminary and one Final are passed.	In case of suit or proceeding number of order may be passed.
5. Appeal From	Every decree is appealable unless otherwise expressly provided.	Every order is not appealable. Only those orders are appealable as specified in the Code i.e. Section 104 & Order 43 Rule 1.
6. Second Appeal	A second appeal lies to the High Court on Certain grounds from the decree passed in First Appeal (Sec. 100). Thus there may be two appeals.	No Second appeal lies in case of appealable orders [Sec. 104(2)].

2(3) "Decree-Holder" means any person in whose favour a decree has been passed or an order capable of execution has been made.

2(5) "Foreign Court" means a Court situate outside India and not established or continued by the authority of the Central Government;

2(6) "Foreign Judgment" means the judgment of a foreign Court;

2(8) "Judge" means the presiding officer of a Civil Court;

2(9) "Judgment" means the statement given by the Judge on the grounds of a decree or order.

2(10) "Judgment-Debtor" means any person against whom a decree has been passed or an order capable of execution has been made.

2(11) "Legal Representative" means a person who in law represents the estate of a deceased person, and includes any person who intermediates with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

2(12) "Mesne Profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession;

The owner of property or any other person who is entitled to have possession of property has a right to the possession of his property and when such person is deprived of such a right by any other person, person, then he is entitled not only to receive back possession of that property but also to damages for wrongful possession from that person.

"Mesne Profits" of property means those profits which the person in wrongful possession of such property actually received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.[1]

The mesne profits are compensation, which is penal in nature.

A decree for mesne profits is to compensate the person who has been kept out of possession even though he was entitled to possession thereof.

Against whom Mesne profits can be claimed?

The mesne profits can be claimed with regard to immoveable property only. Generally, person in wrongful possession and enjoyment of immoveable property is liable for mesne profits.[2]

A decree for mesne profit can be passed against a tresspasser or a person against whom a decree for possession is passed, or against a mortgagee in possession of property even after a decree for redemption is passed or against a tenant holding over at will after a notice to quit has been served him.

To ascertain and provide mesne profits it is not what the plaintiff has lost by being out of possession but what the defendant gained or might reasonably and with ordinary prudence have gained by such wrongful possession. Since interest is an integral part of mesne profits, it has to be allowed in the computation of mesne profits itself. [3]

2(14) "order" means the formal expression of any decision of a Civil Court which is not a decree;

2(16) "prescribed" means prescribed by rules;

2(18) "rules" means rules and forms contained .in the First Schedule or made under section 122 or section 125.

SUITS OF CIVIL NATURE

Meaning: Jurisdiction means power of a Court to hear and decide a case. Jurisdiction of a Court means the power or the extent of the authority of a Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it. The Jurisdiction of a Court means the extent of the authority of a Court to administer justice prescribed with reference to the subject matter, pecuniary value or local limits.[4]

Consent of Parties: It is well settled principle of law that consent cannot confer nor take away jurisdiction of a Court. If the Court has no inherent jurisdiction, neither acquiescence nor waiver nor estoppels can create its But if two or more Courts have jurisdiction to try the suit, the parties may agree among them that the suit should be brought in one of those Courts and not in other, since there is no inherent lack of jurisdiction in the Court.

The defect of jurisdiction cannot be cured by consent of parties and the judgment or order passed by a Court, however precisely certain and technically correct, is null and void6 and its invalidity could be setup whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings.[7]

"A defect of jurisdiction strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."[8]

Lack of and illegal exercise of jurisdiction: "A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed." [9] A decree passed in the inherent lack of jurisdiction, is a nullity, and that nullity can be set up in any collateral proceedings. But in case, the Court has jurisdiction but it is irregularly exercised, the error can e remedied with the help of procedures prescribed by law for setting that error right i.e. in appeal or revision and when there is no such remedy or not availed of, the decision is final. Where the party aggrieved does not take appropriate steps to have that error corrected, the erroneous decree will hold good and will not be open to challenge on the basis of being a nullity.[10]

Decision as to jurisdiction: Whenever the jurisdiction of the Court is challenged, the Court has inherent jurisdiction to decide the said question.[11] The allegations made in plaint decide the forum and e jurisdiction does not depend upon the defence taken by the defendants in the Written Statement.[12]

Kinds of jurisdiction: Jurisdiction of a Court may be classified into the following four categories-

i. **Territorial jurisdiction or Local jurisdiction:** Each Court has vested power to exercise jurisdiction within its own territorial or local limits beyond which it cannot go.

ii. **Pecuniary jurisdiction:** The term 'Pecuniary jurisdiction' connotes the value of the subject matter of the suit. The High Courts and District Courts have no pecuniary limitation but the other Courts have no such unlimited pecuniary jurisdiction. The Court of Civil Judge (Jr. Div.) in the State of Uttar Pradesh can entertain the suits where the value of the subject matter does not exceed Rs. 25,000/-.

iii. **Jurisdiction as to subject matter of dispute:** The different Courts have power to decide different kinds of suit, like the Family Courts have jurisdiction to decide the suits/disputes relating to the matrimonial matters.

iv. **Original and appellate jurisdiction:** In its original jurisdiction, a Court entertains and adjudicates suits while in its appellate jurisdiction a Court decides appeals.

Suit of Civil Nature

Introduction: A litigant having a grievance of a civil nat.ure has a right to institute a civil suit in a civil Court competent to hear and decide the matter unless its cognizance is either expressly or impliedly barred by any statute.[13] It is a fundamental principle of English law that whenever there is a right, there is a remedy.[14]

The word "civil" relates to the community or to the policy and government of the citizens and subjects of a State. The word "civil" indicates a state of society reduced to order and regular government; as against

"criminal" it pertains to private rights and remedies of men and also used in contradistinction to military, ecclesiastical, natural, or foreign.

Generally, civil action is an action wherein an issue is presented for trial, formed by averments of complaint and denials of answer; or replication to new matter; or an adversary proceeding for declaration, enforcement, or protection of a right or redressal or prevention of a wrong. It is a personal action which is instituted to compel payment, or doing of some other thing which is purely civil.

Civil proceeding includes, at least, all proceedings affecting civil rights which are not criminal. It is a proceeding in which some rights to property or other civil rights are involved, no matter whether the jurisdiction of the court is ordinary, special or extraordinary. If the proceeding is in aid of establishing a civil right or for disputing one, it would be a civil proceeding.

Meaning: According to S.9 a Civil Court has jurisdiction to try a suit, when the following two conditions are satisfied:

i. the suit is of a Civil nature, and
ii. the cognizance of such a suit is neither expressly nor impliedly barred.

The word "civil" has not been defined in the Code. The word "civil" means "pertaining to the private rights and remedies of a citizen as distinguished from Criminal, political, etc."[15] The expression "Civil Nature" is wider than the expression "Civil Proceedings".[16] Thus a suit is of a civil nature if the private question therein relates to the determination of a civil right and enforcement thereof. It is not the status of parties to the "suit, but the subject matter of it which determines whether or not the suit is one of a civil nature. The expression is "suit of a civil nature will cover private rights and obligations of a citizen. Political and religious questions are not covered by that expression."

Explanation- 1 of 8.9 says that a suit in which the right to property or to an office is contested is a suit of a Civil Nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Illustrations of suits of a civil nature: The followings are the illustrations of the suits of a 'Civil Nature'-

Suits relating to right to property, right to worship, taking out of religious procession, right to share in offerings, suits for damages for civil wrong, for breach of contract, for a specific relief, for restitution of conjugal rights, for dissolution of marriage, for rent. for or on accounts; etc., etc.

But the *following are not suits of a civil nature:-*

Suits involving principally caste questions, purely religious rights or ceremonies, for upholding mere dignity or honour or for recovery of voluntarily payments or offerings.

Cognizance not barred: Court to try all civil suits unless barred-

'The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."17 The cognizance of a suit may be barred either expressly or impliedly.

a. **Suits expressly barred:** A suit is said to be "expressly barred" when it is barred by any enactment for the time being in force18 by a competent Legislature, while keeping itself within the field of legislation and without contravening any provision of the constitution. Every presumption should be made in favour of the jurisdiction of the Civil Court and the provisions of the exclusion of the jurisdiction of a Court must be strictly construed.[19] It is well settled that a civil court has inherent power to decide its own jurisdiction.[20]

   The matters falling within the exclusive jurisdiction of the Revenue Courts or under the Criminal Procedure Code or the matters dealt with by special tribunals, under the relevant statutes; eg., Bar Council, Medical Council, University, Club etc., are expressly barred from the cognizance of a civil court.

b. **Suits impliedly barred:** A suit is said to be "impliedly barred" when it is barred by general principle of law. Where an Act creates an obligation and enforces the performance in a specified manner, that performance cannot be enforced in any other manner, e.g., certain suits of a civil nature are barred from the cognizance of a Civil Court on the grounds of public policy.[21] Thus, no suit shall lie for recovery of costs incurred in Criminal prosecution or for enforcement of a right upon a contract hit by Section 23 of Indian Contract Act, 1872 or against any Judge for acts done in the course of his duties. A Civil court has no jurisdiction to adjudicate upon disputes of political nature.

RES SUB JUDICE AND RES-JUDICATA

Res Sub Judice (Stay of Suit)

Section-10: Provides

No court shall proceed with the trial' of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any other Court beyond the limits of India established or constituted by the Central Government and having like jurisdiction or before he Supreme Court."

Explanation: The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.

Object: The object of S.1 0 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue.[22] The section intends to prevent a person from multiplicity of proceedings and to avoid a conflict of decisions.

Conditions: This section will apply where the following conditions are satisfied:

1) **Presence of Two Suits:** Where there are two suits, one previously instituted and the other subsequently instituted.

2) **Matter in Issue:** The matter in issue in the subsequent suit must be directly and substantially in issue in the previous suit.

3) **Same Parties:** Both the suits must be between the same parties or between their representatives.

4) **Pendency of Suit:** The previously instituted suit must be pending:-

a. in the same Court in which the subsequent suit is brought, or
b. in any other Court in India, or
c. in any Court beyond the limits of India established or empowered by the Central Government, or
d. before the Supreme Court.
e. **Jurisdiction:** The Court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit.
f. **Same Title:** Such parties must be litigating under the same title in both the suits.

Provisions are Mandatory: The provisions contained in section-10 are mandatory and no discretion is left with the Court. The order staying proceedings in the subsequent suit can be made at any stage.

A suit pending in a Foreign Court: The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.23

Inherent power to stay: A civil court has inherent power U/s 151 to stay a suit in the ends of justice or to consolidate different suits between the same parties containing the same matter in issue substantially.

Decree passed in contravention of S.10: It is the trial and not the institution of the subsequent suit which is barred under this section and therefore, a decree passed in contravention of S.10 is not a nullity, and the same can be executed.

Consent of parties: The provision of Section 10 is a rule of procedure which can be waived by a party and where the parties waive their right and expressly ask the Court to proceed with the subsequent suit, they cannot afterwards challenge the validity of the proceedings.

Res-Judicata
(A case or suit already decided)
(The rule of Conclusiveness of judgment)

Meaning: *"Res-judicata"* consists of two Latin Words, 'Res' means a thing or a matter or a question and 'Judicata' means adjudicated, adjudged or decided. Therefore, the expression 'Res-judicata" means "a thing or matter already adjudged or adjudicated or decided".

Res-judicata means "a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto."[24]

The principal of Res judicata is based on the need of giving finality to judicial decisions.[25] When a matter-whether on a question of fact or a question of Law-has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again.[26]

Section 11: "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

Explanation-I: The expression "Former Suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation-II: For the purposes of this section the competence of Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.

Explanation-III: The mater above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation-IV: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in suit.

Explanation-V: Any relief claimed in the plaint, which is not expressly granted by the degree, shall, for the purposes of this section be deemed to have been refused.

Explanation- VI: Where persons litigate bona fide in respect of a public right or of a private right claimed, in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation-VII: The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree" question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation-VIII: An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit in which such issue has been subsequently raised,"

Object :
The doctrine of Res Judicata is based upon the following four maxims-

a. ***Nemo debet lis vexari pro una et eadem causa:*** no man should be vexed twice over for the: same cause;

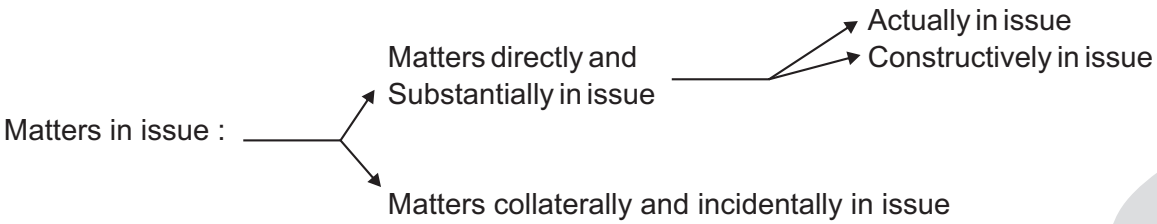
b. ***Interest republicae ut sit finis litium:*** it is in the interest of the State that there should be an end to a litigation;

c. ***Res judicata pro veritate occipitur:*** **an judicial decision must be accepted as correct.**

d. ***Res judicata pro veritate habetur: an adjudicated matter shall be deemed correct.***

Important Terms: To understand the doctrine of Res-judicata, it is essential to know the meaning of the following terms-

Matters in Issue: The expression 'matter in issue' means the right litigated between the parties. The matters in issue may be:



Directly and substantially in issue: "A matter is 'directly and substantially in issue' if it is necessary to decide it in order to adjudicate the principal issue and if the judgment is based upon at decision."

Directly: A matter cannot be said to be directly in issue if the judgment stands whether the fact exists or does not exist.

Substantially: means essentially, materially or in a substantial manner. A matter can be said to be substantially in issue if it is of importance for the decision of a case.

In order that a matter decided in a former suit may operate as res judicata in a subsequent suit, it must have been directly and subsequently in issue in the former suit.
Illustration: A sues B for rent due. The defence of B is that no rent is due. Here the claim to rent is the matter in respect of which the relief is claimed. The claim of the rent is, therefore a matter, directly and substantially in issue.

Actually in issue: Expl. III

A matter is actually in issue when it is in issue directly and substantially and a competent Court decides it on merit. A matter is actually in issue when it is alleged by one party and denied or admitted by the other. (Expl. III)

Constructively in issue : Expl. IV

A matter can be said be constructively in issue when it "might and ought" to have been made a ground of defence or attack in the former suit. A. matter is constructively in issue when it might and ought to have been made a ground of defence or attack in the former suit. (Expl. IV)

Collaterally or incidentally in issue: "A matter is 'collaterally or incidentally in issue' if it is necessary to decide it in order to grant relief to a plaintiff or to a defendant and the decision on such issue either way does not affect the final judgment.

A collateral or incidental issue means an issue which is ancillary to the direct and substantive issue. It refers to a matter in respect of which no relief is claimed and yet it is put in issue to enable the Court to adjudicate upon the matter which is directly and substantially in issue. Decisions on the matters collateral and incidental to the main issues in the case will not operate as *res-judicata.*

Illustration: A sues B for the rent due: B pleads abatement of the rent on the ground that the actual area of the land is less than that mentioned in the lease deed. The Court, however, finds the area greater than that shown in the lease deed. The finding as to the excess area, being ancillary to the direct and substantial issue, is not res judicata.

It was held in ***re Gangabai Vs Chhabubai AIR 1982 SC 20*** that in order to operate as res judicata the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purposes of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata.

The question whether a matter was directly and substantially in issue or merely collaterally or incidentally in issue must be decided on the facts of each case.

In **Vithal Yashwant v. Shikandarkhan, AIR 1963 SC 385** the Court held that "It is well settled that if the final decision in any matter at issue between the parties is based by a Court on its decision on more than one point - each of which by itself would be sufficient for the ultimate decision- the decision on each of these points operates as res judicata between the parties."

Illustrations: A sues B (i) - for a declaration of title to certain lands; and (ii) - for the rent of those lands. B denies A's title to the lands and also contend that no rent is due. In this case, there are two matters in respect of which relief is claimed, viz. (i) - the title to the lands; and (ii) the claim for rent. Both these matters are, therefore, directly and substantially in issue.

Conditions to apply S.11: To constitute a matter as Res judicata U/s 11, the following conditions must be satisfied -

a. **Matter in Issue :** The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.

b. Same Parties: The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.

c. Same Title: Such parties must have been litigating under the same title in the former suit.

d. Competent Court: The court which decides of the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequent raised.

e. Final decision of former suit: The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit.

Constructive Res-Judicata
(Prayer for the same relief in the subsequent suit)

The doctrine of constructive Res-judicata is provided in the Explanation IV of section 11 which explains that where the parties have had an opportunity of controverting a matter, that should be taken to be the same

thing as if the matter has been actually controverted and decided. The object of Expl. IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence which were open to him.

The rule of Constructive res judicata is an artificial form of res judicata, and provides that if a plea could have been taken by a party in a proceeding between him and his opponent, he should not be permitted to take that plea against the same party in a subsequent proceeding with reference to the same subject matter. That clearly is opposed to consideration of Public Policy. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by Courts would also be materially affected.

In ***Forward Construction Co. Vs. Prabhat Mandai AIR 1986 S.C.,*** the Court observed that "an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence."

The principle underlying Expl. IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it can not be said to have beer actually heard and decided. It could only be deemed to have been heard and decided.

In Workmen, C.P. Trust Vs Board of Trustees AIR 1978 S.C. 1283, the Supreme Court held that "The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided".

Illustrations[27]

1. A files a suit against B for declaration that he is entitled to certain lands as heir of C. The suit is dismissed. The subsequent suit, claiming the same property on the ground of adverse possession, is barred by constructive res judicata.

2. A files a suit against B to recover money on a pro-note. B contends that the promissory note was obtained from him by undue influence. The objection is overruled and suit is decreed. B cannot challenge the promissory note on the ground of coercion or fraud on subsequent suit, in as much as he ought to have taken that defence in the former suit.

3. As a mortgagor A sues B for redemption of certain property alleging that he has mortgaged it with possession to B. The mortgage is not proved and the suit is dismissed. A files another suit against B for possession of the same property claiming to be the owner thereof. The suit is not barred.

4. A sues B for a declaration that he is entitled to certain property as an heir of X. The suit is dismissed. A files another suit for injunctions on the ground that he had become an owner of the property by adverse possession. This ground was available to him even at the time of previous suit but was not taken at that time. The subsequent suit is barred.

Section 11 is not exhaustive

It has been held in ***Lal Chand Vs Radha Kishan A IRs. 1977 S C 789 by Chandrachud, J.*** that ..... Section 11 is not exhaustive and the principle which motivates that section can be extended to cases which do not fall strictly within the letter of Law. The principle of res judicata is convinced in the larger public interest, which requires that all litigation must, sooner than later, come to an end.

Waiver of Plea of res-judicata: The plea of res judicata is not one, which affects the jurisdiction of the Court. The doctrine of res jUdicata belongs to the domain of procedure and the party may waive the plea of res judicata. Similarly, the Court may decline to go into the question of res judicata on the ground that it has not been properly raised in the proceedings or issues.

Res-judicata between co-defendants: A matter may operate as res-judicata between co- defendants and co- plaintiffs if the following conditions are satisfied:

a. There must be conflict of interest between the co-defendants.

b. It must be necessary to decide that conflict in order to give relief to the plaintiff.

c. The question between the co- defendants must have been finally decided; and

d. The co- defendants were necessary or proper parties in the former suit.

Illustration: A sues B, C and D and in order to decide the claim of A, the Court has to interpret a will. The decision regarding the construction of the will on rival claims of the defendants will operate as res-judicata in any subsequent suit by any of the defendants against the rest.

Distinction between Res Sub – Judice (S.10) and Res- Judicata (S.11)

Res-judicata	Res Sub-Judice
1. It applies to a matter adjudicated upon (Res-judicatum)	It applies to a matter pending trial (sub-Judice)
2. It bars the trial of a suit or an issue, which has been decided in a former suit.	It bars trial of a suit which is pending decision in a previously institute suit.

Res-judicata between different stages of the same proceedings: The principle of res- judicata applies in between two stages in the same litigation[28] ". It is well settled that principle of res-judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent stage of that proceeding ….."[29]

Res-judicata and Issue Estoppel:

Issue Estoppel: An issue or fact of law which has been determined in an earlier proceeding cannot be raised in a subsequent proceeding. The court has few inherent power in the interest of finality not to allow a particular issue which has already been litigated to be reopened.

There is a distinction between 'issue estoppel' and 'res-judicata'. Res-judicata debars a court from exercising its jurisdiction to determine the *lis* if it has attained finality between the parties whereas the doctrine of issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the later proceeding.[30]

Criminal Proceedings: The doctrine of res-judicata is of universal application, which applies even to criminal proceedings. Once a person is acquitted or convicted by a competent criminal court, he cannot once again, be tried for the same offence.

Writ Petitions: The General principle of res-judicata applies even to Writ petition filed under Article 32 of the Constitution. This was held, first time, in re ***Sharma v Krishna Sinha AIR 1960 SC.***

It would not be open to a party to ignore the judgment passed on a writ petition filed by a party under Article 226, which is considered on merits as a contested matter and is dismissed, and again move the High Court under Article 226 or the Supreme Court under Article 32 on the same facts and for obtaining the same or similar orders or writs.[31]

Writ Petition and Constructive Res-Judicata: The question whether the rule of constructive res-judicata can be applied to writ petitions, was first answered by the Hon'ble Supreme Court in Amolgamated Coalfields Ltd. v. Janapada Sabha AIR 1964 SC. It held that "In our opinion, constructive res-judicata which is a special and artificial form of res-judicata enacted by Section 11 of the code should not generally be applied to writ petitions filed under Article 32 or Article 226."

But in re Devilal v S. T.O. AIR 1965 SC, the Court had decided that the principle of constructive res-judicata also applies to writ petitions.[32] The principle of res-judicata (constructive res-judicata)[33] is not applicable to the writ petition of Hebeas Corpus.

Res-judicate and Estoppel: Res-judicata is really estoppel by verdict or estoppel by judgment (record). The rule of constructive res-judicate is nothing else but a rule of estoppel. Even then, the doctrine of res-judicata differs in essentials particulars from the doctrine of estoppel.

Distinction Between Res-judicata & Estoppel

1. **Origin:** It results from a decision of the Court.

   Estoppel flows from the act of parties.

2. **Basis :** The rule is based upon public policy, viz that there should be an end to litigation. It bars multiplicity of suits.

   It proceeds upon the doctrine of equity; that he who by his conduct, has induced another to alter his position to his disadvantage cannot turn round and take advantage of such alteration of the other's position.

3. **Affects the jurisdiction :** It ousts the jurisdiction of a court to try a case and precludes an enquiry in limine.

   In other words, estoppel prevents multiplicity of representations.

4. **Stop the Party:** It prohibits a man averring the same thing twice in successive litigations.

   It is only a rule of evidence and shuts the mouth of a party.

5. **Binding effect on party/parties:** This rule presumes conclusively the truth of the decision in the former suit. It binds both the parties to a litigation.

   Estoppel prevents him from saying one thing at one time and the opposite at another. The rule of estoppel prevents a party from denying what he has once called the truth. i.e. estoppel binds only that party who made the previous statement or showed the previous conduct.

FOREIGN JUDGMENT
(A judgment of a Foreign Court)

Meaning: S.2(6) defines the foreign judgment as the "judgment of a foreign Court". The term foreign Court has been defined in s. 2(5) as a Court situate outside India and not established or continued by the authority of the Central Government. The examples of the foreign Courts are the Courts in England, Pakistan, Ceylon etc.

Object: The judgment of a foreign Court is enforced on the principle that where a Court of Competent Jurisdiction has adjudicated upon a claim, a legal obligation arises to satisfy that claim. Section 13 embodies the principle of res-judicata in foreign judgments. This provision embodies the principle of private International Law that a judgment delivered by a foreign Court of competent jurisdiction can be enforced in India.

Example: A sues B in a foreign Court. The suit is dismissed. The judgment will operate as a bar to a fresh suit by A against B in India on the same cause of action.

Conclusive Nature: Section 13 of the Code provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between- parties under whom they or any of them claim litigating under the same title except as specified in clauses (a) to (f) of Sec. 13.

When Foreign Judgment Not Binding: According to Section 13 under the following six cases, a foreign judgment shall not be conclusive -

1) Foreign Judgment not by a Competent Court;
2) Foreign Judgment not on merits;
3) Foreign Judgment against International or Indian Law;
4) Foreign Judgment opposed to Natural Justice; Foreign Judgment obtained by fraud;
5) Foreign Judgment founded on a breach of Indian Law;

Foreign Judgment Not by Competent Court: A foreign judgment must be pronounced by a Court of competent jurisdiction and must be by a Court competent both by the law of the State which has constituted it and in an International sense and it must have directly adjudicated upon the 'matter' which pleaded as res-

judicata. Only the judgment and not the reasons for the judgment is conclusive.

Foreign Judgment Not on Merits: A judgment is said to be given on merits when, after taking evidence and application of mind, the Judges decide the case one-way or the other. The dismissal of suit for default of appearance or non-production of the document by the plaintiff or passing of decree due to default of defendant in furnishing security are not on merits and can not be conclusive.

Foreign Judgment Against International or Indian Law: The mistake of International or Indian Law must be apparent on the face of the proceedings.

In **Narsimha Rao V. Venkata Lakshmi (1991) 3 SCC,** the Court held that "when a foreign judgment is founded on a jurisdiction or on a ground not recognized by International or Indian Law, it is a judgment which is in defiance of the law. Hence, it is not conclusive of the matter adjudicated therein and, therefore, not enforceable in this country.

Foreign Judgment Opposed to Natural Justice: The judgment pronounced by a Foreign Court must e after the observation of the judicial process, i.e., the Court rendering the Judgment must observe the minimum requirements of Natural Justice. The judgment to be conclusive must be composed of impartial persons, act fairly, without bias, and in good faith; it must give reasonable notice to the parties to the dispute and to afford each party adequate opportunity of presenting his case.

Foreign Judgment Obtained by Fraud: It is the fundamental Principle of Private international Law that a Foreign Judgment is obtained by fraud, it will not operate as res-judicata. It is the settled preposition of law that a judgment or decree obtained by playing fraud on the Court is a nullity and non est in the eye of law. Such a judgment/decree by the first Court or by the highest Court has to be treated as a nullity by every Court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings.[34]

Foreign Judgment Founded On Breach of Indian Law: It is implicit that the foreign law and foreign judgment would not offend against our public policy.[35] Thus, a foreign judgment .for a gambling debt or on a claim which is barred under the Law of Limitation in India is not conclusive.

Presumption as to Foreign Judgments: Section 14 provides that "the Court shall presume, upon the reduction of any document purporting to be certified copy of the foreign judgment, that such judgment pronounced by a Court of Competent jurisdiction unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction."

Enforcement of Foreign Judgments: A conclusive judgment U/s 13 can be enforced in India in the following two ways:-

1) **By Instituting a suit on such Foreign Judgment:** A foreign judgment may be enforced by institution of a suit within a period of 3 years[36] from the date of the foreign judgment. The Apex Court has held in Roshan Lal V Mohan Singh AIR 1975 SC that any decision of a foreign Court, Tribunal or Quasi-judicial authority is not enforceable in a Country unless such decision is embodied in a decree of a Court of that Country; or

2) **By Institution of Executing Proceedings:** A foreign judgment may be enforced by way of execution proceedings as per specified U/s 44-A of the Code and where all the conditions of S. 13 (a) to (f) are