

CHAPTER 6**CODE OF CIVIL PROCEDURE, 1908**

Q: Explain the meaning of following terms under Code of Civil Procedure, 1908

Cause of Action

"Cause of action" means every fact that it would be necessary for the plaintiff to prove in order to support his right to the judgement of the Court. Under Order 2, Rule 2, of the Civil Procedure Code it means all the essential facts constituting the rights and its infringement. It means every fact which will be necessary for the plaintiff to prove, if traversed in order to support his right to the judgement.

Judgement

"*Judgement*" as defined in Section 2(9) of the Civil Procedure Code means the statement given by the Judge on the grounds of a decree or order. Thus a judgement must set out the grounds and reasons for the Judge to have arrived at the decision. In other words, a "judgement" is the decision of a Court of justice upon the respective rights and claims of the parties to an action in a suit submitted to it for determination (*State of Tamilnadu v. S. Thangaval*).

Decree

"*Decree*" is defined in Section 2(2) of the Code as

- the formal expression of an adjudication which, so far as regards the Court expressing it;
- conclusively;
- determines the rights of the parties;
- with regard to all or any of the matters in controversy;
- in the suit and may be either preliminary (i.e. when further proceedings have to be taken before disposal of the suit) or final.

But decree does not include:

- any adjudication from which an appeal lies as an appeal from an Order, or
- any order of dismissal for default.

Essentials of a decree are:

- a) There must be a formal expression of adjudication;
- b) There must be a conclusive determination of the rights of parties;
- c) The determination must be with regard to or any of the matters in contravention in the suit;
- d) The adjudication should have been given in the suit.

A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. The preliminary decree is not dependent on the final. On the other hand, final decree is dependent and subordinate to the preliminary decree, and gives effect to it. The preliminary decree ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree. If the preliminary decree is set aside the final decree is automatically superseded.

Decree-holder

"Decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made. [Section 2(3)] Thus, a person who is not a party to the suit but in whose favour an order capable of execution is passed is a decree-holder.

Judgement-debtor

"Judgement-debtor" means any person against whom a decree has been passed or an order capable of execution has been made. [Section 2(10)] The definition does not include legal representative of a deceased judgement-debtor.

Judgement

The "*judgement*" means a statement given by a judge on the grounds of a decree or order [Section 2(9)].

Order

"Order" as set out in Section 2(14) of the Code means the formal expression of any decision of a Civil Court which is not a decree.

Appealable orders

According to Section 104 of the Code, no appeal lies against orders other than what is expressly provided in the Code or any other law for the time being in force. Under the Code appealable orders are:

- an order under Section 35A, i.e. for compensatory costs in respect of false or vexatious claims within pecuniary jurisdiction of the Court, but only for the limited ground that no order should have been made, or that such order should have been made for a lesser amount.
- an order under Section 91 or Section 92 refusing leave to institute a suit under Section 91 (Public nuisances and other wrongful acts affecting the public) or Section 92 (alleged breach of trust created for public purposes of a charitable or religious nature).
- an order under Section 95, i.e. compensation for obtaining arrest attachment or injunction on insufficient grounds.
- an order under any of the provisions of the Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree.
- any order made under rules from which an appeal is expressly allowed by the rules.

No appeal lies from any order passed in appeal under this section.

Interlocutory order

The Court may, on the application of any party to a suit, pass orders on different applications and any order which is not the final order in a suit is called an "**interlocutory order**". An interlocutory order does not dispose of the suit but is merely a direction to procedure. It reserves some questions for further determination.

Q: Explain the difference between an order and a decree

The main difference between an order and a decree is that when in an adjudication which is a decree appeal lies and second appeal also lies on the grounds mentioned in Section 100 of CPC. However, no appeal lies from an order unless it is expressly provided under Section 104 and Order 43 Rule 1. No second appeal in any case lies at all even in case of appealable orders. [Section 104(2)] A decree conclusively determines the rights and liabilities of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final but this is not the case in order.

Q: What is the structure of civil courts under Civil Procedure Code?

Section 3 of the Civil Procedure Code lays down that for the purposes of this Code, the District Court is subordinate to the High Court and every Civil Court of a grade inferior to that of a District and every Court of small causes is subordinate to the High Court and District Court.

Q: What is the jurisdiction of courts and venue of suits under Civil Procedure Code?

Jurisdiction means the authority by which a Court has to decide matters that are brought before it for adjudication. The limit of this authority is imposed by charter, statute or a commission. If no such limit is imposed or defined, the jurisdiction is said to be unlimited. A limitation on jurisdiction of a Civil Court may be of four kinds. These are as follows:-

- ***Jurisdiction over the subject matter***

The jurisdiction to try certain matters by certain Court is limited by statute; e.g. a small cause court can try suits for money due under a promissory note or a suit for price of work done.

- ***Place of suing or territorial jurisdiction***

A territorial limit of jurisdiction for each court is fixed by the Government. Thus, it can try matters falling within the territorial limits of its jurisdiction.

- ***Jurisdiction over persons***

All persons of whatever nationality are subject to the jurisdiction of the Civil Courts of the country except a foreign State, its Ruler or its representative except with the consent of Central Government.

- ***Pecuniary jurisdiction depending on pecuniary value of the suit***

Section 6 deal with *Pecuniary jurisdiction* and lays down that save in so far as is otherwise expressly provided Courts shall only have jurisdiction over suits the amount or value of which does not exceed the pecuniary limits of any of its ordinary jurisdiction. There is no limit on pecuniary jurisdiction of High Courts and District Courts.

Jurisdiction may be further classified into following categories depending upon their powers:

- *Original Jurisdiction* — A Court tries and decides suits filed before it.
- *Appellate Jurisdiction* — A Court hears appeals against decisions or decrees passed by subordinate Courts.
- *Original and appellate Jurisdiction* — The Supreme Court, the High Courts and the District Courts have both original and appellate jurisdiction in various matters.

Courts to try all civil suits unless barred: Section 9 of Civil Procedure Code states that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The explanation appended to the Section provides that a suit in which the right to property or to an office is contested is a suit of civil nature, notwithstanding that such right may depend entirely on the decision on questions as a religious rites or ceremonies.

Q: Write a short note on Doctrine of Res sub judice

STAY OF SUIT (DOCTRINE OF RES SUB JUDICE)

Section 10 provides that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other Court (in India) having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

However, the pendency of a suit in a foreign court does not preclude the Courts in India from trying a suit founded on the same cause of action.

To prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of same matter in issue, Section 10 is enacted. The purpose is also to avoid conflict of decision. It is really intended to give effect to the rule of *res judicata*. The institution of second suit is not barred by Section 10. It merely says that the trial cannot be proceeded with.

A suit was instituted by the plaintiff company alleging infringement by the defendant company by using trade name of medicine and selling the same in wrapper and carton of identical design with same colour combination etc. as that of plaintiff company. A subsequent suit was instituted in different Court by the defendant company against the plaintiff company with same allegation. The Court held that subsequent suit should be stayed as simultaneous trial of the suits in different Courts might result in conflicting decisions as issue involved in two suits was totally identical (*M/s. Wings Pharmaceuticals (P) Ltd. and another v. M/s. Swan Pharmaceuticals and others*).

Essential conditions for stay of suits

- There must be two suits instituted at different times;
- The matter in issue in the later suit should be directly and substantially in issue in the earlier suit;
- Such suit should be between the same parties;
- Such earlier suit is still pending either in the same Court or in any other competent Court but not before a foreign Court.

If these conditions exist, the later suit should be stayed till the disposal of earlier suit, the findings of which operate as *res judicata* on the later suit.

Q: Write a short note on place of suing under Civil Procedure Code

Section 15 lays down that every suit shall be instituted in the Court of the lowest grade to try it. According to Section 16, subject to the pecuniary or other limitations prescribed by any law, the following suits (relating to property) shall be instituted in the Court within the local limits of whose jurisdiction the property is situated:

- a) for recovery of immovable property with or without rent or profits;
- b) for partition of immovable property;
- c) for foreclosure of sale or redemption in the case of a mortgage or charge upon immovable property;
- d) for the determination of any other right to or interest in immovable property;
- e) for compensation for wrong to immovable property;
- f) for the recovery of movable property actually distraint or attachment.

Where immovable property is situated within the jurisdiction of different Courts: Where the jurisdiction for a suit is to obtain relief respecting, or compensation for wrong to immovable property situated within the local limits of jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction the property is situated provided the value of the entire claim is cognisable by such Court. (Section 17)

Where local limits of jurisdiction of Courts are uncertain: Where jurisdiction is alleged to be uncertain as being within the local limits of the jurisdiction of which of two or more Courts, any immovable property is situated, then any of the said Courts may proceed to entertain the suit after having recorded a statement to the effect that it is satisfied that there is ground for such alleged uncertainty. (Section 18)

Where wrong done to the person or to movable property: Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the Courts. (Section 19)

Other suits: Other suits to be instituted where defendants reside or cause of action arises, subject to the limitations provided by Sections 15, 16, 18 and 19, every suit shall be instituted in a Court within local limits of whose jurisdiction the defendant, or each of the defendants (where there are more than one defendant) actually and voluntarily resides or carries on business or personally works for gain or where such defendants actually and voluntarily resides or carries on business or personally works for gain, provided either the leave of the Court is obtained or the defendant(s) who do not reside or carry on business or personally work for gain at such place acquiesce in such institution or, where the cause of action arises, wholly or in part. (Section 20)

In the case of a body corporate or company it shall be deemed to carry on business at its sole or principal office in India, or in case of any cause of action arising at any other place, if it has a subordinate office, at such place.

Q: Write a short note on Res Judicata under Civil Procedure Code

RES JUDICATA

Section 11 of the Civil Procedure Code deals with the doctrine of *Res Judicata* that is, bar or restraint on repetition of litigation of the same issues. It is a pragmatic principle accepted and provided in law that there must be a limit or end to litigation on the same issues.

The doctrine underlines the general principle that no one shall be twice vexed for the same cause (S.B. Temple v. V.V.B. Charyulu). The doctrine of *res judicata* prevails over the doctrine of *lis pendens* where there is a conflict between the two.

It prevents two different decrees on the same subject. Section 11 says that once a *res* is *judicata*, it shall not be adjudged again. The principle applies to suits in Section 11 of the Code; but even where Section 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of giving finality to litigation.

For the applicability of the principle of *res judicata* embodied in Section 11, the following requirements are necessary:

1. The matter directly and substantially in issue in former suit shall also be directly and substantially in issue in later suit.

The expression “directly and substantially in issue” means an issue alleged by one party and denied or admitted by the another either expressly or by necessary implications (*Lonakutty v. Thomman*).

In the matter of taxation for levy of Municipal taxes, there is no question of *res judicata* as each year’s assessment is final for that year and does not govern latter years (*Municipal Corporation v. Madan Mohan*).

2. The former suit has been decided—former suit means which is decided earlier.
3. The said issue has been heard and finally decided.
4. Such former suit and the latter are between the same parties or litigation under the same title or persons claiming under parties above (*Isher Singh v. Sarwan Singh*, AIR 1965 SC 948).

In short, this principle applies where an issue which has been raised in a subsequent suit was directly and substantially in issue in a former suit between the same parties and was heard and decided finally. Findings incidentally recorded do not operate as *res judicata*.

A consent or compromise decree is not a decision by Court. It is an acceptance of something to which the parties had agreed. The Court does not decide anything. The compromise decree merely has the seal of the Court on the agreement of the parties. As such, the principle of *res judicata* does not generally apply to a consent or compromise decree. But when the court on the facts proved comes to a conclusion that the parties intended that the consent decree should have the effect of deciding the question finally, the principle of *res judicata* may apply to it.

The rule of *res sub judice* relates to a matter which is pending judicial enquiry while *res Judicata* relates to a matter adjudicated upon or a matter on which judgement has been pronounced. *Res sub judice* bars the trial of a suit in which the matter directly or substantially is pending adjudication in a previous suit, whereas rule of *res judicata* bars the trial of a suit of an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit between the same parties under the same title. *Res Judicata* arises out of considerations of public policy viz., that there should be an end to litigation on the same matter. *Res-Judicata* presumes conclusively the truth of the former decision and ousts the jurisdiction of the Court to try the case. It is however essential that the matter directly and substantially in issue must be the same as in the former suit and not matters collaterally or incidentally in issue.

Constructive *res judicata* is the doctrine which has been provided for in Explanation IV (viz. matters or issues which could have been taken as ground of defence or attack in a former suit) as earlier referred to. This doctrine is based on the following grounds of public policy:

- a) There should be an end to litigation;
- b) The parties to a suit should not be harassed to agitate the same issues or matters already decided between them;
- c) The time of Court should not be wasted over the matters that ought to have been and should have been decided in the former suit between the parties;
- d) It is a rule of convenience and not a rule of absolute justice.

Conditions of res judicata

1. The matter must be directly and substantially in issue in two suits;
2. The prior suit should be between the same parties or persons claiming under them;
3. The parties should have litigated under the same title;
4. The court which determined the earlier suit must be competent to try the latter suit;
5. The same question is directly and substantially in issue in the latter suit.

Q: Write a short note on Set-off, Counter-claim and Equitable set-off under Civil Procedure Code

Set-off

Order 8, Rule 6 deals with set-off which is a reciprocal acquittal of debts between the plaintiff and defendant. It has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the defendant as a counter claim. Under Order VIII Rule 6 where in a suit for the recovery of money the defendant claims to *set off* against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff not exceeding the pecuniary jurisdiction of the Court and where both parties fill the same character as in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

Counter-claim

A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of claim for damages or not. Such counter-claim must be within the pecuniary jurisdiction of the Court. (Order 8, Rule 6A)

Equitable set-off

Sometimes, the defendant is permitted to claim set-off in respect of an unascertained sum of money where the claim arises out of the same transaction, or transactions which can be considered as one transaction, or where there is knowledge on both sides of an existing debt due to one party and a credit by the other party found on and trusting to such debt as a means of discharging it. Generally the suits emerge from cross-demands in the same transaction and this doctrine is intended to save the defendant from having to take recourse to a separate cross-suit.

Q: Write a short note on Temporary injunction under Civil Procedure Code

Temporary injunction

The Court may grant temporary injunction to restrain any such act (as set out below) or make such other order for the purpose of staying and preventing the wasting, damaging, alienation or sale or removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit; where it is proved by affidavit or otherwise:

- a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- b) that the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors, or

- c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

It would be necessary for the plaintiff to satisfy the Court that substantial and irreparable harm or injury would be suffered by him if such temporary injunction (till the disposal of the suit) is not granted and that such loss or damage or harm cannot be compensated by damages. (Order XXXIX)

Q: What are the provisions in relation to institution of suit under Civil Procedure Code

INSTITUTION OF SUIT

Suit ordinarily is a civil action started by presenting a plaint in duplicate to the Court containing concise statement of the material facts, on which the party pleading relies for his claim or defence. In every plaint the facts must be proved by an affidavit.

The main essentials of the suit are—

- the opposing parties,
- the cause of action,
- the subject matter of the suit, and
- the relief(s) claimed.

The plaint consists of a heading and title, the body of plaint and the relief(s) claimed. Every suit shall be instituted in the Court of the lowest grade competent to try it, as to be determined with regard to the subject matter being either immovable or movable property or to the place of abode or of business or the defendant. A suit for a tort may be brought either where the wrong was committed or where the defendant resides or carries on business. A suit for a breach of contract may be instituted in a Court within the local limits of whose jurisdiction the defendant or each of the defendants (where there are more than one) at the time of commencement of the suit actually or voluntarily resides or carries on business or personally works for gain, or where any of the defendants so resides or works for gain or carries on business provided the leave of the Court is given or that the other defendants acquiesce in such situation. A suit for breach of contract may also be instituted where the cause of action arises that is, where the contract was made or where the breach was committed. A suit for recovery of immovable property can be instituted in a Court within the local limits of whose jurisdiction the property or any property of it is situate.

Claim for recovery of any immovable property could be for

- a) *mesne* profits or arrear's of rent,
- b) damages for breach of contract under which the property or any part thereof is held and
- c) claims in which the relief sought is based on the same cause of action.

Misjoinder of Parties:

Where more than one persons joined in one suit as plaintiffs or defendants in whom or against whom any right to relief does not arise or against whom separate suits are brought, no common question of law or fact would arise, it is a case of '*misjoinder of parties*'.

To avoid such misjoinder, two factors are essential viz.

- the right to relief must arise out of the same act or transaction brought by the plaintiffs or against the defendants,
- there is a common question of law or fact.

The Code does not require that all the questions of law or of fact should be common to all the parties. It is sufficient that if there is one common question.

Q: What are the important stages in proceedings of a suit under Civil Procedure Code

When the suit has been duly instituted, the Court issues an order (known as summons) to the defendant to appear and answer the claim and to file the written statement of his defence if any within a period of 30 days from the date of service of summons. No summons are to be issued when the defendant has appeared at the presentation of plaint and admitted the plaintiffs claim.

If the defendant fails to file the written statement within the prescribed period of 30 days, he is allowed to file the same on such other days as specified by the Court for reasons to be recorded in writing but not later than ninety days from the date of service of summons. Provision though negatively worded is procedural. It does not deal with power of court or provide consequences of non-extension of time. The provision can therefore be read as directory. (*Shaikh Salim Haji Abdul Khayumsab v. Kumar & Ors*)

The defendant may appear in person or by a duly instructed pleader or by a pleader accompanied by some person to be able to answer all material questions relating to the suit.

Every summons must be signed by the judge or an authorised officer of the Court and sealed with the seal of the Court and be accompanied by a copy of the plaint. (Order 5)

If the requirement of personal appearance of the defendant or plaintiff is felt by the Court, then it has to make an order for such appearance. The summons must contain a direction that it is for the settlement of issues only or for the final disposal of the suit. Every summons must be accompanied by a copy of the plaint. Where no date is fixed for the appearance of the defendant, the Court has no power to dismiss the suit in default. The summons must also state that the defendant is to produce all documents in his possession or power upon which he intends to rely in support of his case.

The ordinary mode of service of summons i.e. direct service is by delivery or tendering a copy of it signed by the judge or competent officer of the Court to the person summoned either personally or to his agent or any adult male or female member of his family, against signature obtained in acknowledgement of the services.

Q: What are the provisions in relation to delivery of summons by court under Civil Procedure Code

DELIVERY OF SUMMONS BY COURT

Rule 9 substituted by the Code of Civil Procedure (Amendment) Act, 2002 provides that—

1. Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer, who may be an officer of a Court other than that in which the suit is instituted, to be served by him or one of his subordinates or to such courier services as are approved by the Court.
2. The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgement due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means to transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court.
Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.
3. Where the defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgement due), the provisions of rule 21 shall not apply.
4. When an acknowledgement or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:
Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgement due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.
5. Where defendant resides in another province, a summons may be sent for service in another state to such court and in such manner as may be prescribed by rules in force in that State.
6. In the case of a defendant who is a public officer, servant of railways or local authority, the Court may, if more convenient, send the summons to the head of the

office in which he is employed. In the case of a suit being instituted against a corporation, the summons may be served

- on the secretary or on any director, or other principal officer of the corporation or
- by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office, then at the place where the corporation carries on business.

7. Where persons are to be sued as partners in the name of their firm, the summons shall be served either

- upon one or more of the partners or
- at the principal place at which the partnership business is carried on within India or upon any person having the control or management of the partnership business.

Where a partnership has been dissolved the summons shall be served upon every person whom it is sought to make liable.

Defence:

The defendant has to file a written statement of his defence within a period of 30 days from the date of service of summons. If he fails to file the written statement within the stipulated time period he is allowed to file the same on such other day as may be specified by the Court for reasons to be recorded in writing. The time period for filing the written statement should not exceed 90 days.

Any document which ought to be produced in the Court but is not so produced, such document shall not be received in evidence at the time of hearing of the suit without the leave of the Court. However this rule does not apply to documents produced for the cross-examination of the plaintiff witnesses or handover to a witness merely to refresh his memory.

Appearance of parties and consequence of non-appearance:

If both the parties do not appear when the suit is called on for hearing, the Court may make an order that the suit be dismissed. If the defendant is absent in spite of service of summons and the plaintiff appears, the Court may proceed *ex-parte*.

In case the defendant is not served with summons, the Court shall order a second summon to be issued. If the summons is served on the defendant without sufficient time to appear, the Court may postpone the hearing to a further date. If the summon was not served on the defendant in sufficient time due to the plaintiff's default, the Court shall order the plaintiff to pay costs of adjournment. Where the hearing of the suit is adjourned *ex-parte* and the defendant appears at or before such hearing and assigns a good cause for his previous non-appearance, the defendant may be heard in answer to the suit on such terms as to costs or otherwise.

In any case in which a decree is passed *ex-parte* against a defendant he may apply for setting aside the decree on the ground that the summons was not duly served on him or that he was prevented by any sufficient cause from appearing when the suit was called on

for hearing and the Court shall set aside the decree on such terms as to costs payment into Court or otherwise as it deems proper and shall appoint a day for proceeding with the suit (O.9, R.13).

A defendant has four remedies available if an *ex-parte* decree is passed against him:

- a) He may file an appeal against the *ex-parte* decree under Section 96 of the C.P.C.
- b) He may file an application for review of the judgement.
- c) He may apply for setting aside the *ex-parte* decree.
- d) A suit can also be filed to set aside an *ex-parte* decree obtained by fraud but no suit shall lie for non-service of summons.

DETENTION, PRESERVATION, INSPECTION ETC. OF SUBJECT-MATTER OF SUIT

The Court may, on application of any party to a suit, and on such terms as it thinks fit:

- (a) make an order for the detention, preservation or inspection of any property which is the subject matter of such suit or as to which any question may arise therein;
- (b) for all or any of the purposes as in (a) above, authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and
- (c) for all or any of the purpose as in (a) above authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. (Rule 7)

Application for such order to be after notice—

- (1) An application by the plaintiff for an order under Rule 6 or Rule 7 may be made at any time after institution of the suit.
- (2) An application by the defendant for such an order may be made at any time after appearance.
- (3) Before making an order under Rule 6 or Rule 7 on an application made for the purpose, the Court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the opposite party.

Deposit of money etc. in the Court

Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security subject to further direction of the Court. (Rule (10))

In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like nature arising out of the same contract or relating to the same property or right. The Court may grant an injunction on such terms including keeping of an account and furnishing security etc. as it may think fit.

The grant of a temporary injunction is a matter of discretion of Courts. Such injunction may be granted if the Court finds that there is a substantial question to be investigated and that matter should be preserved in status until final disposal of that question. In granting injunction, the Court has to see the balance of convenience and inconvenience of both sides. If the object of granting a temporary injunction is liable to be defeated by the delay, the Court while passing an order granting interim or temporary injunction, has a notice served on the defendant to show cause why the order granting the interim injunction should not be confirmed. On hearing the objection of the defendant to such injunction, the Court either confirms the interim injunction or cancels the order of injunction.

Discovery and interrogatories and production of documents

"Discovery" means finding out material facts and documents from an adversary in order to know and ascertain the nature of the case or in order to support his own case or in order to narrow the points at issue or to avoid proving admitted facts.

Discovery may be of two kinds

- by interrogatories
- by documents.

The objects of discovery are to:

- a) ascertain the nature of the case of the adversary or material facts for the adversary's case.
- b) obtain admissions of the adversary for supporting the party's own case or indirectly by impeaching or destroying the adversary's case.
- c) narrow the points at issue.
- d) avoid expense and effort in proving admitted facts.

Discovery by interrogations — Any party to a suit, by leave of the Court, may deliver interrogatories in writing for the examination of the opposite parties. But interrogatories will not be allowed for the following purposes:

- a) for obtaining discovery of facts which relates exclusively to the evidence of the adversary's case or title.
- b) to interrogate any confidential communications between the adversary and his counsel.
- c) to obtain disclosures injurious to public interests.
- d) interrogatories that are of a 'fishing' nature i.e. which do not relate to some definite and existing state of circumstances but are resorted to in a speculative manner to discover something which may help a party making the interrogatories.

Discovery by documents — All documents relating to the matters in issue in the possession or power of any adversary can be inspected by means of discovery by documents. Any party may apply to the Court for an order directing any other party to the suit to make discovery on oath the documents which are or which have been in his possession or powers relating to any matter in question. The Court may on hearing the application either refuse or adjourn it, if it is satisfied that such discovery is not necessary

at all or not necessary at the stage. Or if it thinks fit in its discretion, it may make order for discovery limited to certain classes of documents.

Every party to a suit may give notice to the other party at or before the settlement of issues to produce for his inspection any document referred to in the pleadings or affidavits of the other party. If the other party refuses to comply with this order he shall not be allowed to put any such document in evidence, unless he satisfies the Court that such document relates only to his own title, he being a defendant to the suit or any other ground accepted by the Court. Documents not referred to in the pleadings or affidavits may be inspected by a party if the Court allows.

A party may refuse to produce the document for inspection on the following grounds :

- where it discloses a party's evidence
- when it enjoys a legal professional privilege
- when it is injurious to public interest
- denial of possession of document.

Admission by parties

"Admission" means that one party accepts the case of the other party in whole or in part to be true. Admission may be either in pleadings or by answers to interrogatories, by agreement of the parties or admission by notice.

Issues

Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Issues may be either of fact or of law. It is incumbent on the Court at the first hearing of the suit after reading the plaint and the written statement and after ascertaining and examination of the parties if necessary regarding the material propositions of law and facts, to frame the issues thereon for decision of the case. Where the Court is of the opinion that the suit can be disposed off on issues of law only, it shall try those issues first and postpone the framing of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision of that issue.

Issues are to be framed on material proportions of fact or law which are to be gathered from the following—

- (i) Allegations made in the plaint and written statement,
- (ii) Allegations made by the parties or persons present on their behalf or their pleaders on oath,
- (iii) Allegations in answer to interrogatories,
- (iv) Contents of documents produced by the parties,
- (v) Statements made by parties or their representatives when examined,
- (vi) From examination of a witness or any documents ordered to be produced.

Hearing of the suit

The plaintiff has the right to begin unless the defendant admits the fact alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief sought by him and in such a

case the defendant has a right to begin (O.18, R.1). Where there are several issues, the burden of proving some of which lies on the other party, the party beginning has an option to produce his evidence on those issues or reserve it by way of an answer to the evidence produced by the other party, and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence. Care must be taken that no part of the evidence should be produced on those issues for which the plaintiff reserves a right to produce evidence after the defence has closed his evidence, otherwise the plaintiff shall lose his right of reserving evidence (O.18, R.3).

Affidavit:

An affidavit is a written statement of the deponent on oath duly affirmed before any Court or Magistrate or any Oath Commissioner appointed by the Court or before the Notary Public. An affidavit can be used in the following cases:

- a) the Court may at any time of its own motion or on application of any party order that any fact may be proved by affidavits (Section 30).
- b) the Court may at any time order that the affidavit of any witness may be read at the hearing unless either party bona-fide desires to cross-examine him and he can be produced.
- c) upon application by a party, evidence of a witness may be given on affidavit, but the court may at the instance of either party, order the deponent to attend the court for cross-examination unless he is exempted from personal appearance. Affidavits are confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory applications.

Q: What are the various types of appeals under Civil Procedure Code**APPEALS**

Right of appeal is not a natural or inherent right attached to litigation. Such a right is given by the statute or by rules having the force of statute (*Rangoon Botatoung Company v. The Collector, Rangoon*).

There are four kinds of appeals provided under the Civil Procedure Code:

- Appeals from original Decrees (Sections 96-99-Order 41)
- Second Appeals (Sections 100-103-Order 42)
- Appeals from Orders (Sections 104-106, O.43 r. 1-2)
- Appeals to the Supreme Court (Sections 109 and 112, Order 45)

Appeals from original Decrees:

Appeals from original decrees may be preferred in the Court superior to the Court passing the decree. An appeal may lie from an original decree passed *ex parte*. Where the decree has been passed with the consent of parties, no appeal lies. The appeal from original decree lies on a question of law. No appeal lies in any suit of the nature cognizable by Courts of small causes when the amount or value of the subject matter of the original suit does not exceed Rs. 10,000.

Second appeal:

As per Section 100 of the Civil Procedure Code, an appeal lies to the High Court from every decree passed in appeal by any subordinate Court if the High Court is satisfied that the case involves a substantial question of law. Under this Section, an appeal may lie from an appellate decree passed *ex parte*.

The High Court is not to vary or reverse any order or decree except the order which if made in favour of the party applying for revision would have finally disposed of the suit or proceedings or against which an appeal lies either to the High Court or any subordinate Court. A revision shall not operate as a stay suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Appeal from orders:

Appeal from orders would lie only from the following orders on grounds of defect or irregularity in law—

- an order allowing special costs, and order refusing leave to Institute a suit of the nature,
- an order for compensation for obtaining attachment or injunction on insufficient ground,
- an order under the Code imposing a fine or directing the detention or arrest of any person except in execution of a decree.
- appealable orders.

Appeals to the Supreme Court:

Appeals to the Supreme Court would lie in the following cases:

- from any decree or order of Civil Court when the case is certified by the Court deciding it to be fit for appeal to the Supreme Court or when special leave is granted under Section 112 by the Supreme Court itself,
- from any judgement, decree or final order passed on appeal by a High Court or by any other court of final appellate jurisdiction,
- from any judgement, decree or final orders passed by a High Court in exercise of original civil jurisdiction.

The general rule is that the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary. But the appellate court has a discretion to allow additional evidence in the following circumstances:

- When the lower court has refused to admit evidence which ought to have been admitted.
- The appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgement.
- for any other substantial cause.
but in all such cases the appellate court shall record its reasons for admission of additional evidence.

Q: Write a short note on reference, review and revision under Civil Procedure Code

Reference to High Court

Subject to such conditions as may be prescribed, at any time before judgement a court in which a suit has been instituted may state a case and refer the same for opinion of the High Court and the High Court may make such order thereon as it thinks fit. (Section 113 and Order 46 Rule 1).

Review

The right of *review* has been conferred by Section 114 and Order 47 Rule 1 of the Code. It provides that any person considering himself aggrieved by a decree or order may apply for a review of judgement to the court which passed the decree or made the order on any of the grounds as mentioned in Order 47 Rule 1, namely:

- a) discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or
- b) on account of some mistake or error apparent on the face of the record, or
- c) for any other sufficient reason,

and the Court may make such order thereon as it thinks fit.

Revision

Section 115 deals with *revision*. The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

- a) to have exercised a jurisdiction not vested in it by law, 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 as it thinks fit.

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

Q: Write a short note on Suits by or against a corporation under Civil Procedure Code

Signature or verification of pleading

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation, by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Service of summons

Subject to any provision regulating service of process, where the suit is against a corporation, the summons may be served:

- on the secretary or any director or other principal officer of the corporation, or
- by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office then at the place where the corporation carries on business.

Power of the Court to require personal attendance

The Court may at any stage of the suit, require the personal appearance of the secretary or any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

Q: Write a short note on Suits by or against minors under Civil Procedure Code

A minor is a person

- who has not completed the age of 18 years and
- for whose person or property a guardian has been appointed by a Court, for whose property is under a Court of Wards, the age of majority is completed at the age of 21 years.

Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. The next friend should be a person who is of sound mind and has attained majority. However, the interest of such person is not adverse to that of the minor and that he is not in the case of a next friend, a defendant for the suit. (O.32, Rules 1 and 4).

Where the suit is instituted without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

Where the defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor [O.32, R.3(1)]. An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff

A person appointed as guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional court and any proceedings in the execution of a decree.

When minor attain majority — When the minor plaintiff attains majority he may elect to proceed with the suit or application or elect to abandon it. If he elects the former course, he shall apply for an order discharging the next friend and for leave to proceed in his own name and the title of the suit will be corrected. If he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant apply for an order to dismiss the suit on repayment of the costs incurred by the defendant or opposite party etc.

Q: Write a short note on Summary procedure under Civil Procedure Code

A procedure by way of summary suit applies to suits upon bill of exchange, hundies or promissory notes, when the plaintiff desires to proceed under the provisions of Order 37. Order 37 provides for a summary procedure in respect of certain suits. The object is to prevent unreasonable obstruction by a defendant. (Order 37)

Institution of summary suits

Such suit may be instituted by presenting a plaint containing the following essentials:

1. a specific averment to the effect that the suit is filed under this order;
2. that no relief which does not fall within the ambit of this rule has been claimed;
3. the inscription immediately below the number of the suit in the title of the suit that the suit is being established under Order 37 of the CPC.

Leave to defend

Order 37 rule 3 prescribe the mode of service of summons etc. and leave to defend. The defendant is not entitled to defend the suit unless he enters an appearance within 10 days from the service of summons. Such leave to defend may be granted unconditional or upon such term as the Court or the Judge may think fit. However, such leave shall not be granted where:

1. the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence or that the defences are frivolous or veracious, and
2. the part of the amount claimed by the plaintiff and admitted by the defendant to be due from him is deposited by him in the Court.

The summary suit must be brought within one year from the date on which the debt becomes due and payable, whereas the period of limitation for suits for ordinary cases under negotiable instrument is three years.