contract between the company and its members and members *inter se*. It is framed with the object of carrying out aims and objects of the company as contained in Memorandum and if necessary it may clarify anything contained in Memorandum.

- Shareholders' agreement is a contractual arrangement between the shareholders of a company describing how the company should be operated and the defining inter-se shareholders' rights and obligations. shareholders' agreement. Such agreements are specifically drafted to provide specific rights, impose definite restrictions over and above those provided by the Companies Act.
- While drafting a contract of appointment for the appointment of a managing director of a company, certain important points have to be taken care of, i.e., the person who is being appointed as managing director must be a director of the company and must be entrusted with substantial powers of management.
- The Board of Directors while appointing a director as managing director, critically examines the draft agreement prepared by the Secretary for the appointment of the managing director and after having approved the same with or without any modification, authorises one of its directors to sign and execute for and on behalf of the company, the agreement for the appointment of the managing director.
- Being an agreement, such a contract must have all the other essential ingredients of a contract under the Indian Contract Act, 1872.
- Likewise, the Secretary has to bear in mind important points while drafting an agreement for the appointment of a manager.
- The appointment of a Company Secretary is done by the Board of Directors and he functions at the pleasure of the Board. Usually the appointment of a Company Secretary is made by an appointment letter signed and issued by the Chief Executive Officer, who may be the managing director, executive director, whole-time director etc. under specific authority of the Board.
- This letter is an offer by the company to the prospective Company Secretary and when he accepts the same it become a binding contract between him and the company and their relationship is governed by the terms and conditions thereof.
- During its life time a company may find it necessary to reorganise itself. Such a re-organisation may be for many reasons. When a company is financially weak, it wishes to reach a compromise with its members and/or creditors. It may wish to take over the business of another running but endangered company. It may wish to restructure its share capital.
- The Companies Act, 2013 provide various methods of company re-organisation or reconstruction. The various terms used for reorganization are arrangement, reconstruction, amalgamation, merger, take-over, etc.
- Slump sale is one of the widely used ways of business acquisitions. The term 'slump sale' under the Income Tax Act is defined as transfer of one or more undertakings as a result of the sale for a lump- sum consideration without values being assigned to the individual assets and liabilities in such sales.

SELF-TEST QUESTIONS

(*These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Draft a specimen underwriting agreement.
2. ABC Co. Ltd., wants to engage Mr. M as its managing director. The Chairman of the company wants you to prepare and submit to him a draft specimen agreement of service with Mr. M. as a managing director of the company, draft the same. Also mention what care you will take while drafting the above agreement.

3. Define amalgamation. Draft specimen agreement between two companies to amalgamate by sale of one to the other.
4. What important points you will keep in view while drafting Articles of Association of a public limited company or object clause in Memorandum of Association.
5. Draft a specimen of the letter of Offer to a prospective Company Secretary.

Lesson 9
Pleadings

LESSON OUTLINE

- Introduction
- Fundamental Rules of Pleading
- Plaint Structure
- Description of the Parties
- Written Statement
- Requirement of Written Statement
- How to draft a Written Statement
- Interlocutory Application
- Affidavit
- Execution Petition
- Memorandum of Appeal and Revision
- Revision
- Various types of suits under C.P.C
- Complaint & Bail Application
- Application under Section 125 of Cr.P. C
- First Information Report
- LESSON ROUND UP
- SELF TEST QUESTIONS

LEARNING OBJECTIVES

Pleadings generally mean either a plaint or a Written statement. The main objective behind formulating the rules of pleadings is to find out and narrow down the controversy between the parties.

Drafting of plaints, applications, reply/written statement require the skills and knowledge of a draftsman. These should be drafted after looking into the provisions of law so that no relevant detail is omitted.

The objective of the study lesson is to disseminate information to the students about the legal provisions relating to drafting of pleadings. Besides, students will be familiarized with the drafting of various petitions/applications under the Civil Procedure Code, appeals and revision applications etc.

BACKGROUND OF INDIAN SYSTEM

In the ancient times when the king was the fountainhead of all justice, a petitioner used to appear before the king in person and place all facts pertaining to his case before His Majesty. After such oral hearing, the King used to summon the other party and thereafter listen to the defence statements put forward by the person so summoned. There used to be same sort of cross examination or cross questioning of the parties by the King himself. Thereafter, the decision was announced. There was hardly any system of written statements; all the same "pleadings" did exist, although they were oral. The King and his courtiers kept on what may be called a mental record of the proceedings. Perhaps only few serious and otherwise significant cases, the decisions were recorded. Similarly during the Mughal period also pleadings were oral in form. During British period with the establishment of Diwani Courts, High Courts etc. and with the passage of time, judicial system underwent a change. The administration at justice was separated from the executive and assigned to the court of law. Complexity of resulted in enormous litigation, and oral hearing of the ancient times became almost impossible. Scribes used to keep records of all the proceedings. Gradually this procedure was also abandoned and the litigants were allowed to bring their claims and contentions duly drawn up to file them before the Hon'ble courts. When this change exactly happened, it is difficult to say. Experience was a better teacher; and the changes in court procedure took place not only in the light of the past experience but also in the face of expediency. Written proceedings made the task of the courts of law easier and less complicated than the earlier oral proceedings. By the turn of 19th century the procedure of pleadings has become fairly elaborate and systematized.

INTRODUCTION

When the civil codes came to be drafted, the principles of pleadings were also given statutory form. Vide Order VI Rule 1 of the Code of Civil Procedure, 1908 "Pleading" shall mean 'plaint' or 'written statement'. Mogha has elaborated this definition when he remarked that "pleadings are statements, written, drawn up and filed by each party to a case, stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer".

Before the trial of a civil suit starts, it is highly desirable that the Court should know exactly what it has to decide upon and the parties should know exactly what they are contesting about. The most, satisfactory method of achieving this object would be one by which each party in turn is obliged to state his own case, and answer the case of the opponent before the trial comes on. Such statement of the parties and the replies to them are known as pleadings. The present day system of pleadings in our country is based on the provisions of the Civil Procedure Code, 1908 supplemented from time to time by rules in that behalf by High Courts of the States. There are rules of the Supreme Court and rules by special enactments as well. For one, words 'plaints' and 'complaints' are nearly synonymous. In both, the expression of grievance is predominant. Verily, when a suitor files a statement of grievance he is the plaintiff and he files a 'complaint' containing allegations and claims remedy. As days passed, we have taken up the word 'Plaint' for the Civil Court and the word 'Complaint' for the Criminal Court. Section 26 of the Code of Civil Procedure, 1908 states that every suit shall be instituted by the presentation of a Plaint or in such other manner as may be prescribed. Order IV Rule 3 states "every suit shall be instituted by presenting a plaint in duplicate to the Court or such officer as it appoints in this behalf". Similarly Order VIII Rule 1 defines that 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 service of summons on that defendant.

The document stating the cause of action and other necessary details and particulars in support of the claim of the plaintiff is called the "plaint". The defence statement containing all material facts and other details filed by the defendant is called the "written statement". The written statement is filed by the defendant as an answer to the contentions of the plaintiff and it contains all materials and other objections which the defendant might place before the court to admit or deny the claim of the plaintiff.

Pleadings are, therefore, the foundation of any litigation, and must be very carefully drafted. Any material

omission in the pleading can entail serious consequences, because at the evidence and argument stages, parties are not permitted to depart from the points and issues raised in the pleadings, nor can a party be allowed to raise subsequently, except by way of amendment, any new ground of claim or any allegation of fact inconsistent with the previous pleadings of the party pleading the same. In some cases, the court may allow amendment of the plaint or the written statement on the application of a party. This can be done under order VI Rule 17 of Civil Procedure Code, 1908. Another case of departure is where a party pleads for set-off.

Pleadings contain material facts, contentions and claim of the plaintiff, and the material facts, contentions, denials or admissions of claims by the defendants. There may also be counter claims by the defendant which may of two categories - (i) a claim to set-off against the plaintiff's demand is covered by order 8 Rule 6, and (ii) and independent counter claims which is not exactly set off but falls under some other statute. While the former is permitted to be pleaded by the courts, the latter is not, but when the .defendant files such counter claims, the written statements is treated as a plaint.

Object of Pleadings

The whole object of pleading is to give a fair notice to each party of what the opponent's case is. Pleadings bring forth the real matters in dispute between the parties. It is necessary for the parties to know each other's stand, what facts are admitted and what denied, so that at the trial they are prepared to meet them. Pleadings also eliminate the element of surprise during the trial, besides eradicating irrelevant matters which are admitted to be true. The facts admitted by any parties need not be pursued or proved. Thus the pleadings save the parties much bother, expense and trouble of adducing evidence in support of matters already admitted by a party, and they can concentrate their evidence to the issue framed by the Court in the light of the facts alleged by one party and denied by the other. There is another advantage of the pleadings. The parties come to know beforehand what points the opposite party will raise at the trial, and thus they are a prepared to meet them and are not taken by surprise, which would certainly be the case if there were no obligatory rules of pleadings whereby the parties are compelled to lay bare there cases before the opposite party prior to the commencement of the actual trial.

Odgers in his "Pleading and Practice" (14th Ed. At p 65) observes:

"The defendant is entitled to know what it is that the plaintiff alleges against him; the plaintiff in his turn is entitled to know what defence will be raised in answer to his claim. The defendant may dispute every statement made by the plaintiff, or he may be prepared to prove other facts which put a different complexion on the case. He may rely on a point of law, or raise a cross claim of his own. In any event, before the trial comes on it is highly desirable that the parties should know exactly what they are fighting about, otherwise they may go to great expense in procuring evidence to prove at the trial facts which their opponents will at once concede. It has been found by long experience that the most satisfactory method of attaining this object is to make each party in turn state his own case and answer that of his opponent before the hearing. Such statements or answers to them are called the pleadings."

The object of the pleadings is three fold. They are

a. to define the issues involved between the parties;

b. to provide an opportunity to the opposite party or other side to met up the particular allegation raised against him or her, and

c. to enable the Court to adjudicate the real issue involved between the parties.

Fundamental Rules of Pleadings

It is a rule to observe in all Courts that a party complaining of an injury and suing for redress, can recover only *secandum allegata et probate*[1]. The provisions of law under which the suit has been instituted should also be

1. William Maleomson v. Glayton 14 Moore PC 128.

mentioned[2]. The pleas should be specifically mentioned, as the evidence cannot be looked into in the absence of a specific plea or point. The Court will however see the substance, if the plea is not properly worded. The four fundamental rules of pleadings are:

1) That a pleading shall contain, only a statement of facts, and not Law;
2) That a pleading shall contain all material facts and material facts only.
3) That a pleading shall state only the facts on which the party pleading relies and not the evidence by which they are to be proved,
4) That a pleading shall state such material facts concisely, but with precision and certainty.

Rule I: Facts and not Law: One of the fundamental rules of pleadings embodied in Order VI Rule 2 is that a pleading shall contain and contain only a statement of facts and not law. The duty of the pleader is to set out the facts upon which he relies and not the legal inferences to be drawn from them. And it is for the judge to draw such inferences from those facts as are permissible under the law of which he is bound to take judicial notice. A judge is bound to apply the correct law and draw correct legal inferences and facts, even if the party has been foolish to make a written statement about the law applicable of those facts. If a plaintiff asserts a right in him without showing on what facts his claim of right is funded or asserts that defendant is indebted to him or owes him a duty without alleging the facts out of which indebtedness or duty arises, his pleading is bad.

The parties should not take legal pleas but state the facts on the basis of which such legal conclusions may logically follow and which the court would take a judicial notice of. Thus where a party pleads that the act of the defendant was unlawful, or that the defendant is guilty of negligence, or that the defendant was legally bound to perform specific contract, such a pleading would be bad. In such cases, the plaintiff must state facts which establish the guilt or negligence of the defendant, or how the particular act of the defendant was unlawful, of the fact leading to the contract which thus bound the defendant. The plaint should only contain the recitals that would form the basis of the claim. The legal position created thereby need not be described.

Thus in a declaratory suit, it is not enough to plead that the plaintiff is the legal heir of the deceased for this is an inference of law. The plaintiff must show how he was related to the deceased, and also show the relationship of other claimants, and other material facts to show that he was nearer in relation to the deceased than the other claimants.

Similarly on money suit it is not enough that the plaintiff is entitled to get money from the defendant. He must state the facts showing his title to the money. For example, he should state that the defendant took loan from the plaintiff on such and such date and promised to return the money along with specified interest on a particular date, and that he requested the defendant to return the said amount after the date but that he refused to return the money. If some witnesses were present when the money was lent or when the demand was made or when the refusal by the defendant was made, the fact should be stated specifically, for at the time of the trial the court may order the plaintiff to adduce evidence in support of his statement, and then he can rely on the evidence of the witnesses in whose presence he had lent money or in whose presence he had made a demand for the return of the money.

In a matrimonial petition, it is not enough to state that the respondent is guilty of cruelty towards the petitioner-wife and that she is entitled to divorce. The petitioner must state all those facts which establish cruelty on the part of the respondent. She may state that her husband is a drunkard and used to come home fully drunk and in a state of intoxication he inflicted physical injuries on her, she should specify dates on which such incidents took place; or that the husband used to abuse her or beat her in the presence of her friends and relations or that after her marriage she was not allowed to visit her parents or that he was forcing her to part with her dowry, giving threats of physical beating; or that immediately after her marriage till date the respondent did not even talk to her nor he cohabited with her. It is such facts which can establish physical or mental cruelty.

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2. Lalta v Ambika 1968 All LJ 1133.

In another example plaintiff files a suit for negligence and damages. It is not enough for him to state negligence. First of all the plaintiff must state those facts which establish the defendant's duty towards the plaintiff. Thereafter, he must state how and in what manner the defendant was guilty of negligence. Thus he must state all the facts on which his plaint is based. The inference of law to the breach of duty should be left to the court because the correct legal principles will be applied by the court and the plaintiff cannot even add any prayer that a particular legal conclusion which follows must be applied. The only prayer that he may add is that the relief may kindly be granted to him.

Omission to state all the fact renders the pleading defective whatever inferences of law might otherwise have been pleaded. Such a plaint may be rejected on the ground that it discloses no cause of action. The plaintiff or the defendant as the case may be, and his counsel must be on their guard not to omit any facts and straight-a-way jump to pleading legal interference without stating such facts.

For example, in a suit for recovery of money for the goods sold, the defendant should not just take the plea that he is not liable. Such a statement is a plea of law, and can hardly stand and in spite of his good defence his case will fail. In such a case the defendant must clearly state that he did not purchase any goods from the plaintiff nor was there an agreement to do so. He may also state that though the goods were sent to him, but he did not take the delivery as he had placed no order therefore or that the goods were sold to him on credit and the money was to be paid to the plaintiff after the sale of such goods and the goods were still lying with him unsold, and that he was willing to return the goods to the plaintiff in accordance with the written or oral understanding that in case of the goods remaining unsold the same shall be taken back by the plaintiff. Such facts would be valid pleas.

In another example of a suit for defamation and damages, it is not sufficient for the plaintiff to state that the defendant defamed him and therefore he was entitled to damages or special damages. The plaintiff must state all the facts of the defendant act or acts such as his public utterances in which he named the plaintiff and made remarks about his character or profession or the publications in which he was painted in a manner as would in the opinion of a common man lower him in the eyes or estimation of society. Wherever possible the plaintiff must give the exact words spoken or used in the entire sentence or statement and also give the general, grammatical or implied meaning of such words spoken or used. Wherever there is any ambiguity, he may take the plea of "inuendo" and state how such a remark was commonly understood by persons known to him. Thus the plaintiff should build his case on facts from which the conclusion would naturally and logically follow.

The rule that every pleading must state facts and not law is subject to the following exceptions:

i. Foreign Law
ii. Customs
iii. Mixed question of law and fact
iv. Legal Pleas
v. Inferences of law

Rule II: Material Facts: When a litigant comes to a legal practitioner, he brings all facts and circumstances pertaining to a case. In fact, he tries to narrate each and every event which may possibly have a remote bearing upon the case. Not all such facts are important. If everything were to be included in the plaint, then the plaint is likely to become so voluminous that the learned judge is likely miss the essential track and be guided by the inessentials.

What is necessary therefore are the facts which are material; facts which have a direct and immediate bearing on the case, facts which are secondary or incidental may easily be omitted. Of course, the lawyer must weigh each fact and test its significance and relevance in relation to the given case. Marshalling of facts is what a good lawyer would always do before he sets them down in form of a plain.

The second fundamental rule of pleading is therefore, that every pleading shall contain and contain only, a

statement of the material fact as on which the party pleading relies for his claim or defence. This rule is embodied in Order VI Rule 2 and it requires that –

I. The party pleading must plead all material facts on which he intends to rely for his claim or defence as the case may be; and

II. He must plead material facts only, and that no fact which is not material should be pleaded, nor should the party plead evidence, nor the law of which a Court may take a judicial notice[3].

The rule is indeed a strict one. The question would naturally arise: what are the material facts? Indeed every fact on which the cause of action or the defence is founded is material fact. The purpose entertained by the rule is that every unnecessary and irrelevant fact need not be brought on record, and the rule acts as a damper to the litigants, habit of stating all details that strike their mind, whether such details are relevant or not, it necessitates the process of elimination on the part of the litigant. All facts which will be required to be proved at the trial in order to establish the existence of a cause of action or defence are material facts. Then there are other facts which do not directly establish the cause of action or defence but which nonetheless are material facts in that the party pleading them has an inherent right to prove them at the trial.

Whether a particular fact is material or not will depend upon the circumstances of the case. A fact may not appear to be material at the initial stage but it may turn out to be material at the time of the trial. Thus if a party is not able to decide whether a fact is material or not, or it he entertains a reasonable double as to the materiality of a particular fact, it would be better to include than to exclude, be better to include than to exclude, because if a party omits to state or plead any material fact, he will not be permitted to adduce evidence to prove such a fact at the trial unless the pleading is amended under Order VI Rule 17. The general rule is that a party cannot prove a fact which he has pleaded.

The task of a lawyer is therefore rather difficult. He must observe the rule that only material facts are to be pleaded, and, at the same time, he must not exclude any fact which may seem apparently unnecessary but which may turn out to be material as the trial progresses. Thus he must visualize all the possible directions or dimensions which the pleadings are likely to assume. An experienced lawyer would marshal all the facts placed before him by his client and by correlating them, and after carefully examining the interplay between such facts, decide what facts are material to establish the cause of action or defence. There after he would prepare or rough or a mental outline of the pleading and submit all such facts to a close analysis in order to make sure whether if he is able to prove all such material facts he would succeed. By a process of elimination he must also see whether by excluding certain seemingly immaterial facts from the outline he has prepared, he would still succeed. If he can return an affirmative answer, he should exclude such irrelevant facts, but if the answer be in the negative, then he must include them another way of testing the materiality of the facts would be to ask whether by proving a particular fact, he would certainly establish the cause of action or the defence.

The idea is that the pleading should not include any fact which would not assist the party even if such a fact is proved. And why at all waste energy, time and money is establishing the correctness or otherwise of a fact which does not advance the party's case? One of the reasons why the litigation drags on for years is that the litigants do not come to the point, there being much about nothing. In India the courts are filled with all sorts of litigation. The lawyers are taking briefs of all sorts and they are extremely busy. They have hardly any time to examine the materiality of the facts narrated to them by their clients. The pleadings, therefore, become unwidely and voluminous, so much so that at the time of framing the issues, the matter becomes really a hard nut to crack. The litigation drags on withstanding the wishes of the parties to the contrary. It is the duty of the lawyers to ensure that the pleadings. conform to the rules laid down in the code of civil procedure. They should be guided more by their own sense of proportion rather than succumb to every whim or eccentricity of their clients.

Instances of Material Facts: In a suit for damages for injuries sustained in a collision, the plaintiff in framing his statement of claim should set out the circumstances of the collision, so far as they are known to him, with

3. Hari Shankar Jain v. Sonia Gandhi AIR 2001 SC 3689.

clearness and accuracy to enable his adversary to know the case he has to meet, he should also state in particular terms the particular acts of negligence which, according to him, caused the collision.

In a suit for ejectment of a trespasser from the land and for injunction it is material to allege that defendant "threatens and intends to repeat the illegal act" similarly if a party seeks a stay order against any authority's act of demolition his premises, shop or building he must allege that he is owner of the property and the plans or the map thereof was duly sanctioned by the appropriate authority. Or if a government land, he must allege that he has been in undisturbed possession thereof for over twelve years. Such facts are material, because if proved, they will establish the cause of action.

In a suit for defamation, it is material to allege that the words were intended to defame the plaintiff or at least they were so understood by men at large, if the words are ambiguous, then "innuendo" must be pleaded that they were ironically used or were intended so to be understood.

Where a party claims the benefit of a special rule or custom then he must allege all facts which bring the case within the ambit of that special rule or custom. For example where a marriage between two spindas or between two persons within the degrees of prohibited relationship is challenged in some property matter, the party is challenging the validity of the marriage must allege that there was no custom governing the parties which permitted or sanctioned such a marriage between spindas. It is material to allege the existence of a long established family or caste custom governing the parties to the marriage which permitted or sanctioned such a marriage.

In a money suit, it is material to allege part-payment of the loan and also any other fact which gives a new lease of three years time to the loan in order to save the suit from the bar of limitation.

When a plaintiff bases his claim on some document, it is material to state the effect of such a document. For example, where the case is based on a sale-deed, it is material to state that a particular person has sold property to him by a sale-deed dated so and so which was duly registered.

In a suit for specific performance of a contract it is material to allege that the plaintiff has always been willing and is willing to perform his part of the contract.

Example of Facts not Material

In a suit on a promissory note, it is not material to state that the plaintiff requested the defendant to make the payment and he refused, because no demand is necessary when the promissory note becomes due and it is payable immediately.

Similarly in a suit for recovery of money for the goods sold, it is not material to state that the goods belonged to the plaintiff or that the goods were sold to the defendant on the belief that he would honestly make the payment.

In the case of damages general damages are presumed to be the natural or probable consequence of the defendant's act. Such damages need not be proved. But special damages will not be presumed by law to be the consequence of the defendant's act but will depend on the special circumstances of the case. Therefore, it will have to be proved at the trial that the plaintiff suffered the loss and also that the conduct of the defendant resulted in the loss so suffered by the plaintiff. In such cases the proof of special damages is essential to sustain an action. A person has no right of action in respect of a public nuisance unless he can show some special injury to himself which is over and above what is common to others.

Thus it is clear that whereas general damages may not be pleaded the special damages must be alleged, and all facts on which such special damages are based are material to the pleading. They are material because they will have to be proved. All such facts must, therefore, be mentioned or state. With necessary particulars to show what special damage the plaintiff suffered. For example in a suit for defamation it will have to mentioned that services of the plaintiff were terminated as a result of a particular article which damaged the professional repetition of the plaintiff so much salary which he might have continued to get but for the publication of the

defamatory article

Exception to the General Rules: The second fundamental rule of pleading, namely, that every pleading must state all the material facts and the material facts only is subject to the following well known exceptions:

i. **Condition Precedent**: The performance of occurrence of any condition precedent need not be pleaded as its averments shall be implied in the pleading. But where a party chooses to contest the performance or occurrence of such condition, he is bound to set-up the plea distinctly in his pleading. This follows from the provision contained in Order VI Rule 6 C.P.C. which runs thus:

   "Any condition Precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading."

   For example, X agrees to build a house for Y at certain rates. A condition of the contract is that payment should only be made upon the certificate of Y's architect that so much is due. If X desires to file a suit for money against Y, the obtaining and presenting of the certificate from Y's architect is a condition precedent to X's right of action. Here it is not necessary of Y to state in his plaint that he has obtained the said certificate. He can draft a plaint showing a good prima facie right to the agreed amount without mentioning any certificate. It will be for Y to plead that the architect has never certified that the amount is due.

ii. **Presumption of Law**: Order VI Rule 13, C.P.C., provides that neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied. For example in a suit on a promissory note the plaintiff need not allege consideration as Sec.118 of Negotiable instruments Act raises a presumption in his favour. It is also not necessary to state that the defendant executed the bond of his own free will and without any force or fraud because the burden of proving any fact invalidating the bond lies upon the defendant. In Sethani v. Bhana4, a sale deed was executed by tribal a woman who was old, illiterate and blind, in favour of one of her relatives with whom she was living till her death and was dependent on him. It was held that it was upon that relative to prove that the sale-deed was executed under no undue influence. A party should not plead anything which the law presumes in his favour.

   Regarding legal presumptions the exception applies to only such facts as the court "shall presume" and not to those facts which the court may presume", and therefore the facts falling under the latter class must be pleaded.

iii. **Matters of Inducement**: Another exception to the general rule is regarding facts which are merely introductory. Such facts only state the names of the parties, their relationships, their professions and such circumstances as are necessary to inform the court as to how the dispute has arisen. Such facts are hardly necessary or material to the pleading, but they are generally tolerated and are set in the pleadings by both the parties in order to facilitate the court to take a stock of the situation of the parties. It is better if such prefatory remarks are cut down to the minimum.

Rule III: Facts not Evidence: The third fundamental rule of pleadings is that only facts must be stated and not the evidence there of there is a tendency among the litigants to mix up the bare facts with the facts which are in realty the evidence. At the stage of pleading, the court and the opposite party should be supplied with the facts and such contentions on which the claim is founded; the plaintiff must keep the facts in evidence for a later stage of evidence. Order VI Rule 2 of C.P.C. enjoins that every pleading shall contain a statement of the material facts on which the party pleading relies for his claim or defence but not the evidence by which they are

4. AIR 1993 SC 956.

to be proved. While drafting a plaint, a lawyer must distinguish between facts which are asserted and which have to be established through evidence whether documentary or oral, and facts which are, by themselves, in the nature of evidence. At the initial stage only the former facts have to be narrated, and when the state of evidence comes, then the other facts will be represented as a part of evidence in order to establish the first set of facts. The reason behind the rule stating evidence is that if the evidence were also allowed to be stated in the pleading that there shall remain no limit of details and the chief object of the pleading would disappear. Evidence also consists of facts. How then to distinguish between the two kinds of facts (i.e. material facts and evidence)? Long back in Ratti Lalv. Raghu AIR 1954 VP 53, the question was answered thus: Material facts are those facts which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Evidence also consists of facts and in order to distinguish between the two kinds of facts, the material facts on which the party pleading relies for his claim or defence are called *facta probanda* and the facts by means of which they (i.e. material facts) are be proved are called *facta probantia*.

(a) ***Facta probanda*:** The facts which are to be proved. These are the facts on which a party relies and are ought to be stated in the pleading.

(b) ***Facta probantia***: These are the facts which are not to be stated because by their means *facta probanda* are proved. Thus these facts are the evidence as to the existence of certain facts on which the party relies for his cause of action or defiance as the case may be. *Facta probanda* are not facts in issue, but they are relevant in that at the trial their proof will establish the existence of facts in issue. No doubt in certain cases both the facts in issue and there facts in evidence are mixed up and are almost indistinguishable. They should not be stated in the pleading. For ex., A was married to B in accordance with a particular custom governing marriage between A and B. in this case the “custom” is a both fact in issue and a fact in evidence, because once the custom is proved, then the marriage also, stands proved. In the pleading it is sufficient to allege that the marriage was celebrated in accordance with a particular custom. At the evidence stage, it will be sufficient to refer to the manual of customary law which records customs.

The following rules have been enacted under the code of civil procedure and hereunder we elaborate them with the help of suitable illustrations:

a. Mental Condition : Order VI Rule 10 clearly says that wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred. Thus it is sufficient to allege that the defendant has cheated the plaintiff to the extent of Rs. 10,000/-. It is not necessary, nor would it be in order, to plead how the defendant has cheated the plaintiff. The “how” part would be evidentiary and should not be pleaded. In a suit for malicious prosecution the plaintiff should only allege that the defendant was actuated by malice in prosecuting him. It should not stated the details of any previous hostility of the defendant’s previous conduct towards the plaintiff.

b. Notices: Rule 11 of Order VI lays down that wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact unless the form or the precise terms of such notice or the circumstances from which such notice is to be inferred, are material. In many cases notice has to be alleged as a material fact. For ex., in a suit to recover trust property from a person to whom a trustee has given it in breach of the trust or in a suit where priority for subsequent transfer is claimed. In such cases, it is sufficient to allege notice as a fact. It is not necessary to state the entire from or precise words of the note, nor any other circumstances from which such a notice could be inferred sometimes, however, the form or the precise words of the notice are material under must be alleged. For ·ex., where the plaintiff claims to have determined the monthly tenancy by 15 days notice to quit the pleading should state “On 14th Jan. dated, the plaintiff served upon the defendant a written notice calling upon him to vacate the house and deliver up possession to him on the expiry of January the 31st In such cases the precise form and words of the notice are material and must therefore be

clearly stated in the pleading.

c. **Implied Contract or Relation:** Order VI Rule 12 directs that wherever any contract or any rotation between any persons is to be implied from a series of letter or circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters conversations or circumstances without setting them out in detail. And if in such case the person pleading desires to rely in the alternative upon more contracts or relations than one as to be implied form such circumstances he may state the same in the alternative. The reason for this rule is that what is really material is the effect of the letter or conversation etc. which are only a part of evidence. Take the case of carrier's contract. The moment the goods are accepted to be carried to a particular destination and the receipt is issued, there is an implied contract, and the receipt for the goods is an evidence of the contract. In this case, it would be sufficient to plead the implied contract by making a reference to the receipt issued. The evidence of the receipt and other matters will come up later. If any contract is to be inferred from letters, the dates of the letters must be given.

d. **Presumptions of Law:** Order VI Rule 13 states that neither party need in any pleading allege any matter of fact which the law presumes in this favour or as to which the burden of proof lies up on the other side unless the same has first been specially denied.

Exception: The only exception to the third fundamental rule of pleadings is to be found in the case of writ-petitions and election-petitions. In such petitions it is necessary to state matters of evidence in support of the allegations made therein.

Rule IV: Facts to be stated concisely and precisely: Order VI Rule 2 enjoins that every pleading must state the material facts concisely, but with precision and certainty. This rule is that the material rule is that the material facts should be stated in the pleading in a concise form but with precision and certainty the pleading shall be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figure. What this rules means is that the pleading should be brief and to the point. There should be no obscurity or vagueness or ambiguity of any sort otherwise the very purpose of pleading will be defeated. Another point to remember is that no doubt brevity and conciseness are the rule, but brevity should not be at the cost of precision or clarity. Thus where brevity and precision cannot be achieved without clarity, prolixity in pleading would be justified. If the facts stated in the pleading are all material, then they all must be alleged notwithstanding the prolixity that might cause.

In order to bring precision, conciseness and clarity, a lawyer should have a good command over the language and grammatical structure, and should know the exact meaning of the words. Longer and complex sentence which is likely to become ambiguous should be avoided.

The following points should be kept in mind while drafting a pleading: -

a) The names of persons and places should be accurately given and correctly spelt; spellings adopted at one place should be followed throughout the pleading.

b) Facts should be stated in active and not in the passive voice omitting the nominative.

c) All circumstances and paraphrases should be avoided.

d) 'Terse', 'Short', 'Blunt' sentences should be used as far as possible. All 'its' and 'buts' should be avoided.

e) Pronouns like "he" "she" or "that" shout be avoided if possible. Anyway such pronouns when used should clearly denote the person or the thing to which such pronouns refer.

f) The plaintiff and the defendant should be referred not only by their names. It is better to use the word "plaintiff' or "defendant".

g) Things should be mentioned by their correct names and the description of such things should be

adhered to throughout.

h) Where an action is founded on some statute, the exact language of the statute should be used.

i) In any pleading, the use of "if', "but" and "that" should be, as far as possible, avoided. Such words tend to take away the "certainty" and can cause ambiguity.

j) Necessary particulars of all facts should be given in the pleading. If such particulars are quite lengthy, then they can be given in the attached schedule, and a clear reference made in the pleading. Repetitions should be avoided in pleadings.

k) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph (Order VI Rule 2). The division of the pleading into paragraphs should be so done as to endure that each paragraph deals with one fact. At the same time, the entire pleading should appear a running and will knit matter, must not look like isolated fact placed together. Inter-relations ships of paragraphs must seem to exist. To factor that should keep in mind is the strict chronological order.

l) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

Pleading must be Signed: Order VI Rule 14 makes it obligatory that the pleading shall be signed by the party and his pleader (if any). Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

The main purpose of this rule is to prevent any possible denial by any party that he did not authorize the proceedings. Thus even if pleader produces the vakalat-nama duty authorizing him to fight or defend the suit, the signature of the pleader alone would not do. The pleading must bear the signature or thumb impression or any other identification mark of the party concerned. The only exception the party is unable to sign by reason of absence or any other good cause. Mere absence would sufficient; "absence" in this context means such as would not enable the party to be present. Where the party is unable to sign the pleading as aforesaid, then a person duly authorized by him will sign the pleading. Such authority to sue or defend must be produced before the court.

Verification of Pleading: Order VI Rule 15, states every pleading shall be verified at the foot by the by any of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. The person verifying shall specify, by reference to the numbered paragraphs of the pleading what he verifies of his own knowledge and what he verified upon on received and believed to be true. The verification shall be signed by the person making it and the date on which and the place at which it was signed. The aim of verification is only to fix responsibility of the statements made in the pleading upon same one before the court proceeds to adjudicate upon them.

A person making a false verification is liable to be punished under the Indian Penal Code, as making a false statement is by itself an offence. Therefore the responsibility of verifications is very great and its significance and the consequences thereof must be realized. After the signature to the pleading some space may be left out and then verification should begin.

Pleading Civil

1. Classes of Civil Courts – Besides the Supreme Court, High Courts there are Civil Courts at District level. Highest among them is Court of District Judge, followed by Additional District Judges. The lower Civil Courts are divided in two forms e.g., one by territorial limits and secondarily pecuniary limit. The territorial limit is by jurisdiction of the court and by pecuniary limit it is divided into Civil Judge (Senior Division), Civil Judge (Junior Division) and Small Cause Court. When a suit is filed, if it is of civil in nature, it is filed by a complaint which is submitted to computerized filing centre of a District.

PLAINT: Particulars to be contained in plaint provided under order VII, Rule 1. According to this rule the plaint shall contain the following particulars:

(a) The name of the Court in which the suit is brought;

(b) The name, description and place of residence of the plaintiff;

(c) The name, description and place of residence of the defendant, so far as they can be ascertained;

(d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

(e) The facts constituting the cause of action and when it arose;

(f) The facts showing that the Court has jurisdiction;

(g) The relief which the plaintiff claims;

(h) Where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and

(i) A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits.

2. **In money suits**: Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed: But where the plaintiff sue for manse profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, [136][or for movables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate, the plaint shall state approximately the amount or value sued for].

3. **Where the subject-matter of the suit is immovable property**: where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

4. **When plaintiff sues as representative**: Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject- matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

Plaint Structure

1. Heading and Title: Name of the court in which the suit is filed indicated at the top of the first page. Heading of the plaint means the court in which the suit is instituted. Therefore the name of the court has to come on the top of the plaint (Order VII, Rule 1(a)). If a court has various jurisdictions the specific jurisdiction in which the suit is being instituted should be given below the name of the court. For example:

IN THE COURT OF CIVIL JUDGE (Senior Division), …….

OR

IN THE JUDICATURE OF HIGH COURT …… Original Jurisdiction

Before the heading of the plaint proper space should be left for affixing court-fee stamp. Just below the name of the court, a space should left for the number of the suit. It is as such

Suit No. …….. of ……(Year)

Thereafter the names of the parties to the suit with all necessary particulars should be given. For ex.:

AB s/o CD aged……yrs, Resident of..... Plaintiff

Versus

PQ s/o RS aged …….Yrs, Resident of …… Defendant

If there are more plaintiff or defendant than the names of all plaintiffs/and defendant should be given in plaint as plaintiff No. 1/defendant No.1 and so on.

After the names of the parties the title of the suit should be given for ex.

“Suit for specific performance and damages”

Or

“Suit for Recovery of money”

Or

“Suit for damages for malicious prosecution”

Or

“Petition for Judicial Separation u/s 9 of the Hindu Marriage Act, 1955”

Where the plaintiff or defendant is a minor or a person of unsound mind, the fact should be mentioned in the cause-title. At the same time the name and description to the person through whom such person sues or sued should also be given in the cause-title. The forms given at No. 2 in Appendix A to the First Schedule of C.P.C. would be of special assistance in framing cause-titles in particular cases. For example, if plaintiff or defendant is:

1) **Individual person** - AB S/o……Aged….. Res. of……..
2) **Proprietary concern** - AB S/o……Aged….. Res. of……..proprietor of MIs XYZ and carrying on business at …….
3) **Partnership firm** – M/s XYZ, a partnership firm registered under the Indian partnership Act, 1932 with its principal place of business at …….
4) **A company** - M/s XYZ, Pvt. Ltd. A company incorporated under the companies Act having its registered office at…….
5) **Company in Liquidation** - M/s XYZ Ltd. In liquidation through liquidator Mr. ABC having office at …….
6) **Statutory Corporation** - The Life Insurance Corporation of India established and constituted under the Life Insurance Act, having its registered office at …….
7) **Municipality** – Municipal Corporation of Delhi through its Chairman, Town Hall, Delhi.
8) **Minor** - AB S/o……Aged….. a minor through his father and natural guardian S/o……Aged….. Res. of……..

2. Body of the Plaint: Then follows the body of the suit/plaint. The plaintiff acquaints the court and defendant with the case. The statement of facts is divided into paragraphs numbered consecutively. As far as convenient a paragraph should contain only one allegation. Dates, time and numbers should be expressed in figures as well as in words. The body of plaint usually begins thus:

‘The above named plaintiff states as follows:

1. That …….

   Mogha in ‘The Law of Pleadin in India has divided the body of the plaint into two parts (1) Substantive portion and (2) Formal portion.

   (1) **Substantive portion** of the body of plaint is devoted to (i) statement of all facts constituting the

cause of action and (ii) the facts showing the defendant's interest and liability. But, as already noted, often it is desirable to start the plaint with certain introductory statements, called 'matters of inducement'.

(2) **Formal portion** of the plaint shall state the following essential particulars:

(i) Date when the cause of action arose;

(ii) Statement of facts pertaining to jurisdiction;

(iii) Statement as to valuation of the suit for the purpose of jurisdiction and court fees and it should be stated that the necessary court fee has been affixed;

(iv) Statement as to minority or insanity of a party or if he is representing some other body then statement as to plaintiff's representative character;

(v) When a suit is filed after the expiry the period of limitation a statement showing the ground or grounds on which he has claimed exemption from Limitation Law;

(vi) Every relief sought for by the plaintiff should be accurately worded. Rule 7 says that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement. The plaintiff can claim more than one relief, in the suit. He can seek reliefs alternatively. A plaintiff is entitled to claim more than one relief in respect of the same cause of action should sue for all of them because he is debarred from bringing a fresh suit in respect to the omitted relieves except when the omission in the first suit was with the permission of the court [Order 2. Rule 2 (3) of C.P.C.];

(vii) Signature and Verification: The plaint must be signed by the plaintiff through advocate. But if the plaintiff is, by reason of absence or for other good cause, unable to sign the plaint, it must be signed by any person duly authorized by him to sign the same. The verification is done by the plaintiff himself.

Verification

I…….. (Name), S/o Sri..... (Father's name), the aforesaid plaintiff/defendant do hereby verify that the contents of paragraphs …… to …. of the above plaint are true and correct within my personal knowledge and that the contents of paras……..to ……. (mention the paras by their number in the pleading) I believed to be true on information received.

Signed and verified this at …….(Place) on this …….. (Date) day of month/years.

Sd/- (Plaintiff/Defendant)

Affidavit should also be enclosed with plaint as provided under Order 6 Rule 15 (4) CPC, 1908. All documents on which the plaintiff relies for his claim should be enclosed with a separate List of Documents according to Order 7 Rule 14 (1) CPC, 1908.

Written Statement

A written statement is required to be filed by the defendant in answer to the claim made by the plaintiff in his plaint which is delivered to the defendant along with the summons to attend at the first hearing of the suit. Written statement is the statement or defence of the defendant by which he either admits the claim of the plaintiff or denies the allegations or averments made by the plaintiff in his plaint. The written statement must specifically deal with each allegation of fact in the plaint and when a defendant denies any fact, he must not do so evasively

but answer the same in substance. Before proceeding to draft a written statement, it is always necessary for a pleader to examine the plaint very carefully and to see whether all the particulars are given in it and whether the whole information that he requires for fully understanding the claim and drawing up the defence is available. If any particulars are wanting, he should apply that the plaintiff be required to furnish them before the defendant files his written statement. If he cannot make a proper defence without going through such particulars and/or such documents referred to in the plaint, and that the defendant is not in possession of such copies, or the copies do not serve the required purpose, the defendant should call upon the plaintiff to grant him inspection of them and to permit him to take copies, if necessary, or, if he thinks necessary, he may apply for discovery of documents. If he thinks any allegation/allegations in the plaint are embarrassing or scandalous, he should apply to have it struck out, so that he may not be required to plead those allegations. If there are several defendants, they may file a joint defence, if they have the same defence to the claim. If their defences are different, they should file separate written statements, and if the defences are not only different but also conflicting, it is not proper for the same pleader to file the different written statements. For instance, if two defendants, executants of a bond, are sued on the bond, and their plea is one of satisfaction, they can file a joint written statement. If the plaintiff claims limitation from the date of certain acknowledgement made by one defendant and contends that the acknowledgement saves limitation against the other also, the defendants may file separate written statements. In a suit on a mortgage deed executed by a Hindu father, to which the sons are also made parties on the ground that the mortgage was for a legal necessity, if the sons want to deny the alleged legal necessity, they should not only file a separate defence from their father's but should also preferably engage a separate pleader.

(1) Formal Portion of Written Statement: A written statement should have the same heading and title as the plaint, except that, if there are several plaintiffs or several defendants, the name of only one may be written with the addition of "and another" or "and others", as the case may be. The number of the suit should also be mentioned after the name of the court. After the name of the parties and before the actual statement, there should be added some words to indicate whose statement it is, e.g., "written statement on behalf of all the defendants" or "written statement on behalf of defendant No. 1", or "written statement on behalf of the plaintiff in reply to defendant's claim for a set off" or "written statement (or replication) on behalf of the plaintiff filed under the order of the court, dated……." or "written statement on behalf of the plaintiff, filed with the leave of the court". The words "The defendant states……." or "The defendant states as follows" may be used before the commencement of the various paragraph of the written statement but this is optional.

No relief should be claimed in the written statement, and even statements such as that the claim is liable to be dismissed should be avoided. But when a set off is pleaded or the defendant prefers a counter-claim for any excess amount due to him, a prayer for judgment for that amount in defendant's favour should be made.

(2) Body of the Written Statement: The rest of the written statement should be confined to the defence.

Forms of Defence: A defence may take the form of (i) a "traverse", as where a defendant totally and categorically denies the plaint allegation, or that of (ii) "a confession and avoidance" or "special defence", where he admits the allegations but seeks to destroy their effect by alleging affirmatively certain facts of his own, as where he admits the bond in suit but pleads that it has been paid up, or that the claim is barred by limitation, or that of (iii) "an objection in point of law" (which was formerly called in England "a demurrer"), e.g., that the plaint allegations do not disclose a cause of action, or that the special damages claimed are too remote. Another plea may sometimes be taken which merely delays the trial of a suit on merits, e.g., a plea that the hearing should be stayed under Section 10, C.P.C., or that the suit has not been properly framed, there being some defect in the joinder of parties or cause of action and the case cannot be decided until those defects are removed. These pleas are called (a) "dilatory pleas" in contradistinction to the other pleas which go to the root of the case and which are therefore

known as (b) “peremptory pleas” or “pleas in bar”. Some dilatory pleas are not permitted in pleadings, but must be taken by separate proceedings. Others may either be taken in the written statement under the heading “Preliminary Objections”, or by a separate application filed at the earliest opportunity, as some pleas, such as that of a mis-joinder and non-joinder, cannot be permitted unless taken at the earliest opportunity (O. 1, R. 7 and 13).

A defendant may adopt one or more of the above forms of defence, and in fact he can take any number of different defences to the same action. For example, in a suit on a bond he can deny its execution, he can plead that the claim is barred by limitation, he can plead that, as no consideration of the bond is mentioned in the plaint, the plaint does not disclose any cause of action, he can plead that the bond being stated to be in favour of two persons the plaintiff alone cannot maintain the suit. He can as well plead one form of defence to one part of the claim, and another defence to another part of it. He can take such different defences either jointly or alternatively, even if such defences are inconsistent. But certain inconsistent pleas such as those which depend for their proof, on entirely contradictory facts, are generally not tenable. A ground of defence, which has arisen to the defendant even after the institution of the suit, but before the filing of his written statement, may also be raised (O.8, R.8).

All defences which are permissible should be taken in the first instance, for, if the defendant does not take any plea, he may not be allowed to advance it at a later stage, particularly when it involves a question of fact.

How to Draft a Written Statement

When the defendant relies on several distinct grounds of defence or set off, founded upon separate and distinct facts, they should be stated in separate paragraphs (O.8, R.7), and when a ground is applicable, not to the whole claim but only to a part of it, its statement should be prefaced by words showing distinctly that it is pleaded only to that part of the claim, thus: “As to the mesne profits claimed by the plaintiff, the defendant contends that, etc.” or “As to the price of cloth said to have been purchased by the defendant, the defendant contends that, etc.”

When it is intended to take several defences in the same written statement, the different kinds of defences should be separately written. It is convenient to adopt the following order for the several pleas:

(i) **Denials**: A defendant is said to take the defence of denial when he totally and categorically, denies the allegations contained in the plaint. It is also called ‘traverse’. Admissions and denials of the material facts alleged in the plaint should be given in the opening paragraphs of the body of the written statement. It may be emphasized that bare denials are in themselves valid defences to the claim made in the plaint.

Rules as to denials: a. Denials must be specific, b. Denials must not be evasive.

(ii) **Dilatory pleas**: Pleas which merely delay the trial of a suit on merits have been characterized as ‘dilatory pleas’. They simply raise formal objections to the proceedings and do not give any substantial reply to the merits of the case, e.g., the plea that the court-fee paid by the plaintiff is not sufficient. Such pleas should be raised at the earliest opportunity.

(iii) **Objections to point of law**: By such an objection the defendant means to say that even if the allegations of fact (made in the plaint) be supposed to be correct, still the legal inference which the plaintiff claims to draw in his favour from those facts is not permissible.

(iv) **Special defence** (confession and avoidance): Special defence is more appropriately called the plea of confession and avoidance. It is a plea whereby the defendant admits the allegations made in the plaint but seeks to destroy their effect by alleging affirmatively certain facts of his own, showing some justification or excuse of the matter charged against him or some discharge or release from it.

(v) **Set off and counter-claim**: According to Black’s Law Dictionary set off is the defendant’s counter

demand against the plaintiff, arising out of a transaction independent of the plaintiff's claim. Where the plaintiff sues a defendant for the recovery of money the defendant can defend that suit and he can 'claim a set-off in respect of any claim of his own'. An analysis of sub-rule (1) of Rule 6 of Order VIII would reveal that a claim by way of a set-off is allowed in the following conditions: a. the sum claimed must be ascertained sum of money, b. it must be legally recoverable, c. it must be recoverable by the defendant, d. it must be recoverable from the plaintiff, e. the sum claimed by the defendant must not exceed the pecuniary limits of the jurisdiction of the Court, both parties must fill the same character as they fill in the plaintiff's suit. Set-off may be of two kinds: legal set-off and equitable set-off. Etymologically the counter claim is the claim made by the defendant against the averments made by the plaintiff in his plaint. Black's Law Dictionary defines it as a claim for relief asserted against an opposing party after an original claim has been made, especially a defendant's claim in opposition to or as a set-off against the plaintiff's claim. Counter claim must be treated as a plaint. It shall have the same effect as a cross suit so as to enable the Court to pronounce judgement in the same suit, both on the original claim and on the counter claim.

All admissions and denials of facts alleged in the plaint should be recorded in the first part of the written statement and before any other pleas are written. If a defendant wishes to add an affirmative statement of his own version to the denial of a plaint allegation, or to add anything in order to explain his admission or denial, it is better and more convenient to allege the additional facts along with the admissions or denial, than to reserve them until after the admissions or denials have been recorded. If there are some defences which are applicable to the whole case and others which apply only to a part of the claim, the former should preferably be pleaded before the latter.

Drafting of Reply/Written Statement – Important Considerations

At the time of drafting the reply or written statement, one has to keep the following points in mind:-

(i) One has to deny the averment of the plaint/petition which are incorrect, perverse or false. In case, averment contained in any para of the plaint are not denied specifically, it is presumed to have been admitted by the other party by virtue of the provisions of Order 8, Rule 5 of the Code of Civil Procedure.

It must be borne in mind that the denial has to be specific and not evasive (Order 8, Rule 3 & 4 CPC) [1986 Rajdhani Law Reporter 213; AIR 1964 Patna 348 (DB), AIR 1962 MP 348 (DB); *Dalvir Singh Dhilowal* v. *Kanwaljit Singh* 2002 (1) Civil LJ 245 (P&H); *Badat & Co* v. *East India Trading Co.* AIR 1964 SC 538]. However, general allegation in the plaint cannot be said to be admitted because of general denial in written statement. [*Union* v. *A. Pandurang,* AIR 1962 SC 630.]

(ii) If the plaint has raised a point/issue which is otherwise not admitted by the opposite party in the correspondence exchanged, it is generally advisable to deny such point/issue and let the onus to prove that point be upon the complainant. In reply, one has to submit the facts which are in the nature of defence and to be presented in a concise manner. [*Syed Dastagir* v. *T.R. Gopalakrishnan Setty* 1999 (6) SCC 337.]

(iii) Attach relevant correspondence, invoice, challan, documents, extracts of books of accounts or relevant papers as annexures while reply is drafted to a particular para of the plaint;

(iv) The reply to each of the paras of the plaint be drafted and given in such a manner that no para of the plaint is left unattended. The pleadings are foundations of a case. [*Vinod Kumar* v. *Surjit Kumar,* AIR 1987 SC 2179.]

(v) After reply, the same is to be signed by the constituted attorney of the opposite party. If the opposite party is an individual, it could be signed by him or his constituted attorney or if the opposite party is a partnership firm, the same should be signed by a partner who is duly authorised under the Partnership Deed, because no partner has an implied authority to sign pleadings on behalf of the partnership firm by

virtue of Section 22 of the Indian Partnership Act, 1932. In case of a body corporate, the same could be signed by any Director, Company Secretary, Vice-President, General Manger or Manager who is duly authorised by the Board of Directors of the company because any of the aforesaid persons per se are not entitled to sign pleadings on behalf of the body corporate. [Order 29 of Code of Civil Procedure.]

It may be noted that if the plaint or reply is not filed by a duly authorised person, the petition would be liable to be dismissed [*Nibro Ltd .* v. *National Insurance Co. Ltd.,* AIR 1991 Delhi 25; *Raghuvir Paper Mills Ltd.* v. *India Securities Ltd.* 2000 Corporate Law Cases 1436]. However, at the time of filing of petition, if the pleadings are signed by a person not authorised, the same could be ratified subsequently. [*United Bank of India* v. *Naresh Kumar,* AIR 1997 SC 2.]

(vi) The reply/written statement is to be supported by an Affidavit of the opposite party. Likewise, the Affidavit will be sworn by any of the persons aforesaid and duly notorised by an Oath Commissioner. The Affidavit has to be properly drawn and if the affidavit is not properly drawn or attested, the same cannot be read and the petition could be dismissed summarily. [Order 6, Rule 15 CPC]. The court is bound to see in every case that the pleadings are verified in the manner prescribed and that verifications are not mere formalities.

(vii) The reply along with all annexures should be duly page numbered and be filed along with authority letter if not previously filed.

(viii) At the time of filing of reply, attach all the supporting papers, documents, documentary evidence, copies of annual accounts or its relevant extracts, invoices, extracts of registers, documents and other relevant papers.

(ix) It may be noted that if any of the important points is omitted from being given in the reply, it would be suicidal as there is a limited provision for amendment of pleadings as provided in Order 6, Rule 17 CPC, and also the same cannot be raised in the Affidavit-in-Evidence at the time of leading of evidence. Because if any point has not been pleaded in the pleadings, no evidence could be led on that point. General rule is that no pleadings, no evidence. [*Mrs. Om Prabha Jain* v. *Abnash Chand Jain,* AIR 1968 SC 1083; 1968 (3) SCR 111.]

(x) If a party is alleging fraud, undue influence or mis-representation, general allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice, however, strong the language in which they are couched may be, and the same applies to undue influence or coercion. [*Afsar Shaikh* v. *Soleman Bibi,* AIR 1976, SC 163; 1976 (2) SCC 142]. While pleading against fraud or misrepresentation, party must state the requisite particulars in the pleadings. [*K Kanakarathnam* v. *P Perumal,* AIR 1994 Madras 247.]

(xi) It is well settled that neither party need in any pleadings allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied. [Order 6, Rule 13 CPC; Sections 79 and 90 of Indian Evidence Act.]

(xii) In every pleading, one must state specifically the relief which the party is claiming from the court or tribunal or forum. While framing the prayer clause, one should claim all possible relief as would be permissible under the pleadings and the law [Order 7, Rule 7 CPC]. The general principle is that the relief if not prayed for, will not be allowed. [*R Tiwary* v. *B Prasad,* AIR 2002 SC 136.]

Format of Plaint

Suit for Ejectment and Arrears of Rent

In the Court of Small Cause, ……..

Suit No. ……. Of …..

(Space for Court-fee Stamp)

AB S/o CD Age….. Resident of …… *Plaintiff*

Versus

PQ S/o RS Age….. Resident Of …… *Defendant*

Suit for Ejectment, Arrears of Rent and Mesne Profits

The above-named plaintiff states as follows: -

1. That the plaintiff is the owner of the house no. ……. Situated at …… and bounded as below: -

   Boundaries of the Houses

   * * * * * * * *

2. That under verbal agreement made on ….. 20 ….. the defendant became a monthly tenant to the plaintiff in respect to the house described in paragraph I above at the rent of Rupees ……. Per month and has been in occupation of the said house as such tenant since the above mentioned date of the agreement.
3. That the defendant has not paid the rent from June 1, 20.. or any part thereof.
4. That the plaintiff duly determined the said tenancy by serving on the defendant, by registered post on October 1, 20.. a notice to quit the said house within thirty days of the receipt of the notice and pay the entire arrears f rent from June 1, 20… That the said notice was served upon the defendant on October 7, 20.. yet the defendant has not vacated the house, nor has he paid the said arrears of rent or any part thereof. Hence the defendant is liable to Ejectment under section 20 of the U.P. Act No. XIII of 1971.
5. That now a total sum of Rupees ….. is due to the plaintiff as against the defendant, that is Rupees …….. on account of arrears of rent from June 1, 20.. to November 7, 20.. , and Rupees ……. On account of damages for use and occupation from November 8, 20.., to 20.., the date of filing the suit.
6. That the cause of action for the said arose on November 8, 20.., when the period stipulated in the said notice expired.
7. That the defendant resides at …. within the jurisdiction of the court.
8. That the valuation of the suit for purpose of jurisdiction and payment of court-fee is Rupees …….. , has been paid.

Wherefore the plaintiff claims –

a) That the decree for Ejectment of the defendant from the house described in paragraph 1 above be passed in favour of the plaintiff.

b) That the decree of Rupees on account of arrears of rent from June 1, 20.. to November 7, 20.. be passed in favour of the plaintiff.

c) That a decree for Rupees …. On account of damages for use and occupation at the rate of Rupees …… per month from June 1, 20.. , to November 7, 20.. , the date of suit, be passed in favour of the plaintiff as against the defendant.

d) That a decree for further damages for use and occupation at the aforesaid rate till the Ejectment of the defendant be passed in favour of the plaintiff as against the defendant on payment of additional court-fee.

e) That cost of the suit be allowed to the plaintiff.

Place: …….. *AB*

Date: …….. *Plaintiff*

Through

Advocate

Verification

I, AB, he aforesaid, plaintiff, do hereby verify the contents of paragraphs …… and …….. of the above plaint are true to my personal knowledge nd the contents of the paragraphs ……. And ……., I believe to be true on information received.

Signed and verified this …… day of . 20.. ….., at ……

AB

Plaintiff

Format of Written Statement

Suit for Ejectment and Arrears of Rent

In the Court of Small Cause, ……..

Suit No. ……. of …..

(Space for Court-fee Stamp)

AB S/o CD Age….. Resident of …… *Plaintiff*

Versus

PQ S/o RS Age….. Resident of …… *Defendant*

Written Statement for Ejectment, Arrears of Rent and Mesne Profits

The above-named defendant states as follows: -

1. That the defendant admits the facts stated in paragraph 1 of the plaint.
2. That the defendant admits the agreement mentioned n paragraph 2 of the plaint and his his occupation of the said house as alleged therein.
3. That the defendant denies that he has not paid the rent from June 1, 20.. , as stated in paragraph 3 of the plaint.
4. That the defendant admits service of the notice alleged in paragraph 4 of the plaint, but does not admit that the plaintiff duly determined the defendant's tenancy thereby. That the defendant admits that he continues to be in occupation of the said ouse but denies that he has not paid any part of the said arrears of rent or that he is liable to Ejectment under the provisions of law alleged in paragraph 4 of the plaint.
5. That the defendant oes not admit anyone of the several allegations made in paragraph 6 of the plaint.
6. That no cause of action even occurred to the plaintiff alleged in paragraph 6 of the plaint.
7. That the defendant admits the jurisdiction of the court as alleged in paragraph 7 of the plaint.
8. That paragraph 8 of the plaint relates to valuation of the suit and payment f court fee.

   Additional Pleas

9. That the defendant has paid the rent for the months May, June, July, August and September, 20…, to

Sri EF, the plaintiff's authorized agent who has been collecting the rent of the said house on behalf of the plaintiff but no rent receipts in respect of the aforesaid months have been issued to the defendant even after repeated demands by the defendant.

10. That the rent for the October, 20.. , and that for the subsequent months was tendered to the said agent of the plaintiff and to the plaintiff himself but both have refused to accept it.

11. That in fact only Rupees ….. , are due from the defendant to the plaintiff as arrears of the rent , being the rent for the months mentioned in paragraph 10 above and that the defendant is ready and willing to pay the said amount to the plaintiff.

12. That the notice mentioned in paragraph 4 of the plaintiff is invalid in that it did not purport to give sufficient period of time of the defendant as stipulated in section 30 of the U.P. Act No. XIII of 1972.

13. That there are absolutely no grounds for granting the relief prayed for by the plaintiff and the suit is liable to be dismissed with costs.

Place: …….. *AB*

Date: …….. *Defendant*

Through

Advocate

Verification

I, AB, he aforesaid, defendant, do hereby verify the contents of paragraphs …… and …….. of the above plaint are true to my personal knowledge nd the contents of the paragraphs ……. And ……., I believe to be true on information received.

Signed and verified this …… day of . 20.. ….., at ……

AB

Defendant

Dilatory Pleas

Pleas which merely delay the trial of a suit on merits have been characterized as 'dilatory pleas'. They simply raise formal objections to the proceedings and do not give any substantial reply to the merits of the case, e.g., the plea that the court-fee paid by the plaintiff is not sufficient. Such pleas should be raised at the earliest opportunity.

Interlocutory Application

"Interlocutory" means not that decides the cause but which only settles some intervening matter relating to the cause. After the suit is instituted by the plaintiff and before it is finally disposed off, the court may make interlocutory orders as may appear to the court to be just and convenient. The power to grant Interlocutory orders can be traced to Section 94 of C.P.C. Section 94 summarizes general powers of a civil court in regard to different types of Interlocutory orders. It provides for supplemental proceedings. The detailed procedure has been set out in the Schedule I of the C.P.C which deals with Orders and Rules.

Interlocutory orders may take various shapes depending upon the requirement of the respective parties during the pendency of the suit e.g. Applications for appointment of Commissioner, Temporary Injunctions, Receivers, payment into court, security for cause etc. The Supreme Court in Rashtriya Ispat Nigam Ltd. V. Verma Transport Company, AIR 2006 SC 2800, placing reliance upon its earlier judgment in Vareed Jacob V. Sosamma Geevarghese, AIR 2004 SC 3992 explained the distinction between incidental and supplemental

proceedings explaining that incidental proceedings are those which arise out of the main proceedings.

Original Petition

Suits are filed to lodge money claims in civil courts working under District Courts while petitions are filed in High Courts which are above District Courts seeking some directions against the opposite party; mostly the Government.

There is no legal term like original suit or original petition. Suit of a civil nature is ordinarily tried in civil court. Every person has a right to bring a suit of a civil nature and civil court has jurisdiction to try the suits of a civil nature. Due to increasing litigation and delays in civil suits, parliament and state legislative created special courts and Tribunals with special enactments. The reason behind this exercise is for speedy disposal of cases of various types. For ex. Cases of ejectment in respect of urban buildings between the land lord and tenant are now dealt with by special courts created under various state legislations. Railway accidents claims are decided by railway claim Tribunals, claims by Industrial woken for payment of wages are entrusted to prescribed authorities. So is the case with the workman's compensation claims. In some states and in center also service tribunal have been created for adjudication of cases of public servants in disputes arising out of their employment, including dismissal, terminator of service, etc. At many places family courts have been established to deal with matrimonial disputes. In such cases which are dealt with by special courts under special enactments the party aggrieved expected to approach such special courts or tribunal and the jurisdiction of the civil courts under sec. 9 CPC is barred. However, in practice, the words 'petitions' and 'suits' are generally used to mean formal applications for seeking legal remedy The suit which is initially filed in the first court for the first time is referred as original suit. Petitions are Writ Petitions, Arbitration Petitions, Miscellaneous Petitions etc. & not the original petition.

After judgment in suit or petition, if any aggrieved party challenges it then it is by filing appeal in the higher court which is ordinarily called as Appeal but often in some court it is termed as Letters Patent Appeal (LPA) & as Special Leave Petition (SLP) in Supreme Court.

Affidavit

An affidavit is a sworn statement in writing made specially under oath before an authorized officer. Therefore, great care is required in drafting it. A Court may, at any time, for sufficient reason order that any particular fact or facts may be proved by affidavit or that the affidavit of any particular witness may be read at the hearing, provided that the Court may order the deponent to appear in person in Court for cross-examination [Order XIX Rule 2(1)].

Affidavits to be produced in a Court must strictly conform to the provisions of order XIX, Rule 1 of the Code of Civil Procedure, 1908 and in the verification it must be specified as to which portions are being sworn on the basis of personal knowledge and which, on the basis of information received and believed to be true. In the latter case, the source of information must also be disclosed. Order XIX Rule 3 provides that affidavit should be confined to such facts as the dependent is able of his own knowledge to prove, except on interlocutory application, on which statements on his belief may be admitted; provided that the grounds of such belief are stated. The following rules should be remembered when drawing up an affidavit:

(1) Not a single allegation more than is absolutely necessary should be inserted;

(2) The person making the affidavit should be fully described in the affidavit;

(3) An affidavit should be drawn up in the first person;

(4) An affidavit should be divided into paragraphs, numbered consecutively, and as far as possible, each paragraph should be confined to a distinct portion of the subject (Order XIX Rule 5);

(5) Every person or place referred to in the affidavit should be correctly and fully described, so that he or it

can be easily identified;

(6) When the declarant speaks of any fact within his knowledge he must do so directly and positively using the words "I affirm" or "I make oath and say";

(7) Affidavit should generally be confined to matters within the personal knowledge of the declarant, and if any fact is within the personal knowledge any other person and the petitioner can secure his affidavit about it, he should have it filed. But in interlocutory proceedings, he is also permitted to verify facts on information received, using the words "I am informed by so and so" before every allegation which is so verified. If the declarant believes the information to be true, he must add "and I believe it to be true" or "I make oath and say" (Order XIX Rule 8).

(8) When the application or opposition thereto rests on facts disclosed in documents or copies, the declarant should state what is the source from which they were produced, and his information and belief as to the truth of facts disclosed in such documents;

(9) The affidavit should have the following oath or affirmation written out at the end:

"I swear that this my declaration is true, that it conceals nothing, and that no part of it is false".

or

"I solemnly affirm that this my declaration is true, that it conceals nothing and that no part of it is false". Any alterations in the affidavit must be authenticated by the officer before whom it is sworn. An affidavit has to be drawn on a non-judicial Stamp Paper as applicable in the State where it is drawn and sworn.

An affidavit shall be authenticated by the deponent in the presence of an Oath Commissioner, Notary Public, Magistrate or any other authority appointed by the Government for the purpose.

(10) Affidavits are chargeable with stamp duty under Article 4, Schedule I, Stamp Act, 1899. But no stamp duty is charged on affidavits filed or used in Courts. Such affidavits are liable to payment of Court fee prescribed for the various Courts.

Specimen Affidavit of Creditor in proof of his debt in Proceeding for the Liquidation of a Company

IN THE (HIGH) COURT OF……

In the matter of Companies Act, 1956

And

The matter of the liquidation of…… Company Limited.

I, A.B., aged…… years, son of Shri…… resident of……, do hereby on oath (or on solemn affirmation) state as follows:

1. That the abovenamed company was on the…… day of……, 2013, the date of the order for winding up the same, and still is justly and truly indebted to me in the sum of Rupees…… (Rs……) only in account of (describe briefly the nature of the debt).
2. That in proof of the aforesaid debt I attach hereto the documents marked A, B and C.
3. That I have not, nor have any person or persons by my order or to my knowledge or belief for my use, received the aforesaid sum of Rupees…… or any part thereof, or any security or satisfaction for the same or any part thereof except the sum or security (state the exact amount of security).
4. That this my affidavit is true, that it conceals nothing and no part of it is false.

Sd/- A.B.

Dated

Deponent

Verification

I, the abovenamed deponent, verify that the contents of paragraphs 1 to 4 of this affidavit are true to my personal knowledge.Sd/- A.B.

Dated……

I,……S/o……R/o……declare, from a perusal of the papers produced by the deponent before me that I am satisfied that he is Shri A.B.

Sd/-……

Solemnly affirmed before me on this…… day of…… 2013 of…… (time) by the deponent.

Sd/-……

(Oath Commissioner)

Execution Petition

Application for Execution

Execution of decree

Application for execution of a decree shall be made by a holder of a decree who desires to execute it to the appropriate court which passed it or to the officer appointed in this behalf. In case the decree has been sent to another court than the application shall be made to such court or the proper officer thereof. Execution of an injunction decree is to be made in pursuance of the Order XXI Rule 32 CPC as the CPC provides a particular manner and mode of execution and therefore, no other mode is permissible.

Application for execution of a decree may be either (1) Oral; or (2) written.

(A) Oral Application: Where a decree is for payment of money the court may on the oral application of the decree holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgement debtor, prior to the preparation of a warrant if he is within precincts of the court.

(b) Written Application: Every application for the execution of a decree shall be in writing save as otherwise provided sub-rule (1) (above) signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquinted with the facts of the case, and shall contain in a tabular form the following particulars, namely :

(a) the No. of the suit;

(b) the name of the parties;

(c) the date of the decree;

(d) whether any appeal has been preferred from the decree;

(e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;

(f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;

(g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed;

(h) the amount of costs (if any) awarded;

(i) the name of the person against whom execution of the decree sought; and

(j) the mode in which the assistance of the court is required, whether–

(i) by the delivery of any property specifically decreed;

(ii) by the attachment or by the attainment and sale, or by the sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require.

The court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree. Some High Courts in different States have framed additional rules in this regard may also be taken care by the draftsman or the executing lawyer.

Memorandum of Appeal and Revision

Although "Appeal" has not been defined in the Code of Civil Procedure, 1908 yet any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court is an "appeal". A right of appeal is not a natural or inherent right but is a creature of a statute. It is the statute alone to which the Court must look to determine whether a right of appeal exists in a particular instance or not. Parties cannot create a right of appeal by agreement or mutual consent. The right of appeal is not a matter of procedure, but is a substantive right and can be taken away only by a subsequent enactment, if it says so expressly or by necessary intendment and not otherwise. It is for the appellant to show that the statute gives a right of appeal to him. Appeal from original degree is known as first appeal. Second appeal means the appeal from the decree or judgement from the appellate Court. Second appeal only lies to the High Court. First appeal lies to any appellate Court. First appeal lies on the ground of question of law as well as question of facts. Second appeal can only lie on the ground of substantial question of law. Memorandum of appeal contains the grounds on which the judicial examination is invited. A memorandum of appeal is meant to be a succinct statement of the grounds upon which the appellant proposes to support the appeal. It is a notice to the Court that such specific grounds are proposed to be urged on behalf of the appellant, as also a notice to the respondent that he should be ready to meet those specific grounds. The theory of an appeal is that the suit is continued in the Court of appeal and re-heard there. An appeal is essentially a continuation of the original proceedings.

In *Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad & Ors., (1999) 4 SCC 468*, the apex Court held that the right of appeal though statutory, can be conditional/qualified and such a law cannot be held to be violative of Article 14 of the Constitution. An appeal cannot be filed unless so provided for under the statute and when a law authorizes filing of an appeal, it can impose conditions as well.

Thus, it is evident from the above that the right to appeal is a creation of Statute and it cannot be created by acquiescence of the parties or by the order of the Court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a Court or Authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance of the conditions mentioned in the provision that creates it.

The Code of Civil Procedure, 1908 provides for four kinds of appeals:

(1) Appeals from original decrees (Sections 96 to 99 and Order XLI);

(2) Second Appeals (Sections 100 to 103);

(3) Appeals from Orders (Sections 104 to 106, Order XLIII, Rules 1 and 2); and

(4) Appeals to the Supreme Court.

(1) Appeals from original decrees may be preferred from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court on points of law as well as on facts.

(2) Second Appeals lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

Under Section 100 to the Code, an appeal may lie from an appellate decree passed *ex parte*. The memorandum of appeal shall precisely state the substantial question of law involved in the appeal. The High Court, if satisfied, that a substantial question of law is involved, shall formulate that question. The appeal shall be heard on question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. An application which was dismissed on the application of the appellant himself that he wished to withdraw, it cannot be restored even if he was acting under a misapprehension or a mistake of law (Ram Lal Sahu v Dina Nath AIR 1942 Oudh 50).

In the second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal:

(a) which has not been determined by the Lower Appellate Court or both by the Court of first instance and the Lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred in Section 100 of the Code (Section 103).

(3) Appeals from, Orders under Sections 104 to 106 would lie only from the following Orders on grounds of defect or irregularity of law:

(a) An Order under Section 35A of the Code allowing special costs;

(b) An Order under Section 91 or Section 92 refusing leave to institute a suit;

(c) An Order under Section 95 for compensation for obtaining arrest, attachment or injunction on insufficient ground;

(d) An Order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree; and

(e) Appealable Orders as set out under Order XLIII, Rule 1.

(4) Appeals to the Supreme Court, the highest Court of Appeal, lie in the following cases :

(1) Section 109 of the Code of Civil Procedure, 1908 provides:

"Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of India, and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court from any judgement, decree or final order in a civil proceeding of a High Court, if the High Court certifies:

(i) that the case involves a substantial question of law of general importance; and

(ii) that in the opinion of the High Court the said question needs to be decided by the Supreme Court."

Order 45 of the Code of Civil Procedure, 1908 provides rules of procedure in appeals to the Supreme Court.

(2) Articles 132 to 135 of the Constitution deal with ordinary appeals to the Supreme Court:

(i) Appeals in Constitutional cases: Clause (1) of the Article 132 of the Constitution provides that an appeal shall lie to the Supreme Court from any judgement, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceedings, if the High Court certifies under Article 134A that the case involves a substantial question of law as to interpretation of the Constitution.

(ii) Appeals in civil cases: Article 133 deals with appeals to the Supreme Court from decisions of High Court in civil proceedings. For an appeal to the Supreme Court the conditions laid down in this article must be fulfilled.

These conditions are:

(a) the decision appealed against must be a "judgement, decree or final order" of a High Court in the territory of India,

(b) such judgement, decree or final order should be given in a civil proceeding, and

(c) a certificate of the High Court to the effect that (i) the case involves a substantial question of law, and (ii) in the opinion of the High Court the said question needs to be decided by the Supreme Court.

(iii) Appeals in criminal cases: A limited criminal appellate jurisdiction is conferred upon the Supreme Court by Article 134. It is limited in the sense that the Supreme Court has been constituted a Court of criminal appeal in exceptional cases where the demand of justice requires interference by the highest Court of the land.

There are two modes by which a criminal appeal from any "judgement, final order or sentence" in a criminal proceeding of a High Court can be brought before the Supreme Court:

(1) Without a certificate of the High Court.

(2) With a certificate of the High Court.

(3) Appeal by Special Leave. *(Discussed in this study lesson under the heading "Special Leave Petition".)*

In appeals, as a general rule, the parties to an appeal are not entitled to produce additional evidence, whether oral or documentary, but the Appellate Court has discretion to allow additional evidence in the following circumstances:

(i) When the lower Court has refused to admit evidence which ought to have been admitted;

(ii) When the party seeking to produce additional evidence establishes that he could not produce it in its trial Court for no fault of his;

(iii) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgement; and

(iv) For any other substantial cause.

However, in all such cases the Appellate Court shall record its reasons for admission of additional evidence.

The appellate judgement must include the following essential factors:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled to.

Drafting of Appeals

An appeal may be divided into three parts: (1) formal part, known as the memorandum of appeal, (2) material part, grounds of appeal, and (3) relief sought for.

The memorandum of appeal should begin with the name of the Court in which it is filed. After the name of the Court, number of the appeal and the year in which it is filed are given. As the number is noted by the officials of the Court, a blank space is left for it. Then follow the names and addresses of the parties to the appeal. The name of the appellant is given first and then that of the respondent. It should be indicated against the names of the parties as to what character each party had in the lower Court, i.e. whether he was a plaintiff or a defendant, or an applicant or an opposite party, as:

A.B., son of etc. *(Plaintiff) Appellant*

Versus

C.D., son of etc. *(Defendant) Respondent*

Or

A.B., son of etc. *(Decree-holder) Appellant*

Versus

C.D., son of etc. *(Judgement-debtor) Respondent*

After the names of the parties, an introductory statement giving the particulars of the decree or order appealed from (viz., the number and date, the court which passed it, and the name of the presiding officer), should be written in some such form as:

"The above-named appellant appeals to the Court of…… from the decree of…… Civil Judge at…… in Suit No…… passed on the…… and sets forth the following grounds of objections to the decree appealed from, namely".

This may also be written in the form of a heading as:

"Appeal from the decree of…… Civil Judge of…… at…… in Suit No…… passed on the……".

Thereafter, the grounds of appeal be given under the heading "Grounds of Appeal". The grounds of appeal are the grounds on which the decree or the order appealed from is objected to or attacked. As a general rule, in the grounds of appeal, the following points may be raised:

(a) any mistake committed by the lower Court in weighing the evidence;

(b) any mistake in the view of law entertained by the lower Court;

(c) any misapplication of law to the facts of the case;

(d) any material irregularity committed in the trial of the case;

(e) any substantial error or defect or procedure;

(f) and the defect, error or irregularity of any inter-locutory order passed in the case, whether the same was appealable or not.

A ground taken but not pressed in the first Appellate Court cannot be revived in second appeal. A defendant can question the propriety of *ex parte* proceedings in an appeal from the decree.

The general rule, besides being subject to Section 100 of the Code, is also subject to two conditions:

(1) that the mistake of the lower Court should be material i.e., it should be such as affects the decision, and

(2) that the objection taken must be such as arises from the pleadings and evidence in the lower Court.

Drafting Grounds of Appeals

(i) Grounds of objection should be written distinctly and specifically;

(ii) They should be written concisely;

(iii) They must not be framed in a narrative or argumentative form; and

(iv) Each distinct objection should be stated in a separate ground and the grounds should be numbered consecutively.

These rules are simple but are most important and must be carefully remembered and observed while drafting Grounds of Appeal.

Relief Sought in Appeal

It is nowhere expressly provided in the Code that the relief sought in appeal should be stated in the memorandum of appeal. The absence of prayer for relief in appeal does not appear to be fatal and the Court is bound to exercise its powers under Section 107 of the Code and to give to the appellant such relief as it thinks proper. However, it is an established practice to mention in the memorandum of appeal, the relief sought by the appellant.

Signature

A memorandum of appeal need not be signed by the appellant himself. It may be signed by him or by his counsel but if there are several appellants and they have no counsel, it must be signed by all of them. It is not required to be verified.

Specimen Form of Appeal to the High Court

IN THE HIGH COURT OF…… AT……

CIVIL APPELLATE JURISDICTION

REGULAR CIVIL APPEAL NO…… OF

IN THE MATTER OF:

A.B.C. Company Ltd. a company incorporated under the provisions of the Companies Act and having its registered office……

Appellant

Versus

M/s…… a partnership concern (or XYZ company Ltd., a company incorporated under the Companies Act and having its registered office at……)…

Respondents

May it please the Hon'ble Chief Justice of the High Court of…… and his Lordship's Companion Justices,

The appellant-company

MOST RESPECTFULLY SHOWETH:

1. That the appellant herein is a company duly registered under the provisions of the Companies Act and the registered office of the appellant is at…… and the company is engaged in the business of manufacturing……

2. That the respondents who are also doing business of selling goods manufactured by the appellants

and other manufacturers approached the appellant for purchasing from the appellant-company the aforesaid manufactured goods. An agreement was reached between the parties which were reducing into writing. The appellant supplied goods worth Rs. 15 lacs over a period of …… months to the respondents. A statement of account regarding the goods so supplied is annexed hereto and marked as *ANNEXURE A-1*.

3. That the respondents have made a total payment of Rs. 6 lacs on different dates. The statement of the said payments made by the respondents is appended and is marked as *ANNEXURE A-2*.

4. That the remaining amount has not been paid by the respondent despite repeated demands and issuance of a legal notice by the appellant through advocate.

5. That the appellant filed a suit for recovery of the aforesaid balance amount of Rs. 9 lacs together with interest at the rate of 12% per annum and the cost of the suit. The suit was filed on…… in the court of the learned District Judge.

6. That upon being summoned by the said court the respondents appeared through counsel and filed their written statement to which appellant-plaintiff also filed replication (rejoinder).

7. That the parties led evidence. After hearing the counsel for the parties the learned District Judge has by his judgement and decree passed on…… dismissed the appellant's suit on the ground that the evidence led by the parties does not establish the claim of the appellant-plaintiff. Copies of the judgement and decree of the court below are annexed hereto and are marked as *ANNEXURE A-3 AND A-4*, respectively.

   Aggrieved by the aforesaid judgement and decree of the court below dismissing the suit of the plaintiff, this appeal is hereby filed on the following, amongst other,

GROUNDS

   A. That the judgement and decree under appeal are erroneous both on facts as well as law.

   B. That the learned trial court has failed to properly appreciate the evidence, and has fallen into error in not finding that the preponderance of probability was in favour of the plaintiff-appellant.

   C. That there was sufficient evidence led by the plaintiff to prove the issues raised in the suit and the defendant-respondent has failed to effectively rebut the plaintiff's evidence, more particularly the documentary evidence.

   D. ……

   E. ……

   F. ……

8. That the valuation of this appeal for the purposes of payment of court-fee is fixed at ₹…… and the requisite court fee in the form of stamps is appended to this memorandum of appeal.

9. That this appeal is being filed within the prescribed period of limitation, the judgement and decree under appeal having been passed on……

   In the above facts and circumstances the appellant prays that this appeal be allowed, the judgement and decree under appeal be set aside and the decree prayed for by the appellant in his suit before the court below be passed together with up-to-date interest and costs of both courts.

APPELLANT

(……)

VERIFICATION

Verified at…… on this, the…… day of……, 2018 that the contents of the above appeal are correct to the best of my knowledge and belief and nothing material has been concealed therefrom.

THROUGH

APPELLANT

Revision

Revision is not a continuation of the suit, but is altogether a separate proceeding. Hence a fresh *vakalatnama* would be necessary to enable the advocate to file the petition for revision. Section 115 of the Code of Civil Procedure, 1908, deals with revisionary jurisdiction of the High Courts. The Section lays down:

"(1) The High Court may call for the record of any case which has been decided by any Court sub-ordinate to such High Court and in which no appeal lies thereto, and if such sub-ordinate Court appears:

(a) to have exercised a jurisdiction not vested in it by law; or

(b) to have failed to exercise a jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under the Section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where:

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

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

REVISION (CIVIL)

Section 115 of the Code of Civil Procedure, 1908 provides for the remedy of revision. In a case where an appeal does not lie against a final order the aggrieved party can file a revision before the High Court (an no other court). There are certain orders passed by the Civil Courts subordinate to the High Court against which the remedy of appeal is not available, even through such orders finally decide an important question involved in the suit or substantially affect the right or interest of a party to the suit. In such cases the High Court can entertain a revision and quash or modify the order of the court below.

SPECIMEN FORM OF REVISION

In the High Court of……

Civil Appellate Jurisdiction

Civil Revision No…… of 2018

IN THE MATTER OF:

ABC S/o……..... R/o…… *Petitioner*

Versus

XYZ S/o.....R/o…… *Respondent*

AND

IN THE MATTER OF:

CIVIL REVISION AGAINST THE ORDER DATED…… PASSED BY THE LEARNED SUB-JUDGE, IST CLASS…… IN THE SUIT ENTITLED ABC -VS.- XYZ (CIVIL SUIT NO. …… OF 2013)

May it please the Hon'ble Chief Justice, High Court of…… and his companion Justices.

The petitioner most respectfully showeth:

A. That the petitioner named above has filed a suit against the respondents for the recovery of possession of a house situated in……, fully described in the plaint. The suit is pending in the court of Sub-Judge Ist Class…… and the next date of hearing is……

B. That on being summoned the respondent appeared before the court below and filed his written statement wherein he denied the petitioner's title set up in the suit property.

C. That the trial court framed issues on…… and directed the petitioner (plaintiff) to produce evidence, upon which the petitioner promptly furnished to the court below a list of witnesses and also deposited their diet expenses etc., making a request that the witness be summoned by that Court.

D. That on a previous date of hearing that is……, 2013, two witness of the petitioner had appeared and their statements were recorded. However, the learned Presiding Officer of the court below passed an order that the remaining witnesses be produced by the petitioner-plaintiff on his own without seeking the assistance of the court. This order was passed despite a request by the petitioner that at least those witness named in the list who are State employees should be summoned by the court, as they are required to produce and prove some official records.

E. That on the next date of hearing the learned trial court by the order impugned in this revision closed the evidence of the petitioner-plaintiff on the ground that the remaining witnesses were not produced by him.

F. That the impugned order has caused great prejudice to the petitioner and if the same is allowed to stand the petitioner's suit is bound to fail.

G. That the trial court has unjustifiably denied assistance of the court to the petitioner-plaintiff to secure the attendance of his witnesses. The interests of justice demand that he is provided with all legal assistance in this regard.

In the facts and circumstances discussed above the petitioner prays that this Hon'ble Court be pleased to quash and set aside the order under revision and direct the court below to provide assistance of the court for summoning the plaintiff-witnesses.

PETITIONER

[*Affidavit to be filed in support of the fact that the contents of the accompanying revision petition are true and correct to the best of the deponent's knowledge and that nothing has been kept back or concealed*].

Complaint

Complaint under section 2(d) of the Criminal Procedure Code means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but it does not include a police report. The petition of complaint must be submitted to the Magistrate. If it is submitted to some other official it is not a complaint. In order to be a complaint the petition must make allegations about occurrence of some offence. The object of the petition of complaint

submitted before the Magistrate must be with a view to his taking action. Mere information to a Magistrate is not a complaint. A petition to Civil Court complaining some obstruction is not complaint within the meaning of the Criminal Procedure Code. A petition submitted before the District Magistrate or Superintendent of Police is not a complaint.

However, a report made by the police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer making the report as a complainant. In general a complaint into an offence can be filed by any person except in cases of offences relating to marriage, defamation and offences mentioned under Sections 195 and 197.

A complaint in a criminal case is what a plaint is in a civil case. The requisites of a complaint are:

(i) an oral or a written allegation;

(ii) some person known or unknown has committed an offence;

(iii) it must be made to a magistrate; and

(iv) it must be made with the object that he should take action.

There is no particular form for narration of the incident in the body of complaint. It is sufficient if it contains a vavid and correct description how and in what manner the offence was committed. Only facts which are connected with the incident have to be stated in the complaint. Facts which can prove involvement of the accused in the offence should also be mentioned. The petition of complaint must disclose the names of the witnesses of the offence. The petition of complaint shall thus set out in clear and unambiguous terms all the points essential for establishing the case. A petition addressed to the Magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprit be suitably dealt with is a complaint. (*Mohd. Yousuf* v. *Afaq Jahan*, AIR 2006 SC 705). Complaint need not be presented in person. A letter to a magistrate stating facts constituting an offence and requesting to take action is a complaint. Police report is expressly excluded from the definition of complaint but the explanation to Section 2(d) makes it clear that such report shall be deemed to be a complaint where after investigation it discloses commission of a non-cognizable offence. Police report means a report forwarded by a police officer to a Magistrate under Subsection (2) of Section 173.

Section 133 of Cr.P.C. deals with removal of public nuisance. Strictly speaking information regarding existence of a public nuisance is not a complaint but for all practical purposes it is a complaint. Even a private individual can lodge the information. The Magistrate on receiving such an information or complaint shall pass a conditional order of removal.

Criminal Miscellaneous Petition

The Criminal Miscellaneous Petitions are one of the important tasks of the Judge in the Criminal Court. The filing of Criminal Miscellaneous Petition will start even before registering the case by way of anticipatory bail application. According to Oxford Dictionary meaning, Miscellaneous means consisting of mixture of various things that are not usually connected with each other. When a petition is filed seeking interim relief, it is registered as miscellaneous petition. A Memo filed before the Court of Law need not be treated as Petition. The main difference between Petition and Memo is that Memo is nothing but bringing a fact to notice before a Court of Law and no relief can be sought for in a Memo and notice to the opposite party is not required. However, where a Petition is filed requiring some relief from the court, a notice to opposite party is mandatory in most of the cases. No order be passed on Memo (Held in a decision held in between Syed Yousuf Ali Vs. Mohd. Yousuf and Others reported in 2016 (3) ALD 235.

In nut-shell it can be called a Petition other than a main case. When a Miscellaneous Petition is filed in Criminal cases, it is registered as Criminal Miscellaneous Petition. As soon as a Petition is filed, primary duty of the Court is to see whether the relief sought is provided under Criminal Procedure Code or not. If it is provided,

the Petition shall be called in Public Court by assigning a particular miscellaneous number and notices shall be ordered to the opposite party. Having heard both the parties, a speaking order has to be pronounced. In day to day, Criminal Courts come across several Miscellaneous Petitions seeking different reliefs. The petitions filed U/sec.239 Cr.P.C, Sec.227 Cr.P.C, Sec.311 Cr.P.C, Sec.319 Cr.P.C, Sec.451 Cr.P.C and Sec.457 Cr.P.C and also used to file applications U/sec.90 and 91 Cr.P.C and Sec.125(3) Cr.P.C for necessary reliefs.

The other Miscellaneous Petitions which are filed before the Criminal Courts regularly are the petitions under sections 256 and 317 of Cr.P.C. In addition to the above Miscellaneous Petitions, another important Miscellaneous Petitions used to be filed by the accused in criminal cases are the bail petitions U/sec.436 Cr.P.C and Sec.437 Cr.P.C before the Judicial Magistrate of I Class Courts and Sec.438 Cr.P.C. and 439 Cr.P.C. before the Sessions Court for seeking the bail.

Bail

Bail means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date. Bail is liberty to the accused to remain at large till the investigation, inquiry and trial is over.Section 436 of the Code of Criminal Procedure relates to bail in bailable offence. Under this section an accused in a bailable case can get bail as a matter of course. Section 437 of Cr.P.C. deals with non-bailable cases. When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant or appears or is brought before a Court such person may be released on bail by the Court under section 437 (1) Cr.P.C.

An *"anticipatory bail"* is granted by the High Court or a Court of Session, to a person who apprehends arrest for having committed a non-bailable offence, but has not yet been arrested (Section 438). An opportunity of hearing must be given to the opposite party before granting anticipatory bail (*State of Assam* v. *R.K. Krishna Kumar* AIR 1998 SC 144).

Specimen Bail Application under Section 437, Cr.P.C. 1973

In the Court of..... Magistrate .....

The State .....

Versus

Accused AB son of TZ, Village: .....

Thana: .....

In the matter of petition for bail of accused AB, during police enquiry

The humble petition of AB the accused above-named

Most respectfully sheweth:

1. That your petitioner was arrested by the police on 5th March 2013 on mere suspicion. That nearly a month has passed after the arrest but still the Investigating Police Officer has not submitted a charge-sheet.
2. That your petitioner was not identified by any inmate of the house of CM where the burglary is alleged to have taken place, nor was any incriminating article found in his house.
3. That your petitioner has reason to believe that one GS with whom your petitioner is on bad terms and who is looking after the case for complainant has falsely implicated your petitioner in the case out of grudge.
4. That your petitioner shall fully co-operate with the police.

5. That your petitioner is not likely to abscond or leave the country.

Your petitioner prays that your Honour may be pleased to call for police papers and after perusing the same be pleased to direct the release of your petitioner on bail.

And your petitioner, as in duty bound, shall ever pray.

Advocate AB

Verification

I, AB, son of TZ, residing at..... by occupation business, do hereby solemnly affirm and say as follows:

1. I am the petitioner above-named. I know and I have made myself acquainted with the facts and circumstances of the case and I am able to depose thereto.
2. The statements in paragraphs 1 to 5 of the foregoing petition are true and correct to my knowledge and belief.
3. I sign this verification on the 6th day of May 2013.

Solemnly affirmed by the said AB on 6th May 2013 at the Court

House at..... AB

Before me

Notary/Magistrate.

Specimen Petition by Wife under section 125, Cr.P.C. 1973 for Maintenance

In the Court of .... Judicial Magistrate 1st Class

Case No. …… under s. 125, Cr.P.C.

Petitioner W (wife)		Opposite Party H (husband)
Daughter of.....	versus	Son of.....
Village		Village.....
Thana		Thana .....
Occupation.....		Occupation.....

In the matter of petition for maintenance of petitioner W from the husband H under S.125, Cr.P.C.

The humble petition of W (wife), the petitioner above-named

Most respectfully Sheweth:

1. Your petitioner W is the married wife of the opposite party. The marriage between them was solemnized according to the Hindu rites on ……
2. The opposite party H is a clerk on the staff of AB & Co. Ltd. holding a responsible position and drawing salary of Rs. 15,000 per month.
3. The opposite party severely assaulted the petitioner on ..... and drove her away from the matrimonial house on ..... in presence of several gentlemen of the locality.
4. That the opposite party leads a life of drunkenness and debauchery. He is besides a man of uncertain temperament and would fly into rage in season and out of season without any reason whatsoever. He has lost all sense of decorum and would use extremely filthy language.
5. Your petitioner after being driven out of the house by the opposite party came over to her father's place

on the same day and has been staying at father's house with his family members.

6. The opposite party was served with a pleader's notice to send your petitioner Rs. 2000 every month for her maintenance but with no result. Having regard to the violent temper of H and his inhuman way of beating your petitioner she does not venture to go back to the place of the opposite party.

Your petitioner, therefore, prays that Your Honour may be pleased to issue notice on the opposite party and after taking evidence of both sides be pleased to order the opposite party to pay the petitioner maintenance at the rate of Rs. 2000 per month.

And your petitioner, as in duty bound, shall ever pray.

I, W daughter of MN resident at …… do hereby solemnly affirm and say as following:

1. I am the petitioner above-named and I know the facts and circumstances of the case and I am able to depose thereto.
2. The statements in the paragraphs 1, 2, 3, 4, 5 and 6 of the foregoing petition are true to my knowledge and that I have not suppressed any material fact.

Solemnly affirmed by the said

Mrs. Won the …….. day of ……. 2013 in the Court House at Calcutta

Before me

Notary

First Information Report (FIR)

Section 154 Cr.P.C 1973 deals with information in cognizable cases. Section 154 reads:

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under Sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

In *Lallan Chaudhary and Ors v. State of Bihar, AIR 2006 SC 3376*, the Supreme Court held that section 154 of the Code thus casts a statutory duty upon police officer to register the case, as disclosed in the complaint, and then to proceed with the investigation. The mandate of Section 154 is manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station, such police officer has no other option except to register the case on the basis of such information.

The provision of Section 154 is mandatory. Hence, the police officer concerned is duty-bound to register the case on receiving information disclosing cognizable offence. Genuineness or credibility of the information is not a condition precedent for registration of a case. That can only be considered after registration of the case. [*Ramesh Kumari v. State (NCT of Delhi) and Ors, 2006 Cri.LJ 1622*].

Specimen Form of First Information Report

To

The Officer-in-Charge

..... (Name of the Police Station)

Sir

This is to inform you that my cycle has been stolen from the cycle stand in the daily market last evening. Last evening, before I went to the market, I placed my green model Hero Cycle in the cycle stand No. 1 as usual.

I had locked the cycle. The cycle bears the No. ..... I had bought it only a month ago and it was almost new. The cycle had a full gear case, a carrier and a side basket. When such mishap occurred I was buying vegetables in the market. I asked everybody who were present there about the cycle. It was all in vain.

I request you to kindly register a case of theft and initiate the necessary investigation to recover the stolen cycle.

Yours faithfully,

_____ (Your Name)

Application under Section 156 (3) Cr.P.C.

In the Court of Chief Judicial Magistrate at ……..

Complainant	Accused
'X'	(1) "Y"
W/o	S/o ……
D/o	(2) "Z"
At present residing at her father's place,	S/o …….
At ……	all of ……..
Distt.	….P.S. …… District ….
	Witnesses: (1)…….
	(2) ……..

Under section 498 – A/40 of the Indian Penal Code

The complainant above-named begs to state as follows:

1. The complainant was married to the accused no. 1 ……(Name) according toHindu rites and customs at her father's place at ……(Place) P.S. …….
2. That at the time of the marriage the father of the complainant apart from arranging for a large gathering gave in stridhan gold ornaments worth Rs. ……, a Swift car worth Rs. ……. and ……(mention all other items)
3. That after marriage the complainant was first taken to her matrimonial home where the in-laws were residing and after spending a month complainant and accused (1) and (2) were shifted to ……..
4. That after six months of the marriage, the complainant was subjected to mal treatment, both physically and mental at the hands of accused (1) and encouragement of the accused (2) for demand of dowry of Rs. 20 lacs. Having failed to meet such demand she was tortured continuously and torture by accused (1) and (2) were unabated.

5. That the offence under section 498 –A, Indian Penal Code is a continuing offence and on some occasions both accused (1) and (2) had taken part in inflicting tortures on the complainant and on other occasion accused (1), husband had taken part of the said offence and as such …….. (P.S.) has jurisdiction to investigate into the matter under Clause (C) of Section 178 of the Cr.P.C. and this Court has jurisdiction to try this case.
6. That there is primafacie case under sections, 498 – A/406 of the Indian Penal Code against all the accused persons.
7. That the incident was reported to the ……..(P.S.), they did not take any action against the accused and refused to report a FIR against them, hence the Complaint is filed in the Court.

Prayer:

It is therefore, prayed that the complaint be forwarded to the Officer-in-charge,…… (P.S.) to investigate the matter and to lodge an FIR in the above case and report may be called from the SHO …… (P.S.) under Section 156 (3 of Cr.P.C.) in the interest of Justice.

Sd. Complainant

Through Council

LESSON ROUND-UP

- Pleadings generally mean either a plaint or a written statement. A suit is instituted by filing a plaint, which is the first pleading in a civil suit. It is a statement of the plaintiff's claim and its object is simply to state the grounds upon, and the relief in respect of which he seeks the assistance of the court.
- The four fundamental rules of pleadings are:
  1) That a pleading shall contain, only a statement of facts, and not Law;
  2) That a pleading shall contain all material facts and material facts only.
  3) That a pleading shall state only the facts on which the party pleading relies and not the evidence by which they are to be proved,
  4) That a pleading shall state such material facts concisely, but with precision and certainty.
- It is incumbent on the defendant to file his defence in writing. If the defendant fails to file written statement, the court may pronounce judgment against him or may under Order 8, Rule 10, make such order in relation to the suit as it deems fit.
- When the defendant appears and files a written pleading by way of defence, his pleading should conform to all the general rules of pleadings. All the rules relating to defendant's written statement apply, mutatis mutandis to such written statement of the plaintiff also. One has to keep in view various points at the time of drafting the reply or written statement.
- Pleadings filed by a defendant/respondent in answer to the claims set out by the plaintiff/petitioner in the form of an affidavit and/or supported by an affidavit are referred to as a counter affidavit.
- A written statement/reply of the plaintiff/petitioner by way of defense to pleas' raised in the counter affidavit/written statement from the defendant/respondent, is termed as a rejoinder or replication.
- The provisions of Sections 101, 102, 103, 106, 109, 110 and 111 of the Indian Evidence Act must be carefully gone through before one proceeds to draft the affidavit-in-evidence. It is well settled that evidence should be tailored strictly to the pleadings. No extraneous evidence can be looked into in absence of specific pleadings.

- It is incumbent upon a party in possession of best evidence on the issue involved, to produce such evidence and if such party fails to produce the same, an adverse inference is liable to be drawn against such party.
- Preliminary submissions should primarily confine to the true and correct facts regarding the issue involved and which have been suppressed or not disclosed by the other side in the pleadings.
- Legal pleadings/submissions should be taken under the heading "preliminary submissions/objections". While taking such plea one should ensure that the legal provisions and/or interpretation thereof, is very clear and directly applicable to the issues involved in the matter
- An affidavit being a statement or declaration on oath by the deponent is an important document and the consequences of a false affidavit are serious. Therefore, great care is required in drafting it.
- Complaint means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but it does not include a police report. A complaint in a criminal case is what a plaint is in a civil case.
- Bail means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who are sureties to produce the accused to answer the charge at the stipulated time or date.

SELF-TEST QUESTIONS

1. What is meant by pleadings? What is the objective behind formulating the rules of pleadings? Explain the fundamental rule of pleadings.
2. Explain the important considerations while drafting Affidavit in Evidence.
3. Briefly outline various components of an appeal.
4. Draft a Specimen of Appeal to the High Court.
5. Define 'affidavit'. What rules and guiding principles should be followed while drawing up an affidavit?
6. Your friend has been arrested on a mere suspicion. Draft a bail application to get him released on bail.

Lesson 10
Art of Writing Opinions

LESSON OUTLINE

- Introduction
- Case for opinion writing
- Types of Legal Opinion
- Quality of Writing
- Form and Elements of the Opinion Letter
- Research on Relevant Case Laws
- Expression of the Opinion
- Qualifications
- Special Matters
- Things to be kept in mind while preparing for opinion letter
- Standards Applicable to Preparation of an Opinion
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

An opinion is a professional's written response to client's instructions to advise in writing. It follows that it must contain advice. Professionals do not advise someone simply by telling them what to do, but supplement it with the basic reasoning behind it. Advising is inextricably bound up with and is part of the mental attitude with which professionals approach opinion writing, with the thinking process that precedes the actual writing of the opinion, and with the writing process itself.

Any legal opinion should be written with the reader in mind. It should be clear, well-reasoned and as concise as possible without sacrificing completeness. A logical structure based on the legal principles being discussed is vital to clarity. Any piece of legal writing should be read before submission to ensure against grammatical or typographical errors which will detract from the communicative value of the work. Above all, the advisory purpose of a legal opinion should be borne in mind at all times.

The objective of the lesson is to impart knowledge to the students about the drafting of legal opinion.

A. INTRODUCTION

A legal opinion is a written statement by a judicial officer or a legal expert based on giver's professional understanding of a particular aspect of any matter based on legal principles. A person might want to know the correct legal position on a matter of interest or the likelihood of his winning a case if he initiates legal proceedings based on the information that he has supplied to the expert. Lawyers may also from time to time be asked to render a legal opinion to their own clients. Example, a client (querist) may request a tax opinion from its counsel to provide a basis for the avoidance of penalties if the tax aspects of a transaction are later challenged.

The term "opinion" can be defined in a variety of ways, depending upon the context in which it is used. In business transactions, a legal opinion regarding a particular issue is customarily presented in an opinion letter and is widely understood to express the opinion giver's professional understanding of the legal principles generally applicable to a specific transaction or applicable to a particular aspect of the transaction. Many commentators view an opinion letter as a document that provides the opinion recipient with the opinion giver's professional judgment about how the highest court of the jurisdiction whose law is being addressed would resolve the issues covered by the opinion letter on the date of the opinion. It is widely recognized that neither an opinion letter nor any particular legal opinion expressed in it is intended to be or is a guarantee of a particular outcome.

B. CASE FOR OPINION WRITING

An effective and legally sound legal opinion has an immense value. It can show where a party stands in a given factual matrix when looked from a legal perspective and also save time and money spent in futile litigation proceedings. Business savvy clients do not want to litigate, defend or enter into transactions without obtaining a written opinion from at least one legal expert if not more. Some of the common purposes for which legal opinion are sought are as follows:

1. **Lawfulness of an action:** Opinion letters are given when one wants to know if an action is lawful.
2. **Legal consequences:** Sometimes a party entering into a transaction obtains legal opinion to ascertain if the action will lead to desired legal consequences.
3. **Answer questions:** A client may be confused about an issue and they want professional guidance in the area. They also address the question raised by other professionals. Legal opinions provide an authoritative basis for reports, opinions, and reports on matters where other professionals lack the professional capability to make judgments. For example, an opinion regarding local law provided to foreign counsel.
4. R**egulatory requirements**: Sometimes legal opinion has to be sought because it is mandated by law to get the opinion of outside legal expert.
5. **Compliance:** A legal opinion can be sought for assessing the requirements of the regulatory regime so that the querist can meet the compliance requirement.
6. **Protective shield:** Clients sometimes desire the protection of an expert's legal opinion to be used as evidence of lack of mens rea in certain proceedings.
7. **Designed to mislead:** Sometimes promoters of unscrupulous schemes obtain as many opinions from different experts as is possible and use the one which is favourable to their scheme of things.
8. **To satisfy contractual requirements**: Sometimes a clause in commercial contracts require the opinion of an expert. E.g.: an opinion given by issuer's counsel to investors in connection with the sale of securities or by borrower's counsel to the lender pursuant to a loan agreement.
9. **Due Diligence:** Lawyers and clients often cite due diligence as the principal reason for requesting opinion letters in business transactions.

There are as many ways of approaching the writing of an opinion as there are problems to be solved.

C. TYPES OF LEGAL OPINION

1. **Advices on Transaction:** Due diligence is the principal reason for opinion letters in business transactions. An opinion letter may be one component of a party's due diligence, but it is not normally a substitute for due diligence performed by the opinion recipient and its counsel.
2. **Advices on Law:** Sometimes the client would want to know how the law will apply to a given situation. Without in-depth knowledge of law and legal research one cannot give an opinion to the satisfaction of the client. The proper way is to start with the cases and work through to reach a deduction as to the principle of law that covers the situation. Quite often however one forms a value judgment as to what the conclusion ought to be from first principles and moral feelings and then searches for the authorities to support this conclusion. This is top down reasoning should be avoided.
3. **Opinions on Facts:** The third type of opinion is one which is predominantly related to facts. One is given a series of statements and documents and asked whether on that material there are reasonable prospects of prosecuting or defending the claim. The matter may be a simple personal injury case in which the law is well settled. The real question is whether one's side's witnesses will be believed or not. The first problem about this sort of opinion is that seldom does one have any real knowledge of what the other side's witnesses are going to say. One often has little idea of the quality of one's own witnesses and none at all of that of the opposition's. Here one has to search relevant material from the material one is provided with and then arrive at the probabilities of success or failure.
4. **Advices on Evidence:** A special type of opinion is a brief to advice on evidence.

When advising on fact or law one should not be too positive. In relation to advices on quantum of damages one can never be sure so it is advisable to not give a precise figure but a range. Where the law is in a state of flux or doubtful the legal expert should always draw attention to this explaining why one cannot be more positive.

D. QUALITY OF WRITING

The primary purpose of a legal opinion is communication of advice to either a lay or professional client. It is therefore of the utmost importance that it is clear and in plain, understandable English. Every word of the legal opinion should be chosen because it communicates precisely the advice which the writer intends to covey.

It is important to write in plain English wherever possible. A **good legal opinion** will avoid archaic language and legalese. It will no doubt be conveying specialised legal advice and must therefore be as detailed as the writer thinks necessary. The use of plain English simply involves saying what needs to be said in the clearest way possible and avoiding unnecessary verbosity. There are times where technical terms will have to be used if they carry the precise meaning of the advice being delivered. This should not be shied away from. Perfect grammar, punctuation and precision of language are essential.

A legal opinion will often contain a complicated set of facts which will have to be sorted into specific legal issues and defined in legal terms. Clarity of expression is therefore vital. Clarity of expression can only be achieved through thorough planning and thought.

A thorough plan will lead to a logical structure. Any legal opinion will be conveying a particular point, but that point will inevitably need to be broken down into sections. Clarity of legal writing also requires conciseness. This does not necessarily imply brevity, but once the point has been made, nothing more need be said. Having said that, completeness and total accuracy is vital and conciseness should not come above giving full and precise advice.

Most of the time, the clients approach the expert with an unclear question. So, when drafting the questions, they need to be made more sensible. It must be ensured that the questions are phrased in a way that communicates

the client's issues but in a more clear and understandable way.

E. FORM AND ELEMENTS OF THE OPINION LETTER

There is no form for a legal opinion prescribed by law or rule. Opinion letters, however, have developed a certain uniformity because of their repeated use. In general, a legal opinion will cover the following: (1) introductory matters, such as the date, the identity of the opinion recipient, the role of the opinion giver giving the opinion, and the purpose for which the opinion is given; (2) a general or specific recitation of the documents and other factual and legal matters reviewed by the opinion giver, including in some instances a statement of reliance on various factual assumptions; (3) the legal conclusions expressed in the opinion, and any qualifications to the legal conclusions; (4) matters peculiar to the particular opinion, such as matters relative to opinions of local counsel in other jurisdictions and specific limitations on the use of the opinion; and (5) the signature of the opinion giver.

There is likely to be some resistance to a high fee charged for a short opinion. The work that the legal expert has done may not be obvious and therefore very short legal opinions are rare to find.

1. **Introductory Matters**

   i. **Title:** It should be entitled OPINION or ADVICE and contain the title of the case in the heading.

   ii. **Date**. The opinion speaks as of the date mentioned on the opinion letter and need not state separately the effective date of the opinion. If for some reason a conclusion expressed in the opinion is reached as of a date prior to the delivery of the opinion, the opinion giver may so specify in the opinion letter.

   iii. **Addressee**. The opinion is normally addressed to a specified party in an individual capacity, to a party as representative of a larger group, or to an identified class of persons. In all cases, it is customary practice for the opinion recipient to be clearly identified in the opinion letter.

   Generally, the only person or persons entitled to rely on an opinion are the person or persons to whom the opinion letter is specifically addressed. No additional limitation need be expressed in the opinion letter. As a matter of prudence, however, many lawyers include a sentence at the conclusion of the opinion letter to the following effect:

   The opinions set forth herein are rendered solely for your use in connection with the above transaction and may not be relied upon, delivered to or quoted by any other person or for any other purpose without our prior written consent.

   In some limited instances, an opinion letter is intended to be relied upon by persons other than the stated addressee(s). Examples include an opinion letter addressed to an underwriter concerning the validity of a proposed stock issuance that is also to be relied on by the issuer's transfer agent, and an opinion letter of local counsel on which the principal opinion giver will rely to render its opinion. In those cases, the opinion letter normally states specifically who, in addition to the addressee, is entitled to rely upon the opinion.

2. **Introduction:** The first paragraph should serve as an introduction to the legal opinion, laying out the salient facts and what the expert has been asked to advise about. An opinion must set out the questions on which it is sought very clearly and unambiguously. If the Querist (which is what we call a person who seeks the opinion) is himself confused, his questions will be equally mindless. It is your duty as a lawyer to unravel his tangled skein of thought, identify the issues that are material and on which the relief he wants depends, and then frame them as questions. Of course, these must resemble the original questions, because otherwise the Querist will feel that you have not answered him, however stupid his questions might have been.

3. **Definitions**. For purposes of brevity and clarity, it is advisable to define the principal terms used in the opinion. Whenever a term utilized in an opinion letter is derived from statutory law, the opinion customarily uses that term or provides an express definition. Terms that are defined in the underlying Agreement are most often given the same definitions in the opinion, either by defining each term in the opinion or by a reference to the Agreement, such as:

   The terms used in this opinion letter that are defined in the Agreement have the same definitions when used herein, unless otherwise defined herein.

4. **Understanding facts of the case**

   The obligation of an opinion giver to exercise diligence in determining the factual and legal bases for an opinion is implicit in every opinion letter. The first rule is always to commence the opinion by setting out the facts that have been given or have been presumed from the instructions given. Adopting the practice of commencing opinion by outlining the facts upon which one is advising serves another purpose as well. It crystallises those facts in one's mind, visualises any gaps as to which one may need to take further instructions or make assumptions and, where issues of fact are involved, suggests areas which need attention.

   Any fact that has not been supplied should not be included in the narration. However, any inference or presumption one has made from the facts must be included and should not forget to mention that the inference or presumptions are his personal opinions. Facts should be stated in a manner which brings out the materials that will become material for answering questions, whether with an "yes" or a "no".

   The advantage of listing down the facts is that if the ultimate conclusion is wrong, or inapposite, because the facts are wrong, the fault will be that of the client for giving the wrong data or at least the error may be veiled by the failure of the client or solicitor to adapt opinion to the true facts.

   The opinion giver must be satisfied that he has reviewed or assumed (expressly or implicitly) sufficient facts to support each of the legal conclusions expressed in the opinion letter. In case of legal opinion in business transaction, in most instances the opinions in an opinion letter can be supported by an examination of documents, either in their original form or copies identified to the satisfaction of the opinion preparers, or of certificates of public officials or officers of the Company relating to factual matters.

   Some opinion givers preface their opinion letters with a reference to a detailed list of the documents and certificates examined, together with either a statement that they have examined such other documents and have made such further legal and factual investigation as they consider necessary for purposes of rendering the opinion or, alternatively, a specific disclaimer to the effect that they have not made any other examination or factual investigation. Other opinion givers prefer to deliver opinion letters that merely set forth language to the following effect:

   We have been furnished with and have examined originals or copies, certified or otherwise identified to our satisfaction, of all such records of the Company, agreements and other instruments, certificates of officers and representatives of the Company, certificates of public officials and other documents as we have considered necessary to provide a basis for the opinions hereinafter expressed. We have not independently established the facts stated therein.

   At times, the decision whether to set forth a list of documents and certificates reviewed by the opinion giver is dictated by the opinion recipient. Certain lending institutions and securities underwriters desire the 'long-form' opinion letter containing such a list to provide the additional comfort that the opinion giver has reviewed the listed documents for purposes of its opinion. In most instances, however, the decision is based on the preference of the opinion giver. If the opinion giver intends to limit the scope of the opinion to the documents and certificates listed, it should include an express statement to that effect in the opinion.

a. **Reliance on Certificates of Public Officials**: Usually opinions include legal conclusions concerning the corporate nature and existence of the Company and its ability to transact business. They also often include legal conclusions concerning the good standing and ability of the Company to transact business in other jurisdictions. These opinions customarily are based on certificates of public officials in the various jurisdictions involved. The principal certificate among them is the *Certified Copy of the Articles of Incorporation, together with Amendments*. This certification represents conclusive evidence of the formation of the corporation and prima facie evidence of its existence for all purposes.

   Certain certificates maybe required from various state agencies. For example, in loans backed by mortgage of immovable property, certificates showing the title to the property may be required. Many states have implemented websites on which such information can be accessed at any time. The information on any particular website can only be relied upon as current to the extent specified by the state agency responsible for that website.

   Because certificates of public officials will normally bear a date before the delivery of the opinion, the opinion giver must decide what additional verification, if any, is necessary for purposes of the opinion. Additional verification may or may not be necessary depending upon the facts and circumstances of the case. In general, customary practice does not require that every certificate be updated. Opinion recipients routinely accept opinions that in part are based on certificates of a reasonably recent date.

b. **Officers' Certificates**: In business transactions opinion preparers typically obtain two somewhat analogous types of officers' certificates: (1) certificates verifying the authenticity of referenced documents; and (2) certificates relating to factual matters not readily verifiable by the opinion preparers or only verifiable at considerable cost. A common example of the first type of certificate is a certificate of the secretary of the Company certifying that, attached to the certificate, is a true copy of the articles, bylaws and corporate minutes or resolutions pertaining to the transaction.

   The second type of officers' certificate relates to factual matters not readily verifiable or only verifiable at considerable cost by the opinion giver when preparing the opinion. These certificates are used as factual support for legal conclusions expressed in the opinion. The need for them arises, for example, when an opinion giver renders an opinion that the transaction will not cause a breach of the terms of any loan agreement to which the client is a party. The opinion giver is competent to review the loan agreements but may need an officers' certificate to identify the loan agreements to which the client is a party since, typically, the opinion giver is not in a position to know what agreements to review.

   The opinion giver must use its own judgment in determining under what circumstances (and to what extent) reliance on factual matters contained in the certificates can be justified. The opinion giver should also exercise its own judgment in determining those circumstances and matters which reasonably should be supported by an officers' certificate.

c. **Documentary Examination Assumptions:** Opinion givers customarily assume that the signatures on all documents examined are genuine, that copies of documents examined conform to the originals, and that such documents are binding on the other parties. Opinion givers often state these assumptions expressly, although by customary usage, they are implicit and need not be expressly stated. If stated, a common formulation of the assumption is as follows:

   In rendering this opinion, we have assumed the authenticity of all documents submitted to us as originals; the conformity to originals of all documents submitted to us as copies; and the accuracy, completeness and authenticity of all certificates of public officers.

5. Research on Relevant Case Laws

After the facts are over the opinion giver may begin his analysis on which the opinion depends. There is no need to set out basic principles of law with which the opinion recipient will be familiar. Otherwise, authorities should be cited to support propositions of laws and when doing so a full citation should be given. It is important to prioritise the authorities cited in a legal opinion in order of importance to the point being addressed. If a particular case is central to the reasoning, the basis on which the case was decided should be set out fully in the legal opinion. It may even be appropriate to quote directly from the judgment although often paraphrasing the effect of the decision will usually suffice. The case being cited must always be referred back to the facts being dealt with in the legal opinion. The most authoritative case on the point of law being dealt with must always be cited. For example, there is no point citing a High Court judgment which has been overruled by a subsequent judgement of the Supreme Court.

An easy way of analysing is to first set out the law and the provisions of the law (or laws) that are applicable. Then go on to summarize the binding precedents (judgments of the Supreme Court and the High Court of the State exercising jurisdiction over the subject matter) with full citations. If the choice of extracts is precise enough, the ultimate opinion will almost automatically appear from the extracts of the judgments that have been quoted.

With regard to statute, much of the same advice will apply. If there is a statutory provision which deals directly with the subject of the legal opinion then this should be clearly stated and its effects fully explained. Care must be taken to ensure that any statutory provision being cited is in force at the time of writing the legal opinion.

In case of business transactions an opinion letter covers only law that a lawyer exercising customary professional diligence would reasonably be expected to recognize as being applicable to the opinion giver's client, the transaction or the Agreement to which the opinion relates.

6. Expression of the Opinion

Once the facts are organised, a legal framework needs to be constructed into which these facts can be logically slotted. A legal opinion in a personal injury action for example will be based on negligence and therefore will usually be structured along the lines of duty, breach, damage, causation, forseeability and contributory negligence. In a negligence legal opinion it will be vital to assess the level of damages that the client can expect to receive or pay out. This will be at the forefront of the client's mind.

The substantive portion of the opinion normally begins with an introductory statement referring to matters upon which the opinion giver has relied. This introductory statement is generally phrased in a manner that does not limit the opinion giver's investigation to the matters specifically described, but rather indicates that the opinion giver has made such further investigation as it considers appropriate under the circumstances. An example of such an introductory statement reads as follows:

Based on the foregoing and upon such further investigation as we have considered necessary, it is our opinion that:

The opinion can be in the form of summary statement of conclusions or, where a series of discrete questions have been asked, precise answers to the particular questions asked. If the argument has been properly conducted these answers may well be monosyllabic. "Yes", "no", or "does not arise". However, when the monosyllabic answers cannot apply, the answers must be kept short and to the point. Where the querist has asked "Is the transaction a valid mortgage", the answer can be "Yes" or "No", followed by "in view of what has been said in paragraphs such and such of the facts and paragraphs such and such of the analysis". However, where the question is "Why is this not a valid mortgage" the opinion giver cannot answer with 'yes' or 'no' but must explain, though with reference to what has been written in the analysis sections.

7. **Qualifications**. In practice, opinions are frequently subject to qualifications that narrow their apparent scope. Some opinions may be qualified by assumptions or exceptions. Opinions also may be qualified as to scope, particularly when the opinion covers a specialized area of the law. Qualifications take various forms, depending upon the opinion giver's preference and the length of the qualification. If the qualification is short and applies only to one portion of the opinion letter, it often will be included in the operative language of the specific opinion by the reference "subject to _____" or "except _____". If the qualification pertains to more than one portion of the opinion letter or is lengthy, it will usually appear separately from the operative opinion clauses. Typical clauses introducing such qualifications include the following: "our opinion in paragraph ___ is subject to;" or "we express no opinion on the effect of;" or "in rendering our opinion in paragraph ___ we have assumed that _____."

   To simplify the analysis process, number all previous paragraphs. This will relieve you of the burden of repeating previously written information.

8. **Special Matters**

   a. **Foreign Law and Reliance on Local Counsel**: The principal opinion giver for a party in a business transaction typically renders an opinion covering the laws of the state and applicable central laws and sets forth this limitation in the text of the opinion. The opinion giver may also be requested to furnish an opinion on matters governed by the laws of some other country. Unless the limited nature of the review of another jurisdiction's law is described in the opinion, because the opinion giver would likely be held to the same standard as a lawyer licensed or otherwise competent to give advice on the law of the other jurisdiction, the opinion giver will, in most instances, seek the advice and opinion of local counsel.

      An opinion giver should, however, always be cognizant of the fact that rendering an opinion based upon legal principles applicable in foreign jurisdictions exposes the opinion giver to liability for a negligent interpretation of that law.

      The retention of local counsel to furnish an opinion raises different questions with respect to the principal opinion giver's responsibility for the opinions expressed in the local lawyer's opinion. If the principal opinion giver renders an opinion on the same matters as the local lawyer, the opinion giver customarily expresses its reliance on the local counsel's opinion (an example of recommended language is included below) rather than simply restating the local counsel's opinion in the body of its opinion:

      In rendering the opinions expressed in paragraphs __, __ and __, we have relied [solely] on the opinion of _____ insofar as such opinions relate to the laws of _____, and we have made no independent examination of the laws of that jurisdiction.

      When expressly stating reliance on the opinion of local counsel, the principal opinion giver's sole responsibility is to exercise reasonable care in the selection of local counsel (if, in fact, the principal opinion giver selects such counsel). The opinion giver is not responsible for independently investigating or otherwise verifying the law of the foreign jurisdiction. The principal opinion giver may assume a broader responsibility to examine the statutory and case law of the foreign jurisdiction if the principal opinion giver's opinion letter states that the opinion giver "concurs" with the legal opinions provided in the opinion letter of local counsel or that the local counsel's opinion letter is satisfactory in substance. The preferred and more recent common practice is for the local counsel's opinion letter to be addressed to the recipient of the principal opinion letter (rather than to the principal opinion giver) and for the principal opinion giver not to render an opinion on that subject.