

ISBN 984-822-000-3

Civil Procedure Code

Justice Naimuddin Ahmed
Member, Law Commission



PUBLISHED BY:
BANGLADESH INSTITUTE OF LAW AND INTERNATIONAL AFFAIRS (BILIA)

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Published by:

Bangladesh Institute of Law and International Affairs

House # 22, Road # 7, Dhanmondi R/A, Dhaka-1205

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Dhaka-1205, Bangladesh, Tel: 9111 718, Fax: 8110970

E-mail: bilia@citechco.net, Web-site: www.bol-online.net/bilia

First Edition: August, 2000

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Price: Tk. 650.00

Laser tracing by Bangladesh Institute of Law and International Affairs (BILIA)

Printed by: Jamuna Printing & Publication Co., 8/2-3, Nilkhet Babupura

Dhaka-1205, Bangladesh. Tel: 966 89 31

Justice Latifur Rahman
Chief Justice of Bangladesh

Supreme Court
Dhaka-1000.

FOREWORD

Mr. Justice Naimuddin Ahmed, Member, Law Commission and former Judge of the Supreme Court of Bangladesh, High Court Division has given me the draft copy of his book 'Civil Procedure Code' for my perusal and writing a foreword.

I understand that this is the first complete book on Civil Procedure Code written since Bangladesh came into being. It contains several citations of important cases from our jurisdiction. The author has incorporated many important references of the Indian Jurisdiction and of both the Divisions of the Supreme Court of Bangladesh which will be of great help to the Judges, practising lawyers, academicians and others who are connected with the civil justice system in Bangladesh.

This book on Civil Procedure Code will be of practical help to the young trial Judges of the civil Courts in Bangladesh as this is a complete Code with all amendments. The author has taken a great care in incorporating all amendments before 14th August, 1947 to make a comprehensive book on the Code of Civil Procedure.

Justice Ahmed has given great care and attention to the writing of this book. I have no reasons to doubt that it will be an important addition to the existing books on Civil Procedure Code. I am sure that the work will bring much credit to the writer.

I wish the book good currency and appreciation at both home and abroad.



Justice Latifur Rahman
Chief Justice of Bangladesh

1st August, 2000



INTRODUCTORY REMARKS

It gives me great pleasure to note that the Bangladesh Institute of Law and International Affairs (BILIA) is going to publish a comprehensive commentary on the Code of Civil Procedure, 1908 which is the outcome of a project study undertaken by BILIA in 1990 sponsored by the Asia Foundation.

In this regard I would like to record my sincerest appreciation to Mr. Justice Naimuddin Ahmed, Member, Bangladesh Law Commission and Member of the Executive Council of BILIA for his painstaking work in writing an exhaustive and critical commentary on the Code as a comprehensive and unique compendium on the Civil Procedure Code of the Sub-continent. This book, setting a precedent in publication on the Code in Bangladesh, will no doubt be of considerable use to the members of the Judiciary and the Legal Profession.

I would fail in my duty if I did not acknowledge the initial support of Asia Foundation given to BILIA in the shape of seed-money which actually gave us the encouragement to undertake such an onerous task.

Lastly, I would like to express my regret for the delay in the publication of the book due to circumstances beyond our control.

Syed Ishtiaq Ahmed
Chairman, BILIA

PREFACE

About five years ago while I was a sitting Judge of the Supreme Court, High Court Division, Syed Ishtiaq Ahmed, Bar-at-Law, who happened to be the Chairman of the Bangladesh Institute of Law and International Affairs (BILIA), came one day to my chamber with a bunch of typed papers and requested me to pay a cursory glance over those papers which, he said, were a draft of a Commentary on the Code of Civil Procedure, 1908, prepared by a group of consultants engaged by the Institute. I reluctantly agreed having very little time then to do any work other than judicial work.

When I opened the packet I found that the typed papers left by Mr. Ahmed contained hardly anything other than a few synopses copied from some current textbook available in the market. Even the Sections and the Orders of the Code were missing. I informed Mr. Ahmed accordingly. With undaunted perseverance he insisted that I should write what he called a Bench Book on the Code of Civil Procedure, 1908, even if it took ten years to do so. On his insistence, I undertook the work but did not take ten years but a little more than five years to complete it. So, the initiative is his and the labour is mine. But for his initiative I would never have employed my labour.

This book is primarily meant for the new-comers on the bench in the civil courts, and, in this context, it may be called a Bench Book.

While going through the bare text published by the Government and the text books available in the market since Pakistan period it was noticed that amendments of the Code made by the Calcutta High Court under section 122 of the Code from time to time between the coming into force of the Code on 1st January, 1909 and the partition of British India into India and Pakistan and the partition of Bengal into East Pakistan (now Bangladesh) and West Bengal on 14th August, 1947, were excluded although these amendments are laws in force in Bangladesh in view of Section 18(3) of the Indian Independence Act, 1947 read with Article 224 of the Constitution of Pakistan, 1956, Article 225 of the Constitution of Pakistan, 1962 and Article 149 of the Constitution of Bangladesh. Without these amendments the Code is incomplete. Efforts have, therefore, been made to collect these amendments and to include them in this book in order to make the book complete.

The book is aimed at enabling the new-comers to understand and apply the Sections and the Orders of the Code in dealing with civil suits and cases. As such, citations have been generally confined to those cases the interpretations in

which have been accepted as binding within the territory of Bangladesh. Contrary views which have been accepted as good law in territories other than Bangladesh have been generally avoided except in one or two isolated cases.

Along with the case laws references have also been made to the corresponding rules in the Civil Rules and Orders, Volume I and the Civil Suit Instructions Manual and the forms prescribed in Schedule I of the Code and the Civil Rules and Orders, Volume II.

Before I conclude, I must record my thanks to Syed Ishtiaq Ahmed, Bar-at-Law, Chairman, BILIA, Mr. M. Amir-ul-Islam, Bar-at-Law, Honorary Secretary, BILIA and Mr. Waliur Rahman, formerly, Secretary, Ministry of Foreign Affairs, Government of Bangladesh and now Director, BILIA, for the initiative they have taken in goading me to continue and complete the work. Messers Md. Abdul Wadud, Assistant Bench Officer, Supreme Court, High Court Division and Md. Mahbubur Rahman, Computer Programmer, BILIA, deserve special thanks for the enormous labour they have undertaken to take down dictation from me continuously for several years and then prepare the manuscript.

I also express my profound gratitude to His Lordship Hon'ble Mr. Latifur Rahman, the Chief Justice of Bangladesh, for kindly consenting to write the Foreword of the book.

Lastly, it will be an act of highest ingratitude if I do not mention Sultana, my wife, whose encouragement and support revived me whenever I became exhausted and thought of abandoning the work.

In spite of the best care taken by all concerned, I have no doubt that there are mistakes and errors in the book and for them the entire responsibility is mine. All suggestions from any quarter for removing these errors are welcome and will be highly appreciated.

Naimuddin Ahmed



Amir-ul Islam
BARRISTER-AT-LAW

HONORARY SECRETARY'S NOTE

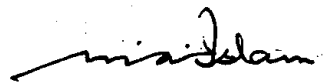
I deem it a great honour and a privilege in writing the Note on the book on the Code of Civil Procedure, written by Mr. Justice Naimuddin Ahmed, Member, Law Commission. The Code of Civil Procedure enacted in the early part of the 20th century (1908) is still governing the procedural law relating to civil litigation. The Code is mainly divided into two parts, i.e., Sections and Orders. Main principles are contained in the Sections and detailed procedures regarding the matters dealt with by the Sections are further specified and elaborated in the Orders. Under Section 122 of the Code, Supreme Court has power to make rules regulating the procedure of both the Divisions of the Supreme Court as well as of the Subordinate Courts. The Supreme Court has been given wide power to alter or add, amend or annul any of the rules. Civil Rules and Orders thus serve as an important instrument. A thorough knowledge of the Code as well as of the Civil Rules and Orders (CR&O) is an imperative for understanding the full implication of the procedural law, regulating our justice delivery system. This book will no doubt help in developing the knowledge as well as in understanding as to how the Code can be used as a guide to give relief to the litigants.

This book on the Code not only gives reference to leading case laws on each of the Sections but also provides a helpful guideline by giving cross references to various Orders which are related to the Sections as well as reference to CR&O contained in Civil Suit Instruction Manual. The book, therefore, may act as a handy reference for judges and advocates for getting a quick overview not only of the Sections but also the interconnection of the Sections with various Orders and Rules. Mr. Justice Naimuddin Ahmed has had long experience as a Judge in all the tiers of the Subordinate Courts as well as being a judge of the High Court Division of the Supreme Court. Mr. Justice Ahmed also served as the Registrar of the Supreme Court for a considerable period. Hence he is most competent to write a book on the Code of Civil Procedure as this Code guided him all through his career as a Judge.

Now, that he sits as a Member of the Law Commission, Mr. Justice Naimuddin Ahmed may reflect adequately upon the Code. In this book Mr. Justice Naimuddin Ahmed very advisedly kept himself away from his comments and reflections as anxiety to help the judges and advocates for using this Code as a guide to their practice is well reflected in the planning of the book. The book is presented in a concise and compact manner. Reference is given to the most relevant and leading case laws under each of the Sections. Citations are made from AIR, ILR, CWN, BLD, DLR, Indian Appeals, PLD and CR&O for the purpose of charting out a pathway. This will help the practitioners and judges to remain on the right track.

There is a growing demand for speedy disposal of the case and reduce unnecessary and unbearable delay in the disposal of cases. It is expected that the Judges may use this book in planning each of the cases pending before them. This book along with CR&O, it is hoped, can act as a handy tool for the Judges both in case management as well as in the quick disposal of cases.

This book, therefore, may act as a guide book for all practitioners and judges a like.



M. Amir-Ul Islam

Barrister-at-Law

Honorary Secretary

BILIA



Director's Note

Long ten years and ten days ----- sounds rather daunting. But a compendium of laws, case laws, and rulings of the Honorable Courts such as this can reasonably take this time : it is a serious and substantive work.

My deep appreciation goes to all the members of the Executive Council particularly Syed Ishtiaq Ahmed, Shah AMS Kibria Barrister Amirul Islam and Professor K. A. A. Kuamruddin for the guidance and inspiration they have given to me since the day I assumed charge in August 1998. I must, however single out the author of this work Justice Naimuddin Ahmed. Who found time in inspite of his heavy workload to reach out to places to get useful case-laws and judgements; he ferreted out materials from sources at home and abroad.

As a member of the law commission, he is busy. But as an author, he was untiring and never felt restrained.

In Bangladesh when we are working hard to restore rule of law in its true sense, this book is certainly a valuable contribution. In a country where even the Constitution was mangled and distorted mostly by extra- Constitutional forces over a long period of time, such a work could not have come at a more propitious time.

Bangladesh Institute of Law and International Affairs shares the joy and pride together with the Asia Foundation in this production, which will, I am confident, assist enormously in promoting greater transparency and accountability in the administration of Justice in Bangladesh.

Waliur Rahman
Director, BILIA

ABBREVIATIONS

The All India Reporter (AIR), Bombay series, Calcutta series, Madras series, etc. have been cited thus:— 1931 B, 1931 C, 1931 M, &c.

The Indian Law Reports (ILR) Bombay, Calcutta, Madras, etc. have been cited thus:— 31 B, 31 C, 31 M, &c.

The Calcutta Weekly Notes (CWN) have been cited thus 31 CWN, 32 CWN, &c.

The Calcutta Law Journals (CLJ) have been cited thus:— 31 CLJ, 32 CLJ, &c.

The Bangladesh Legal Decisions (BLD) have been cited thus:—1981 BLD, 1982 BLD, &c.

The Dhaka Law Reports (DLR) have been cited thus:— 31 DLR, 32 DLR, &c.

The Indian Appeals (IA) have been cited thus:— 31 IA, 32 IA, &c.

The Pakistan Legal Decisions (PLD) have been cited thus:—31 PLD, 32 PLD, &c.

The Civil Rules And Orders (CR&O), Volume I has been cited thus:— C.R. & O.

Addenda

In Section 44A: Add the following note: -

The Government has declared Fiji to be a reciprocating territory and the Supreme Court of Fiji to be a superior Court of the territory for the purposes of this section, vide Gazette of Pakistan, 1949, Pt. I, page 275.

Certain Courts of Pakistan have been declared to be superior Courts for the purpose of Part 1 of the Foreign Judgements (Reciprocal Enforcement) Act, 1933 (23Geo. 5, ch. 13). vide Gazette of Pakistan, 1953 Pt. I, pp 143-144.

The Government has declared the Colony of Singapore to be a reciprocating territory, and the Supreme Court of Singapore to be a superior Court of the territory for the purpose of this section, vide Gazette of Pakistan, 1954, Pt. I. p. 106.

Certain Courts in Pakistan have been declared to be Superior Courts for the purpose of section 5 of the Reciprocal Enforcement of Judgement Ordinance of Singapore, vide Gazette of Pakistan, 1954, Pt. I, p. 296.

The Government has declared the Australian Capital Territory to be a reciprocating territory, and the Supreme Court of Australian Capital territory to be a superior Court of the territory for the purposes of this section, vide Gazette of Pakistan, 1957, Pt. I, p. 174.

The Government has declared New Zealand including the Cook Islands (including Nive) and the Trust Territory of Western Samoa to be a reciprocating territory, and the Supreme Court of New Zealand to be a superior Court of that territory for the purposes of this section (w.e.f. 7th August 1958), vide Gazette of Pakistan, 1958, Pt.I. p. 455.

The Government has declared the Northern Territory of Australia to be a reciprocating territory and the Supreme Court of the said territory to be a superior Court of the territory for the purposes of this section, vide Gazette of Pakistan, 1959, Pt. I, p. 425.

In Section 112: Add the following note:-

“This section does not confer a right of appeal to the Appellate Division. It merely declares that the constitutional prerogative of the Appellate Division to grant special leave to appeal to the Appellate Division is not limited by anything contained in the Code.”

In Rule 2 of Order IV: After the words, “particulars of every suit”, insert the words, “except suits triable by a Court invested with jurisdiction of a Court of Small Causes under the Provincial Small Causes Courts Act, 1887”.

The above insertion was made by rule made by the Calcutta High Court under section 122 of the Code vide Notification No. 8579- G-dated 26-7-1938.

In Rule 43 of Order XXI: After the words, "shall be made by actual seizure", insert the words, "at the identification of the decree-holder or his agent",

The above insertion was made by rule made by the Calcutta High Court under section 122 of the Code vide Notification No. 4440-G dated 29-05-1941.

In Rule 44 of Order XXI: After the words, "attachment shall be made", insert the words, "at the identification of the decree-holder or his agent".

The above insertion was made by rule made by the Calcutta High Court under section 122 of Code vide Notification No. 4440 dated 29-05-1941.

In Sub-rule (2) of Rule 54 of Order XXI: After deleting the full stop, add the following words, "and also, where the property is situated within the cantonment limits, in the office of the local Cantonment Board and the Military Estates Officer concerned."

The above addition was made by rule made by the Calcutta High Court under section 122 of the Code vide Notification No. 6149-G dated 26-7-1941.

In Rule 1 of Order XLII: For Rule 1, substitute the following:-

"1. The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees:

Provided that every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and also (unless the Court sees fit to dispense with any or all of them), by copies of the judgment on which the said decree is founded and of the judgment and decree of the Court of first instance".

The above substitution was made by rule made by the Calcutta High Court under section 122 of the Code vide Notification No. 1750-G dated 15-2-1938.

Corrigendum

- P. 11, line 2 from end, for "pecuring" read "pecuniary".
- P. 14, line 12 from top, for "both the suit" read "both the suits".
- P. 17, line 15 from top, for "Jotindra" read "Jyotirupa" and P Xli, line 16 from end, for "Jotindra" read "Jyotirupa".
- P. 28, line 16 from top, for "P410" read "P228".
- P. 30, line 9 from end, for "Ranchandar" read "Ranchordar" and P lix, line 2 from top, for "Ranchandar" read "Ranchordar".
- P. 36, line 9 from end, for "exercise" read "exercised".
- P. 39, line 14 from end, for "Ommitted" read "Omitted".
- P. 43, line 8 from top, for "violable" read "voidable".
- P. 54, line 14 from top, for "Drab" read "Dorab".
- P. 56, line 3 from top, for "proceeding" read "preceding".
- P. 58, line 10 from end, for "626" read "126".
- P. 59, line 8 from end, for "225-226" read "226-227".
- P. 59, line 6 from end, for "Or.21, r.99" read "Or.21, r. 98".
- P. 59, line 6 from end, after "Or. 21, r. 98;" add "for resistance by bonafide claimant, Or. 21, r. 99;".
- P. 100, line 4 from top, for "miss-description" read "mis-description".
- P. 105, line 11 from end, for "accounting" read "according".
- P. 119, line 6 from top, delete the bracket before "or" and insert the bracket after "or".
- P. 124, line 17 from top, for "1938" read "1928".
- P. 124, line 4 from end, for "page-1648" read "page 1643".
- P. 125, line 18 from end, for "property" read "properly".
- P. 129, line 11 from top, for "38-41" read "31-40".
- P. 130, line 10 from end, for "on" read "or".
- P. 138, line 19 from end, for "describition" read "description".
- P. 142, line 2 from end, for "38-41" read "38-40".
- P. 148, line 2 from end, delete "the Court may make an order that".
- P. 161, line 16 from top, for "163" read "164".
- P. 171, line 12 from top, after "or" insert "of".
- P. 173, line 6 from top, for "on" read "or".
- P. 173, line 7 from top, after "fixed" insert "by".
- P. 174, line 12 from end, for "in delivering" read "by delivering".
- P. 180, line 8 from top, after "one of the parties" insert "or both parties".
- P. 192, line 11 from top, for "For" read "Form".
- P. 200, line 2 from end, for "385" read "735".
- P. 201, line 2 from top, for "for execution" read "for the execution".
- P. 201, line 14 from end, for "count" read "court".
- P. 206, line 3 from end, for "condition" read "conditions".
- P. 206, line 2 from end, for "think" read "thinks".

- P. 240, line 1 and 2 from top, read this note after Rule 86 and then insert "Baijnath-vs-Maheep, 16 C 535; Ramdial-vs-Ramdas, 1A 181".
- P. 241, line 11 from end, insert " , coma" after "irregularity".
- P. 242, line 18 from top, for "compatent" read "competent".
- P. 245, line 16 from end, for "rules" read "rule".
- P. 248, line 11 from top, for "133" read "173".
- P. 250, line 10 from top, for "250" read "198".
- P. 252, line 7 from top, for "one or" read "one of".
- P. 266, line 10 from top, for "Judabendra" read "Jadabendra".
- P. 297, line 17 from end, for "therefrom" read "therefrom of".
- P. 302, line 17 from end, for "his" read "him".
- P. 306, line 5 from top, for "37" read "38".
- P. 314, line 7 from top, for "proceeding" read "preceding".
- P. 314, line 14 from end, for "summon" read "summons".
- P. 320, line 9 from end, for "22" read "122".
- P. 320, line 5 from end, for "273" read "283".
- P. 327, line 5 from top, for "willful" read "wilful".
- P. 331, line 9 from end, for "or" read "and".
- P. 335, line 15 from top, delete " , coma" after "the Court".
- P. 337, line 9 from top, for "terns" read "terms".
- P. 347, line 11 from end, for "(i)" read "(i)(a)".
- P. 358, line 7 from top, for "675" read "676".
- P. 360, line 10 from end, for "Where" read "When".

THE CODE OF CIVIL PROCEDURE, 1908

(Act No. V of 1908)

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THE CODE OF CIVIL PROCEDURE, 1908
[Act No. V of 1908]

[21st March, 1908]

**An Act to consolidate and amend the laws relating to the
 Procedure of the Courts of Civil Judicature.**

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows:—

PRELIMINARY

Section-1: Short title, commencement and extent.—(1) This Act may be cited as the Code of Civil Procedure, 1908.

(2) It shall come into force on the first day of January, 1909.

(3) It extends to the whole of Bangladesh.

Code how far exhaustive—matters not specifically provided for.

The essence of a Code is to be exhaustive on the matters in respect of which it declares the law. The Code of Civil Procedure is, therefore, to be considered to be complete in itself and exhaustive of the matters dealt with therein.

Gokul -vs- Padmanund 29 C 707 PC = (1902) 29 I.A 96 (202).

The object of codification is that on any point specifically dealt with by it, such law should be sought for in the Code. When, however, there is no specific provision the court must act according to justice, equity and good conscience.

Narendra -vs- Kamalbasini 23 C 563 PC

Murahari -vs- Bapayya, 1949 M 743

Hidaybia Textile Mills Ltd. -vs- Allied Bank, PLD 987 SC 521

Contents of the Code—the Civil Procedure Code deals with procedural matters and not substantive rights. The procedural laws are grounded on principles of natural justice.

Abdur Rahman & ors -vs- Sultan and ors.

35 DLR (AD) 51 = 1983 BLD (AD) 129

The body of the Code creates jurisdiction and is unalterable except by the legislature and the rules indicate the mode of exercising it. Therefore, the body must be read in conjunction with the rules.

Abdul Karim Abu Ahmed Khan Ghaznavi -vs- The Allahabad Bank Ltd.
41 IC 598 FB = 27 CWN 877

The orders and rules apply to High Courts unless the Code contains something inconsistent.

Sabitri -vs- Savi, 48 C 481 PC

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

(1) “Code” includes rules:

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

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

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

(3) “decree-holder” means any person in whose favour a decree has been passed or an order capable of execution has been made:

(4) “district” means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a “District Court”), and includes the local limits of the ordinary original civil jurisdiction of the High Court Division:

(5) "foreign Court" means a Court situate beyond the limits of Bangladesh which has no authority in Bangladesh and is not established or continued by the Government:

5(6) "foreign judgment" means the judgment of a foreign Court:

(7) "Government Pleader" includes any officer appointed by the Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader:

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

5(9) "judgment" means the statement given by the Judge of the grounds of a decree or order:

5(10) "Judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made:

✓(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

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

(13) "moveable property" includes growing crops:

5(14) "order" means the formal expression of any decision of a Civil Court which is not a decree:

(15) "pleader" means any person entitled to appear and plead for another in Court:

(16) "prescribed" means prescribed by rules:

(17) "public officer" means a person falling under any of the following descriptions, namely:—

(i) every Judge;

(ii) every member of the Civil Service of the Republic;

- (iii) every commissioned or gazetted officer in the military, naval or air forces of Bangladesh while in the service of the Republic;
 - (iv) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties;
 - (v) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;
 - (vi) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;
 - (vii) every officer whose duty it is, as such officer; to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government; and
 - (viii) every officer in the service or pay of the Republic, or remunerated by fees or commission for the performance of any public duty;
- (18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125:
- (19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds: and
- (20) "signed", save in the case of a judgment or decree, includes stamped.

~~XY~~

(2) "**Decree**"

The important elements of decree are:-

- i) there must be a formal expression of adjudication;
- ii) there must be conclusive determination of the rights of the parties;
- iii) the determination must be with regard to all or any other matter in controversy; and
- iv) the expression of an adjudication must be in a suit.

The importance of the definition of the word "decree" rests on the fact that by reference to it, the right of appeal is determined, the aim being to permit an appeal from an adjudication which purports to settle the rights of the parties, though it does not completely dispose of the suit, e-g- preliminary decree.

The decree may be either preliminary or final, or may be partly preliminary and partly final. These terms have been defined in the explanation.

Preliminary decree

Preliminary decrees are passed, when, after the decision of the suit, the court has to stay its hand in order to mark out the consequences on which the complete disposal of the suit depends. These consequences may be arithmetical as in an account suit, or ministerial as in a partition suit, or contingent as in a mortgage suit. It is only on such preliminary decrees that a right of appeal is given. No doubt the decision of a single issue may, in certain cases, lead to a decree, e.g. when the whole suit, and not part of it, is dismissed as time barred. But an interlocutory decision on each and every point in issue between the parties, is not a 'decree' within the meaning of S. 2(2).

The cases where the legislature contemplated the preparation of a preliminary decree, are specified in rules 12-18 of Order XX of the Code. As to appeal from preliminary decree, see S. 97. A preliminary decree may be passed in the following classes of suits:

- (ix) In suits for possession of immovable property and for rent or mesne profits. (Or XX r. 12. Form No. 23 Appendix D. Sch. 1)
- (ii) In suits for partition of revenue-paying estate under section-54.
- (iii) In suits for partition of any other immovable property under Or.20r. 18.
- (iv) In suits for partition under Act IV of 1893.
- (v) In suits for account between principal and agent. (Or. 20. r. 16. Form No. 21 App. D. Sch. 1).

- (vi) In all other suits in which it is necessary to ascertain the amount of money due to one party from another, that an account should be taken. (Order 20. r. 16).
- (vii) In suits for foreclosure of mortgage. (Or. 34, r. 2, Form No. 3. App. D. Sch. I).
- (viii) In suits for redemption of a mortgage. (Or. 34, r.7. Form No. 7 App. D. Sch. I).
- (ix) In suits by creditors or by legatees for administration. (Or. 20 r. 13; Form No. 17 App. D. Sch. I).
- (x) In suits for dissolution of partnership and accounts. (Or. 20 r. 15; Form No. 21 App. D Sch. I).
- (xi) In suits for pre-emption (Or. 20. r. 14)
- (xii) In suits for sale (Or. 34 r. 4; Form No. 5. App. D. Sch. I)

The above list is not exhaustive and does not preclude the court from passing a preliminary decree in cases not expressly provided for in the Code.

Dattatreya -vs- Radhabai 45 B 627
Raja Peri Mohon -vs- Manohar, 27 CWN 989

Similarly, in suits mentioned in Order XX the Court is not bound to pass a preliminary decree and may pass a decree for the amount due straightaway if it does not involve elaborate accounting.

Velliyappa -vs- Vellayappa, 1930 M 721;
Hurronath -vs- Krishna, 14 C 147.

Final decree

A final decree is one when the adjudication completely disposes of the suit, that is, when it is such that the court which makes it cannot alter or reconsider it, except on review. For forms of final decree, see App. D. Sch. I. A court is competent to make final decrees in all suits except where a preliminary decree is necessary.

Partly preliminary and partly final

In a suit for possession and mesue profits, the decree for possession is a preliminary decree, and the mesue profits are ascertainable in the final decree.

A decree shall be deemed to include—
rejection of plaint and
questions within section 144.

a) Rejection of plaintiff

An order rejecting a plaintiff on the grounds mentioned in clauses (a) to (d) of Or. VII. r. 11, is a decree and is, therefore, appealable under S. 96, but rejection of plaintiff does not preclude the plaintiff from presenting a fresh plaintiff in respect of the same cause of action under Or. VII. r. 13, provided he is not barred by lapse of time and so, a plaintiff whose plaintiff is rejected may either appeal against the order or can present a fresh plaintiff, provided he is not barred by lapse of time.

b) Question within Section 144.

Determination of any question under S. 144 is a decree. It means the determination of a question directly concerned by the section, and not one incidentally connected with or collateral to the decision of any such question. The decision must be on the merits of the application for restitution. The question of limitation is one collateral to the merits of the application for restitution and is not, therefore, a question within section 144, and as such, the determination of limitation is not a decree as defined in S. 2 (2).

“Decree” shall not include:

- a) any adjudication from which an appeal lies as an appeal from an order. Orders which are so appealable are specified in S.104 and Or. 43. r. 1 of the Code;
- b) any order of dismissal for default.

Distinction between decree and order

The principal points of distinction between a decree and an order is that an adjudication which amounts to a decree is generally appealable, but an order is not so, and is appealable in exceptional cases as specified in S. 104 read with Or. 43 r. 1 of the Code.

Decree cannot be different from judgment.
The decree has to agree with the judgment.
See section 33 and Or. XX rr. 6 and 7.

Decree must be formally drawn up

The decision of the court must be expressed in the form of a decree. Mere recording a finding in the judgment without drawing up a decree in the prescribed form, or a finding on a particular issue without embodying it in the decree, is not a decree.

An adjudication cannot be regarded as a decree, unless formally drawn up as such, or at all events can be so drawn up. Omission to draw up the decree does not affect the right of a party to prefer appeal.

Following are Decrees

When an order was made in a suit and it amounted to the formal expression of an adjudication which so far as regards the court expressing it, conclusively determined the rights of parties with regard to one of the matters in controversy in the suit, namely, whether the judgment-debtor was an agriculturist and entitled therefore to have his debt discharged or reduced under the Act. The order was a decree within the meaning of S. 2(2) and an appeal lay under S. 96.

Adaikappa -vs- Chandra Sekhara
P.L.D 1947 PC 279 = 1948 PC 12

In a suit to have partnership accounts taken, and for that purpose to have various matters decided by the court, the court "declared" that the partnership in question was dissolved as from first July, 1907 and then "ordered and decreed" that "It is referred to the Assistant Referee of the court to take the following inquires, that is to say: (i) to inquire who were the partners who were entitled to share in the assets and goodwill of the said partnership business; (ii) to take account of the dealings of the parties with the assets of the said partnership business". It was held that the adjudication was preliminary decree within S.2 and S. 97.

Ahmed Musaji Saleji and others -vs- Hashin Ebrahim Saleji and others 1915 PC 116

Order cannot be separated into elements some of which are orders and others decrees.

Ahmed Musaji Saleji and others -vs- Hashin Ebrahim Saleji and others 1915 PC 116

- An order dismissing an appeal determines the rights of the parties with regard to all the matters in controversy and is as such a decree. Partition suit ended in a compromise decree. Later application was filed for drawing up the final decree. Question arose whether the compromise decree was a preliminary or a final decree.

It has been held that the compromise decree has determined the rights of the parties by allotment of respective shares to the plaintiffs conclusively,

but the suit itself has not been disposed of completely because physical division of the properties in terms of the compromise decree has not been brought on record by either party to the suit and hence the compromise decree was a preliminary decree and not a final decree within the meaning of S.2(2) of the Code of Civil Procedure.

Abdul Gani being dead his heirs Md. Harunur Rashid and others -vs-Raja Mia and others. 2 BSCR 318

Determination of a question under section 144 is available to the Small Causes Court and an order passed therein shall be deemed to be a decree though no appeal lies therefrom in such a case. It is a distinct case of 'Decree' where no appeal lies but remedy in accordance with the provision of the Act lies from such decree.

Sayed Ali -vs- Sree Gopal Chandra Das and ors. 4 B.S.C.R. 221

In view of the definition of decree whether adjudication about costs can be said to be the determination of the rights of the parties in a suit. If costs have been claimed, the decision about costs in a decree is necessarily an adjudication which 'determines the rights of the parties' with regard to a controversy in the suit. Since appeal can be filed against a decree in its entirety or against that part of the decree which the aggrieved party wishes to challenge, a party, if aggrieved, by the rejection of claim for costs can file an appeal under section 96 against the adverse decision regarding costs.

West Pakistan (Now Govt. of N.W.F.P.) -vs- Haji Mohammed Ismail and others. PLJ 1980 SC. 2

2(5) Foreign Court

Two conditions must be satisfied in order to bring a court within the definition of a foreign court:

- (a) it must be situated beyond the limits of Bangladesh.
- (b) it must not have been established or continued by the Government of Bangladesh.

2(6) Foreign Judgment also includes decree.

Ershad Ali -vs- Syed Azizul Huq 3 BSCR 141

2(9) Judgment

The essential element of a judgment is that there should be a statement of the grounds of the decision.

*Vidya Charan Shukla -vs- Khulachand Baghel and ors.
(1964) SC. 1099 (1113)*

2(10) Judgment-debtor

Judgment-debtor is a person against whom a decree has been passed or an order capable of execution has been made. A person who is a party to the suit against whom no decree has been passed is not a judgment-debtor.

Umaprasad Pal and others -vs- Mirtunjay Pal and others
1968 C 547 (548)

2(14) Order

Order as defined in S. 2 (14) means the formal expression of any decision of a civil court which is not a decree. It is analogous to a decree and generally has the essential attributes of a decree but as it arises out of a proceeding not being a suit, it does not amount to a decree.

Md. Shariatullah -vs- Ashrafun Nessa
28 DLR (SC) 91 = 5 BLR (AD) 12

2(15) Pleader

The term "pleader" as defined in S. 2 (15) is used in a much larger sense than its signification under the Legal Practitioners Act according to which it is restricted to the class of practitioners who are entitled to practise only in courts subordinate to High Court.

Jogesh Ch. Mukherjee (Petnr.) 5 DLR 160

Section-3: Subordination of Courts.— For the purposes of this Code, the District Court is subordinate to the High Court Division, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court Division and District Court.

Section-4: Savings.—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special * * law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

The meaning of the saving clause is that if anything in the Code is in conflict with anything in a special law, the Code shall not prevail to override the inconsistent provisions.

Aga Md. -vs- Cohen 13 C 221

Application of the Code is not barred where the special law is silent.

Sahadat -vs- Md. Hossain 57 CWN 948

“Power” includes also execution procedure. If the special law confers a special power on the executing court, that provision shall override the corresponding provision of the Code.

Ram Abhilakh -vs- Ram Jas 1966 A 218

Section-5: Application of the Code to Revenue Courts.—(1)

Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the Government may, by notification in the official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the Government * * may prescribe.

(2) “Revenue Court” in sub-section (1) means a Court having jurisdiction under any law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

Section-6: Pecuniary jurisdiction.—Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

For pecuring jurisdiction of the different grades of court, see sections 3, 18 and 19, Civil Courts Act, 1887 (Act XV of 1887).

Section-7: Small Cause Courts.—The following provisions shall not extend to Courts constituted under the * * Small Causes Courts Act, 1887, * * or to courts exercising the jurisdiction of a Court of Small Causes under the said Act, that is to say,—

- (a) so much of the body of the Code as relates to—
 - (x) suits excepted from the cognisance of a Court of Small Causes;
 - (ii) the execution of decrees in such suits;
 - (iii) the execution of decrees against immoveable property; and
- (b) the following sections, that is to say,—
 - section 9,
 - sections 91 and 92,
 - sections 94 and 95, so far as they authorise or relate to—
 - (i) orders for the attachment of immoveable property,
 - (ii) injunctions,
 - (iii) the appointment of a receiver of immoveable property, or
 - (iv) the interlocutory orders referred to in clause (e) of section 94, and sections 96 to 112 and 115.

Section-8: [*Presidency Small Cause Courts.*] Omitted by A. O., 1949