

**Example<sup>51</sup>:** A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1000. The two claims both definite, pecuniary demands may be set-off.

A sues B for compensation on account of trespass. B holds a promissory- note for Rs. 1,000, from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for as soon as A recovers, both sums are definite pecuniary demands.

**Conditions<sup>52</sup>:** A defendant may claim a set-off, if the following conditions are satisfied:-

- I. The suit must be for the recovery of money.
- II. The sum of money must be ascertained.
- III. Such sum must be legally recoverable.
- IV. It must be recoverable by the defendant or by all the defendants, if more than one.
- V. It must be recoverable by the defendant from the plaintiff or from all plaintiffs'; if more than one.
- VI. It must not exceed the pecuniary jurisdiction of the Court in which the suit is brought.

Both the parties must fill in the defendant's claim to set-off, the same character as they fill in the plaintiffs suit.

**Equitable set-off:** The provision of Rule 6 are not exhaustive. Order VIII, Rule 6 deals with legal set-off while Order XX, Rule 19(3) recognizes an equitable set-off.

An equitable set-off may be claimed by the defendant in respect of an unascertained sum of money, provided that both the cross demands arise out of one and the same transaction or are so connected, in the nature and circumstances, that they can be looked upon as parts of one transaction.

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

**Distinction between legal and equitable set-off:**

| Basis of Distinction | Legal Set - Off   | Equitable Set-off  |
|----------------------|---|--|
| 1. Claim for         | A legal set-off must be for an ascertained cum of money.  | An Equitable set-off may be allowed even for an unascertained sum of money   |
| 2. As Right          | A legal set-off can be claimed as a right and the court is bound to entertain and adjudicate upon it. | An equitable set-off cannot be claimed as a right and it is granted at the court's discretion and the court may refuse to adjudicate upon it |
| 3. Same Transaction  | In a legal set-off, it is not necessary that the cross demands arise out of                           | An equitables set-off can be allowed only when the cross- demands arise  |

out of the same transactions.

out of the same transactions.

4. Legally Recoverable

The amount claimed as set-off must be legally recoverable and should not be time barred.

In cases, where there is a fiduciary relationship between the parties, a time barred claim may be allowed by way of equitable set-off. But even in cases of equitable- set-off where the defendant's claim was not barred at the date of suit but it is barred at the date of W.S., it will be allowed only to the extent of plaintiff's claim, and a decree for balance, if found due to him, shall not be passed in his favour.

5. Court Fee

A legal set-off requires a Court fee.

No Court fee is required in equitable set-off.

**Counter-Claim (Rules 6-A to 6-G)**

**Meaning:** It is a claim made by the defendant in a suit against the plaintiff and can be enforced by a cross action. Counter claim is a cause of action in favour of the defendant against the plaintiff.

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

**In Laxmidas Vls Nanabhai AIR 1984, 'SC.** it was held that the Court has power to treat the counter claim as a cross suit and hear the original suit and counter claim together if the counter claim is properly stamped.

Order VIII, Rule 6-A deals with the counter claim, which is as under:

- a. A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter- claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered defence or before the time limited for delivering his defence has expired whether such counter claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

- b. Such counter claim shall be the same effect as a cross- suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.
- c. The plaintiff shall be at a liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

d. The counter-claim shall be treated as a plaint and governed by the rules applicable to the plaints.

**Rule 6 B: Counter Claim to be stated:** Where any defendant seeks to reply upon ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.

**Rule 6 C : Exclusion of Counter Claim:** Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the-plaintiff may, at the time before issues are settled in relation to the counter-claim, apply to the Court which may, on the hearing of such an application make such an order as it thinks fit.

**Rule 6 D: Effect of discontinuance of suit:** If in any case in which the defendant sets up a counter claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.

**Rule 6 E : Default of plaintiff to reply Counter- Claim:** If the plaintiff makes default in putting in a reply to the counter claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter claim made against him, or make such order in relation to the counter claim as it thinks fit.

**Rule 6 F : Relief to defendant where Counter Claim succeeds:** Where in any suit a set-off or counter-claim is established as a defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be, the Court may give judgment to the party entitled to such balance.

**Rule 6 G : Rules relating to written statement to apply :** The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter claim.

**Rule 7: Defence or set-off or counter- claim founded upon separate grounds:** Where the defendant relies upon several distinct grounds of defence of set-off or counter - claim founded upon separate and distinct facts, they shall be stated, as far as may be separately and distinct.

**Distinction between Set-off and Counter-claims**

| Basis of Distinction | Set-off   | Counter-Claim   |
|----------------------|---|---|
| 1. Nature            | It is statutory defence to a plaintiff's actions.                                   | It is substantially a cross- action   |
| 2. Same Transaction: | It must be either for an ascertained sum or must arise out of the same transaction. | It need not arise out of the same transaction.                                  |
| 3. Date for recovery | In legal set-off the amount must be recoverable at the date of the suit.            | In it the amount must be recovered of amount: at the date of Written Statement. |
| 4. Demand:           | The defendant's demand for an amount below or up to the suit                        | Where -the demand is for a larger   |

claim is a set-off in strict sense.

amount the claim for excess amount is really a counter.

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

### SUITS BY INDIGENT PERSONS (ORDER XXXIII)

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

**Meaning of Indigent Person:** An indigent person is one who is not possessed of sufficient means due bad personal economic condition. The word 'person' includes juristic person. According to Explanation f Rule 1, Order XXXIII,

An indigent person is a person, who

- a. if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or
- b. where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the Subject matter of the suit.

#### Explanations II and III read as under -

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

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

**Procedure to sue as Indigent Person:** Before an indigent person can institute a suit, permission of Court to sue as an indigent person is required. As per rule 3, the application for permission to sue as a indigent person, shall be presented to the Court by the applicant in person, unless he is exempted from appearing in court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person:

PROVIDED that, where there are more plaintiffs than one, it shall be sufficient if the application is presented by one of the plaintiffs.

**Contents of Application:** Every such application shall contain the following particulars:-

- a. the particulars required in regard to plaints in suits;
- b. a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof; and
- c. it shall be signed and verified as provided in Order VI rules 14 and 15.

The suit commences from the moment an application to sue in forma pauperis is presented<sup>53</sup>. According to Rule 1-A, an inquiry to ascertain whether or not a person is an indigent person shall be made.

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

**Examination of Applicant and Rejection of Application:  
Examination: (Rule 4)**

1. Where the application is in proper form and duly presented, the court may if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.
2. If presented by agent, court may order applicant to be examined by commission - Where the application is presented by an agent, the court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

**Rejection of Application: Rule 5:** The court shall reject an application for permission to sue as an indigent person –

1. Where it is not framed and presented in the manner prescribed by rules 2 and 3, or
2. Where the applicant is not an indigent person, or
3. Where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as an indigent person:

PROVIDED that no application shall be rejected if, even after the value of the property disposed of by the applicant is taken into account, the applicant would be entitled to sue as an indigent person, or

4. Where his allegations do not show a cause of action, or
5. Where he has entered into any agreement with reference to the subject matter of the proposed suit under which any other person has obtained an interest in such subject matter, or
6. Where the allegations made by the applicant in the application show that the suit would be barred by

any law for the time being in force, or

7. Where any other person has entered into an agreement with him to finance the litigation.

**Fixing of Date and Notice to the opposite Party and the Government Pleader<sup>54</sup>:** Where there is ground as stated in rule 5, to reject the application the Court shall fix a day (of which at least ten days' ear notice shall be given to the opposite party and the government pleader) for receiving such evidence as the applicant may adduce in proof of his indigency, and for hearing any evidence which may be adduced in disproof thereof.

**Procedure at Hearing<sup>55</sup>:** On the date fixed, the Court shall examine the witness (if any) produced by either party to the matters specified in clause (b), clause (c) and clause (e) of rule 5, and may examine the applicant or his agent to any of the matters specified in Rule 5 the Court after hearing the argument shall either allow or refuse to allow the applicant to sue as an indigent person.

**Procedure if Application Admitted<sup>56</sup>:** Where the application is granted, it shall be deemed the plaintiff in a suit and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court fee or fees payable for service of process in respect of any petition, appointment of a pleader or other proceedings connected with the suit.

**Withdrawal of Permission<sup>57</sup>:** The Court may, on the application of the defendant, or of the government pleader and after giving seven days notice in writing to the plaintiff, withdraw the permission granted to the plaintiff to sue as an indigent person on the following conditions:

1. if he is guilty of vexatious or improper conduct in the course of the suit;
2. if it appears that his means are such that he ought not to continue to sue as an indigent person; or
3. if he has entered into any agreement with reference to the subject matter of the suit under which any other person has obtained an interest in such subject matter.

#### **Realization of Court fees: (Rule 14)**

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

**b. Where Indigent person fails:** (Rule 11) Where the plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed,-

I. because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court fee or postal charges (if any) chargeable for such service or to present copies of the plaint or concise statement, or

II. because the plaintiff does not appear when the suit is called on for hearing, the court shall order the

plaintiff, or any person added as a co-plaintiff to the suit, to pay the court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person.

- c. Where an indigent person's suit abates :(Rule 11.A)** Where the suit abates by reason of the death of the plaintiff or of any person added as a co-plaintiff, the court shall order that the amount of court fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person shall be recoverable by the State government from the estate of the deceased plaintiff.

According to rule 15, where the application to sue as an indigent person is refused, it shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided he pays the costs incurred by the Government Pleader and the opposite party in opposing in application.

When an application is either rejected under rule 5 or refused under rule 7, the Court will grant time to the applicant to pay the requisite Court fee within the specified time or within time extended by the Court from time to time, and upon payment of such Court fee and on payment of the costs referred to in rule 15 within that time, the suit shall be deemed to have been instituted on the date on which the application for permission to sue as an indigent person was presented.<sup>58</sup>

The costs of an application for permission to sue as an indigent person and of an inquiry into indigence shall be costs in the suit.<sup>59</sup>

**Defence by an indigent person: Rule 17:** Any defendant, who desires to plead a set off or counter claim, may be allowed to set up such claim as an indigent person, and the rules contained in this Order shall, so far as may be, apply to him as if he were a plaintiff and his written statement were a plaint.

Subject to the provisions of this order, the Central or State Government may make such supplementary provisions for free legal services to those Who have been permitted to sue as indigent persons,<sup>60</sup> and where an indigent person is not represented by a pleader, the Court may, if the circumstances of the case so require, assign a pleader to him.<sup>61</sup>

**Indigent Person<sup>62</sup>:** A person unable to pay Court fees on memorandum of appeal may apply to allow him to appeal as an indigent person. The necessary inquiry as prescribed in Order XXXIII will be made before granting or refusing the prayer. But where the applicant was allowed to sue as an indigent person in the trial Court, no fresh inquiry will be necessary if he files an affidavit that he continues to be an indigent person.

## **SUITS IN PARTICULAR CASES**

### **Suits by or Against the Government or the Public Officers in their Official Capacity (Section 79 to 82 and Order XXVII)**

**Title to Suit:** The authority<sup>63</sup> to be named as a plaintiff or defendant, in any suit by or against Government shall be.

- 1. the Union of India:** Where the suit is by or against the Central Government, or
- 2. the State:** Where the suit is by or against the State Government.

**Requirement of Notice:** No suit shall be instituted, except as provided in sub-section (2) of section 80 against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity unless a Notice in writing has been issued and until the expiration of two months next after notice.<sup>64</sup>

**Notice to whom:**

- a. Against Government: The Notice issued under section 80(1) shall be delivered to, or left at the office of—
- 1) In the case of a suit against Central Government -
    - i) a Secretary to that Government<sup>65</sup>: when it does not relate to a railway, and
    - ii) the General Manager of Railway<sup>66</sup>: when it relates to a railway.
  - 2) In the case of a suit against the State Government of Jammu and Kashmir<sup>57</sup> -
    - i) a Chief Secretary to that Government; or
    - ii) any other person authorized in this behalf by the State Government.
  - 3) In the case of a suit against any other State Government<sup>68</sup> -
    - i) a Secretary to that Government; or
    - ii) the collector of the district.
- b) **Against Public Officer**<sup>69</sup>: In the case of a suit against Public Officer notice shall be delivered to him or left at his office.

**Contents of Notice:** The notice shall contain the following particulars -

- i) the name, description and place of residence of the plaintiff;
- ii) the cause of action; and
- iii) the relief, which the plaintiff claims.

**Exemption from Notice**<sup>70</sup>: A suit may, with the leave of the Court, be instituted to obtain an urgent or immediate relief without serving any notice as required under section 80(1).

But, in such suit, the Court shall not grant any relief, whether interim or otherwise; except after giving to the Government or Public Officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed in the suit.

It is also provided that the Court shall return the plaint for presentation to it after complying with the requirements of section 80(1), if after hearing the parties, the Court is satisfied that no urgent or immediate relief need to be granted.

**No Dismissal of suit:** Any suit instituted against the Government or such public officer shall not be dismissed, by reason of any error or defect in the notice, if such notice contains-

- I. The name, description and residence of the plaintiff, so as to enable the Government or such public

- officer to identify the person serving the notice;
- II. Notice has been delivered or left at the offices of the appropriate authority specified U/s 80(1); and
  - III. The cause of action and the relief claimed have been substantially indicated.

**Procedure in Suit:**

***Signature and Verification of Plaintiff Or Written Statement***

**Agent and Authorized Agent:** The Court shall allow a reasonable time in fixing a day for the Government to answer the plaint, for the purpose of necessary communication with the Government through proper channel and for the issue of instructions to the Government pleader to appear and answer on behalf of the Government. The time so allowed may, at the discretion of the Court, be extended but the time so extended shall not exceed two months in the aggregate.<sup>71</sup>

Where in any case the Government Pleader is not accompanied by any person on the part of the Government, who may be able to answer any material. questions relating to the suit, the Court may, direct the attendance of such a person.<sup>72</sup>

**Duty of Court:** It shall be the duty of the Court to make every endeavour, if possible to do so consistently with the nature and circumstances of the case, to assists the parties in arriving at a settlement in respect of the subject-matter of the suit<sup>73</sup> and in every such suit or proceeding, at any stage, if it appears to the Court that there is a reasonable opportunity of settlement between the parties, the Court may adjourn the proceeding for such period, as it thinks fit, to enable attempts to be made to effect such a settiemen<sup>74</sup> The power to adjourn proceeding under sub-rule (2) shall be in addition to any other power of the Court to adjourn proceedings.<sup>75</sup>

**Procedure in Suit against Public Officer:** The defendant (public officer) on receiving the summons may apply to the Court to grant the extension of time fixed in the summons, to enable to him to make reference to the Government, and to receive orders thereon through the proper channeF6 and the Court shall, on such application extend the time for so long as it appears to it to be necessary.<sup>77</sup>

The Government shall be joined as a party to the suit, where the suit is instituted against the public officer for damages or for any other relief in respect of any act alleged to have been done by him in his official capacity.<sup>78</sup>

Where the government undertakes the defence of a suit against a public officer, the government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.<sup>79</sup>

Where no application under sub-rule (1) is made by the government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties.<sup>80</sup>

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

by him in his official capacity.

**Exemption from Arrest, Personal Appearance and Attachment of Property<sup>81</sup>:** According to section 81 of the Code, if the suit is against a public officer in respect of any act purporting to be done by him in his official capacity –

- a. the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and
- b. where the court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

**Execution of decree<sup>82</sup>:** Where, in a suit by or against the Government or by or against a public officer in respect of any act purporting to be done by him in his official capacity, any decree passed against the Union of India or a State or, as the case may be, the public officer, shall not be executed except in accordance with the provisions of sub-section (2) of S. 82.<sup>83</sup> i.e.

An execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such decrep.<sup>84</sup>

The provisions of sub-sections (1) and (2) shall apply in relation to an order or award as they apply in relation to a decree, if the order or award<sup>85</sup> –

- a. is passed or made against the Union of India or a State or a public officer in respect of any such act as aforesaid, whether by a Court or by any other authority; and
- b. is capable of being executed under the provisions of this Code or of any other law for the time being in force as if it were a decree.

**Definition of 'Government' and 'Government Pleader':** Rule 8-8 of Order XXVII provides that in Order XXVII 'Government' and 'Government Pleader' mean respectively"

- i. in relation to any suit by or against the Central Government or against a public officer in the service of that Government- the Central Government and such pleader as that Government may appoint<sup>86</sup>.
- ii. in relation to any suit by or against a State Government or against a public officer in the service of a State- the State Government and such Government pleader as defined in Section 2(7), or such other pleader as the State Government may ,appoint.<sup>87</sup>

### **Inter Pleader Suit (Section 88 and Order XXXV)**

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

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

**Principle:** According to Section-<sup>88</sup>

"Where two or more persons claim adversely to one another the same debts, sum of money or other property, moveable or immovable, from another person, who claims no interest therein other than for charges and costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:

Provided that where any suit is pending in which the -rights of the parties can properly be decided, no such suit of interpleader shall be instituted.

**Conditions for Application:** Before the institution of an interpleader suit, the following conditions must be satisfied:

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

**Who may not institute an interpleader suit?**

An Agent or Tenant:

An agent cannot sue his principal or a tenant his landlord for the purpose of compelling them to interplead with persons claiming through such principals or landlords,<sup>88</sup> because ordinarily, an agent cannot dispute the title of his principal and a tenant cannot dispute the title of his landlord during the subsistence of tenancy.<sup>89</sup>

**Illustrations:** A deposited a box of jewels with B as his agent:

- a. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader suit against A and C. (C claims adversely to A, and therefore, no interpleader suit can file.)
- b. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. B then claims the jewels from C. B may institute an interpleader suit against A and C. (C claims through A and , therefore, it can file.)

**Procedure in Interpleader Suit:** Order XXXV provides the procedure for the institution of an interpleader

suit.

**Plaint in Interpleader Suit<sup>90</sup>:** In every interpleader suit the plaintiff in addition to other statements necessary for a plaint, state –

- a. that the plaintiff claims no interest in the subject matter in dispute other than the charges or costs;
- b. the claims made by the defendants severally; and
- c. there is no collusion between the plaintiff and any of the defendants.

**Payment of thing claimed into Court:** The Court may order the plaintiff to place the thing claimed in the custody of the Court when the thing is capable of being paid into Court or placed in the custody of Court<sup>91</sup> and provide his costs by giving him a charge on the thing claimed.<sup>92</sup>

**Procedure where defendant is suing plaintiff (Stay of Proceedings):** Where any of the defendants in an interpleader suit is actually suing the plaintiff in respect of the subject matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader suit has been instituted, stay the proceeding as against him; and his cost in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.<sup>93</sup>

**Procedure of First Hearing:**

1. At the first hearing, the Court may-
  - a. Declare that the plaintiff is discharged from all liabilities to the defendants in respect of the thing claimed, award him his costs and dismiss him from the suit; or
  - b. if it thinks that justice or convenience so require, retains all parties until the final disposal of the suit.
2. Where the Court finds that the admissions of the parties or other evidence enable the Court to do so, it may adjudicate the title to the thing claimed.
3. Where the admissions of the parties do not enable the Court so to adjudicate the Court may direct -
  - a) that an issue or issues between the parties be framed and tried, and
  - b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff, and shall proceed to try the suit in the ordinary manner.

**IMPORTANT QUESTIONS**

- Q.1. Define pleading. What are the fundamental rules of pleading? Discuss fully.
- Q.2. What is a plaint? What are the necessary particulars to be given in a plaint? On what grounds can a plaint be rejected?
- Q.3. Who is an indigent person? Discuss the mode for the institution of the suit as an indigent person.
- Q.4. What are the provisions for institution of a suit by or against the Government or public offices in their

official capacity?

- Q.5. What is an Interpleader suit? Explain the procedure for institution of an Interpleader suit?
- Q.6. Explain the following –
- Representative suit
  - Counter claim and Set off
  - Cause of Action
  - Necessary and Proper Party
  - Joinder and Mis-Joinder of parties
  - Parties to suit
- Q.7. Distinguish between the following-
- Legal and Equitable Set-off
  - Counter claim and Set off

**References:**

- Order I, Rule 6
- Order I, Rule 7
- Order I, Rules 2 and,3-A
- Rule 4 (a)
- Rule 4(b)
- Rule 9
- Order I, Rule 10
- Rule 10(1)
- Rule 10(2)
- Rule 10(4)
- Rule 10(5)
- Order VIII, Rule 1
- Rule 8(1) (a) and Rule 8(1) (b)
- Rule 8(2)
- Rule 2(3)
- Rule 2(3)
- Rule 2(2)
- Rule 2 and 6
- Rule 7
- Rule 6
- Mogha's Law of pleadings.
- Virendra V. Vinayak AIR 1999 SC.

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56. Order XXXIII, Rule 8
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59. Rule 16

60. Rule 18
61. Rule 9-A
62. Order XLIV
63. Section 79
64. Section 80(1)
65. Section 80 (1)(a)
66. Section 80 (1)(b)
67. Section 80 (1)(bb) 8. Section 80 (1)(c) ~9. Section 80 (1)
70. Section 80(2)
71. Order XXVII Rule 5
72. Order XXVII Rule 6
73. Order XXVII Rule 5-B (1)
74. Order XXVII Rule S-B (2)
75. Order XXVII Rule 5-B (3)
76. Order XXVII Rule 7(1)
77. Order XXVII Rule 7(2)
78. Order XXVII Rule 5-A
79. Order XXVII Rule 8(1)
80. Order XXVII Rule 8(2)
81. Section 81
82. Section 82
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84. Section 81 (2)
85. Section 81 (3)
86. Order XXVII Rule 8-B (a)
87. Order XXVII Rule 8-B (c)
88. Order XXX Rule 5
89. Section 116 Indian Evidence Act
90. Order XXX Rule 1
91. Order XXX Rule 2
92. Order XXX Rule 6
93. Order XXX Rule 5

## UNIT - III

### SUMMONS AND DISCOVERY, ISSUE OF SUMMONS (SECTION 27 TO 29)

*(An intimation sent to the defendant/witness by the Court)  
To Defendant (Order 5) and To Witnesses (Order 16)*

**Meaning:** The word summons has not been defined in the Code, but according to the dictionary meaning;<sup>1</sup> "A summons is a document issued from the office of a court of justice, calling upon the person to whom it is directed to attend before a judge or office of the court for a certain purpose."

**Essentials of summons:** Every summons shall be signed by the judge or such officer appointed by him and shall be sealed with the seal of the court [Rule 1 (3)] and every summons shall be accompanied by a plaint or if so permitted, by a concise statement thereof. [Rule 2]

Contents of Valid Summons:

- a. The summons must contain a direction whether the date fixed is for settlement of issues only or for final disposal of the suit (Rule 5).
- b. In cases of summons for final disposal of the suit, the defendant shall be directed to produce his witnesses (Rule 8).
- c. The Court must give sufficient time to the defendant to enable him to appear and answer the claim of the Plaintiff on the day fixed (Rule 6).
- d. The summons shall contain an order to the defendant to produce all documents in his possession or power upon which he intends to rely on in support of his case (Rule 7).

#### **Summons to Defendant:**

**Section 27:** Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed on such day not beyond 30 days from the date of the institution of the plaint.

#### **Order V: Rule 1 (1)**

**Rule 1(1):** When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of the service of the summons on that defendant;

Provided that no such summons shall be issued when a defendant has appeared at the presentation of Plaint and admitted the plaintiff's claim;

Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.

### **Appearance of Defendant [Order V Rule 1 (2)]**

**Rule 1(2)** - A defendant to whom a summons has been issued under sub-rule (1) may appear

- a. in person, or
- b. by a pleader duly instructed and able to answer all material questions relating to the suit, or
- c. by a pleader accompanied by some person able to answer all such questions. The Court, however, may order the defendant or plaintiff to appear in person (Rule 3).

**Rule 1 (3):** Every such summons shall be signed by the judge or such officer as he appoints, and shall be sealed with the seal of the Court.

### **Exemption from Personal Appearance : Order V Rule 4**

No party shall be ordered to appear in person

1. unless he resides-
  - a. within the local limits of the Court's ordinary original jurisdiction, or
  - b. without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situated) less than two hundred miles distance from the Court-house. Or
2. Who is a woman not appearing in person (Section 132), or
3. Who is entitled to exemption under the Code (Section 132).

**Mode of service of summons:**<sup>2</sup> Service of summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the court. The Code prescribes four principal modes of serving a summons to a defendant:

- i) Personal or direct service; (Rules 10 to 15 and 18)
- ii) Substituted Service; (Rules 20, 17 and 19)
- iii) Service by Court; (Rule 9) and
- iv) Service by Plaintiff. (Rule 9-A)

**1. Personal or direct service:** This is an ordinary mode of service of summons. Under the following categories a service of summons should be made by delivering or tendering a copy thereof<sup>3</sup> to the defendant personally or to his agent or other person on his behalf and for the proper service of summons following principles must be remembered-

- a. Where there are two or more defendants, service of summons should be made on each defendant

(Rule 11).

- b. Wherever it is practicable, the summon must be served to the defendant in person or to his authorized agent (Rule 12).
- c. In a suit relating to any business or work against a person, not residing within the territorial jurisdiction of the court issuing the summons, it may be served to the manager or agent carrying on such business or work (Rule 13).
- d. In a suit for immoveable property, if the service of summons cannot be made on the defendant personally and the defendant has no authorized agent, the service may be made on any agent of the defendant in charge of the property (Rule 14).
- e. Where the defendant is absent from his residence at the time of the service of summons and there is no likelihood of him being found at his residence within a reasonable time and he has no authorized agent, the summons may be served on any adult male or female member of the defendant's family residing with him (Rule 15).

The serving officer (a person to whom the copy is delivered or tendered to serve on the defendant) after making acknowledgment of service of summons<sup>4</sup> must make an endorsement on the original summons stating the time and manner of service thereof and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of summons<sup>5</sup>.

2. **"Substituted Service"**<sup>6</sup> means the service of summons by a mode which is substituted for the ordinary mode of summons. The circumstances for the substituted service are:-

- a. i) Where the defendant or his agent refused to sign the acknowledgement or
- ii) Where the serving officer, after due and reasonable diligence cannot find the defendant, who is absent from his residence at the time when the service is sought to be effected on him at his residence and there is no likelihood of him being found at his residence within a reasonable time and there is no authorized agent nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain.

The serving officer shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating the fact about affixing the copy, the circumstances under which to do so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed (Rule 17). If the Court is satisfied either on the affidavit of the serving officer or on his examination on oath that the summons has been duly served; or may make further enquiry in the matter as it thinks fit, and shall either declare that the summon has been duly served or order such service as it thinks fit. (Rule 19).

In the second mode as provided by Rule 17, the declaration by the court about the due service of the summons is essential. If the provisions of the Rule 19 have not been complied with, the service of summons cannot be said to be in accordance with law.

- b. Where the Court is satisfied that there is a reason to believe that the defendant is avoiding the service of summons or for any other reason the summons cannot be served in the ordinary way, the Court shall order that the service may be effected in the following manner-
  - i. by affixing a copy of the summons in some conspicuous place in the court house; and also upon some conspicuous part of the house in which the defendant is known to have last resided, carried on business or personally worked for gain; or
  - ii. In such manner as the court thinks fit [(Rule 20(1)); or
  - iii. By an advertisement in the daily newspaper circulating in the locality in which the defendant is last known to have actually or voluntarily resided, carried on business or personally worked for gain [(Rule 20(1-A)].

Substituted service Under Rule 20 is as effective as personal service [(Rule 20(2)).

- 3) By Court: Rule 9 of Order V deals with delivery of summons by Court and states that in cases, where the defendant or his agent, empowered to accept the service of summons, resides within the jurisdiction of the Court in which the suit was instituted, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer or to approved courier services to be served on the defendant.

**Declaration by Court:** The Court issuing the summons shall declare that the summons had been duly served on the defendant, where

- a. the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept that summons by any other means specified in subrule (3) when tendered or transmitted to him,<sup>7</sup> and
  - b. Where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within 30 Days from the date of issue of summons.<sup>8</sup>
- 4) **By Plaintiff:**<sup>9</sup> In addition to the provisions of rule 9, the Court, on the plaintiffs application may permit and deliver the summons to such plaintiff for service on the defendant and the provisions of rule 16 and 18 shall apply to a summons personally served under rule 9-A as if, the person effecting service were a serving officer.

**Service of summons where defendant resides within jurisdiction of another Court:**<sup>10</sup> A summons may be sent by the Court by which it is issued, whether within or without the State, either by one of its officers or by post or by such courier service as may be approved by the High Court, by fax message or by Electronic Mail service or by any other means as may be provided by the rules made by the High Courts to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.<sup>11</sup>

Where a defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) of rule 9 (except by registered post acknowledgement due), the provision of rule 21 shall not apply.<sup>12</sup>

### **Discovery (5. 30 and Order XI)**

Section 30 of the Code says that subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion on the application of any party,-

make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production impounding and return of documents or other material objects producible as evidence.

**Meaning of Discovery:** Discovery means to compel the opposite party to disclose what he has in his possession or power. The discovery may be either discovery of facts or discovery of documents. Where information as to fact is required, the party is allowed to put a series of questions, known as interrogatories to his adversary.

Where in the opinion of the judge, such proposed questions are proper, then he will compel the other side to answer them on oath before trial. This is called discovery of facts, while where information as to documents is required, then on the application of the party, an order to compel the other party to make a list of relevant documents in his possession or power and for permission to inspect and to take copies of those documents. This is known as discovery of documents. Rules 1 to 11 of Order XI deal with the interrogatories while the rules 12 to 14 of Order XI deal with the discovery of documents. The Court may postpone a premature discovery.<sup>13</sup>

### **SUMMONING AND ATTENDANCE OF WITNESSES (S.31 AND ORDER XVI)**

**Summons to Witnesses:** According to section 31, the provisions in sections 27,28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects. Rule 8 of Order XXI states that every summons under Order XXI, except under rule 7-A, shall be served in the same manner as a summons to a defendant, and the rules of Order V shall apply.

**Attendance of Witnesses:** On or before such date, which may be fixed by the Court and shall not be later than 15 days from the date on which issues are settled, a list of proposed witnesses to give evidence or to produce document and obtain summonses to such persons for their attendance in Court, shall be presented in the Court by the parties.<sup>14</sup>

A party shall file an application stating therein the purpose for which the witness is proposed to be summoned to the Court or to such officer as may be appointed by the Court in this behalf within five days of presenting the list of witnesses under rule 1(1).<sup>15</sup>

On being shown sufficient cause for not mentioning that name of the witness in the list produced U/rule 1 (1), a party may be permitted by the Court, to call any witness whose name has not been mentioned in the list of evidence.<sup>16</sup>

**Expenses of witness<sup>17</sup>** shall be paid into Court by a party applying for summons, within a period to be fixed which shall not be later than 7 days<sup>18</sup> from the date of making application under Rule 1 (4). Where the summons is served directly by the party on a witness, the party or his agent shall pay the expenses referred to in rule 2(1) to the witness.

**Summons given to Party for Service:** (Rule 7 -A) On an application of any party for the issue of summons