

Part I

SUITS IN GENERAL

JURISDICTION OF THE COURTS AND RES JUDICATA

Section-9: Courts to try all civil suits unless barred.—The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.)

Explanation —A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

✓ Civil courts have jurisdiction to try all suits of a civil nature except those the trial of which is expressly or impliedly barred.

✓ *Abdur Rouf -vs- Abdul Hamid Khan, 17 DLR, SC 515*

Suits relating purely to religious rites or ceremonies or involving purely caste questions are not suits of a civil nature but when the principal question is of civil nature such as, as to religious office or fees attached to it or right to any property, the suit is maintainable.

“Expressly barred” means barred by any statute in force. “Impliedly barred” means barred by general principles of law, equity or public policy, etc.

○ Ouster of jurisdiction of the civil court can not be readily inferred unless expressly taken away.)

Shamsuddin Khan -vs- Shamsuzzaman, 22 DLR 655
Chalna Fibre Co. -vs- Abdul Jabbar, PLD 1968 S.C. 381
S -vs- Indian Iron & Steel, 1970 SC 1298

✓ In case of doubt as to jurisdiction, court shall lean towards assumption of jurisdiction.

Gurudwara & C. -vs- Shiv Rattan, 1955 SC 576

Section-10: Stay of suit.—No Court shall proceed with the trial of any suit in which the matter-in-issue is also directly and substantially in

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Judices*

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 Bangladesh having jurisdiction to grant the relief claimed, or in any Court beyond the limits of Bangladesh established or continued by the Government and having like jurisdiction, or before the Supreme Court.

(*Explanation* —The pendency of a suit in a foreign Court does not preclude the Courts in Bangladesh from trying a suit founded on the same cause of action.)

The essential conditions for the application of the section are: (1) the matter-in-issue in the second suit is directly and substantially in issue in the previous suit, (2) the parties in both the suit are the same and (3) the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit and (4) the previously instituted suit is pending in the same court in which the subsequent suit is brought or in any court in Bangladesh or in any court beyond the limits of Bangladesh established or continued by the Government or before the Supreme Court.

Kalipada -vs- Charulata, 60 C 1096

The institution of the subsequent suit is not barred, only the trial of the subsequent suit is barred.

Bepin -vs- Jogendra, 24 CLJ 514

(Suit includes an appeal but does not include an application for leave to appeal.)

Chowdhury -vs- Midnapore Zemindary Co., 27 CWN 772.

[Swami Turiananda -vs- Siris Kumar Sen, 5 DLR 175]

When a suit cannot be stayed under section 10 the court has inherent power under section 151 of the Code of Civil Procedure to stay a suit for ends of justice.

Bashirullah Munshi -vs- Abdul Bari Bepari, 21 DLR 183

Suriya Begum -vs- Alimullah Mallik, 24 DLR 133

Under section 10 only the subsequent suit and not the previous suit can be stayed — court can, however, stay the previous suit for ends of justice by applying section 151 of the Code of Civil Procedure.

Mst. Arifa Begum -vs- Khulque Muhammad Naqvi,

21 DLR (WP) 209

(For purpose of section 10, the date of presentation of plaint and not date of admission is the date of institution.

Heerendra -vs- Dhirendra, 62 C 1115



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

Explanation I — The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

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

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

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

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

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

The following are the conditions of res judicata:-

(1) Identity of matter in issue:

The matter in the subsequent suit must have been directly and substantially in issue in the former suit. *Explanation III* is direct res judicata and *Explanation IV* is constructive res judicata. It is not necessary that the matters in the two suits must be the same in verbatim. It is sufficient if the matter in issue in the former suit was substantially the same.

(2) Identity of parties:

The former suit must have been between the same parties or parties under whom they or any of them claim.

(3) Same title:

The parties in the subsequent suit must have litigated under the same title in the former suit.

(4) Concurrence of jurisdiction:

The court which had decided the former suit must have been competent to try the subsequent suit or the suit in which such issue has been subsequently raised.

(5) Final decision:

The matter-in-issue in the subsequent suit must have been heard and finally decided in the former suit.

Res Judicata does not only forbid trial of a suit but also of an issue which has been finally decided in a previous suit. Res Judicata ousts the jurisdiction of the court whereas estoppel is a rule of evidence, and shuts the mouth of a party.

Cassamally -vs- Currembhoy, 36 B 214

When an issue was raised and finally decided, the rule of res judicata applies although the suit was decided ex parte.

Hara -vs- Bepin, 13 CLJ 38

Shib -vs- Lakhi, 1925 C 427

As between co-plaintiffs, a finding to become res judicata must have been essential for the purposes of giving relief to the plaintiff in the previous suit.

Rukmini -vs- Dhondo, 36 B 207

The conditions for applying res judicata between co-defendants are: (1) there must be conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the plaintiff the relief he claims; (3) the question between the defendants must have been finally decided inter se between them.

Munni -vs- Triloke, 35 CWN 661 PC

Kishen -vs- Durga, 35 CWN 1217 PC

Lalmohon -vs- Dhupi, 59 C 636

Sachindra Lal Das -vs- Hriday Ranjan Das, 40 DLR (AD) 56

A decision in a previous suit cannot operate as res judicata when an appeal is pending.

Annamalai -vs- Thornhill, 36 CWN 1 PC

The bar of res judicata is applicable to writ proceedings on the general principle that there should be an end to litigation.

Syed. Mattur. Rab -vs- Bangladesh, 42 DLR (AD) 126

Constructive res judicata—Two suits, the earlier suit was for declaration of title and the latter for declaration of title and recovery of possession—the latter suit is hit by res judicata.

Hafizuddin Sarkar -vs- Bangladesh, 42 DLR (AD) 57

Where several suits involving common issues are disposed of in one judgment and an appeal is filed against the decree in one and not from the decrees in the others, the matter decided in latter suits does operate as res judicata.

Bahadur vs- Jotindra, 64 CLJ 431

Section-12: Bar to further suit.—Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

As to rules precluding a fresh suit, see Or. 2, r. 2; Or. 9, r. 9; Or. 22, r. 9 and Or. 23, r. 1.

Section-13: When foreign judgement not conclusive.—A foreign judgement shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

- (a) where it has not been pronounced by a Court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Bangladesh in cases in which such law is applicable;
- (d) where the proceedings in which the judgement was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in Bangladesh.

Foreign judgements may be enforced under section 44A of the Code or by a suit upon it.

Sama -vs- Ravji, 24 B 86

Section-14: Presumption as to foreign judgements.—The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgement, that such judgement was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

PLACE OF SUING

Section-15: Courts in which suits to be instituted.—Every suit shall be instituted in the Court of the lowest grade competent to try it.

The section is a rule of procedure not of jurisdiction and while it lays down that a suit shall be instituted in the court of the lowest grade, it does not thereby oust the jurisdiction of the courts of higher grades which they possess under the Acts constituting them.

Mohini Mohan -vs- Kunja Behari, 47 CWN 720
Tangor -vs- Jaladhar, 14 CWN 322

Although it may have jurisdiction in the higher court, such as, a subordinate judge's court, should not, as a matter of procedure, entertain the suit which the lower court has jurisdiction to entertain but to return the plaint to the plaintiff for presentation to the lower court i.e. assistant judge's court as provided by Order 7 rule 10 of the Code.

Nidhi Lal -vs- Mazhar, 7 A (1885), 230

As to valuation, see rule 25, C.R. & O and para 4, Civil Suit Instructions Manual. For grades of courts and pecuniary jurisdiction, see sections 3, 18 and 19, Civil Courts Act, 1887.

Section-16: Suits should be instituted where subject-matter situate.—Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) for the recovery of immoveable property with or without rent or profits,
- (b) for the partition of immoveable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property,
- (d) for the determination of any other right to or interest in immoveable property,
- (e) for compensation for wrong to immoveable property,
- (f) for the recovery of moveable property actually under dstraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or, in the case of suits referred to in clause (c), at the place where the cause of action has wholly or partly arisen, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation — In this section “property” means property situate in Bangladesh.

The section provides that suits covered by clauses (a) to (f) are to be instituted in the courts within the local limits of which the property is situate. “Immovable property” is not defined in the Code. It is defined in section 3 clause (25) of the General Clauses Act, 1897. Suits referred to in clause (c) has some additional forums also.

In clause (e) “wrong to immovable property” means torts affecting immovable property such as, trespass, nuisance, infringement of easement, etc.

Crip -vs- Watson (1893) 20 C 689

Section-17: Suits for immoveable property situate within the jurisdiction of different Courts.—Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate:

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

This section is supplemental to section 16 and applies only to suits falling within clauses (a) to (e) of that section.

Satya Narayan Banerjee -vs- Radha Nath Das. 45 CWN 1085

(The section is for the benefit of litigants, the object being to avoid multiplicity of suits.

Harachandar -vs- Lal Bahadur (1894) 16 A 359

Section 17 applies only to those cases in which there is one and the same cause of action in respect of immovable property situate within the jurisdiction of different courts and does not apply if the cause of action as to the property without the local limits of jurisdiction is different.

Nisar Ali -vs- Mohamad Ali, 36 CWN 937; 59 IA 268

Section-18: Place of institution of suit where local limits of jurisdiction of Courts are uncertain.—(1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of these Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction:

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

(Appellate court will not interfere unless there was, at the time, no reasonable ground for uncertainty as to jurisdiction and there has been consequent failure of justice.

Md. -vs- Md., 1933 A 555

Section-19: Suits for compensation for wrongs to person or moveables.—Where a suit is for compensation for wrong done to the person or to moveable 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 said Courts.

ILLUSTRATIONS

(a) A, residing in Chittagong beats B in Dhaka. B may sue A either in Dhaka or in Chittagong.

(b) A, residing in Chittagong, publishes in Dhaka statements defamatory of B. B may sue A either in Dhaka or in Chittagong.

The section applies to suits for wrong done to the person or the movable property of the claimant.

Section—20: Other suits to be instituted where defendants reside or cause of action arises.—Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises.

Explanation I — Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II — A corporation shall be deemed to carry on business at its sole or principal office in Bangladesh or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

ILLUSTRATIONS

- (a) A is a tradesman in Dacca. B carries on business in Chittagong. B, by his agent in Dacca, buys goods of A and requests A to deliver them to the Bangladesh Biman. A delivers the goods accordingly in Dacca. A may sue B for the price of the goods either in Dacca,

where the cause of action has arisen, or in Chittagong, where B carries on business.

- (b) A resides at Cox's Bazar, B at Dacca and C at Chittagong. A, B and C being together at Khulna, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Khulna, where the cause of action arose. He may also sue them at Dacca, where B resides, or at Chittagong, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

This section is subject to provisions of sections 16-19.

"Residence" means where a person or his family or servants eat, drink and sleep.

Kumud -vs- Jatindra, 13 CLJ 22

A man may dwell at more places than one at the same time.

Orde -vs- Skinner, 3 C. 91 PC

"Cause of action" means the whole of the material facts which it is necessary for the plaintiff to allege and prove in order to succeed.

Dhunji -vs- Fforde, 11 B 649

Cause of action must be antecedent to the institution of the suit.

Govind -vs- Debendra, 52 IC 231

Section-21: Objection to jurisdiction.—No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

Objection to territorial jurisdiction must be taken in the original court at the earliest opportunity and before settlement of issues. Even if this is done and the objection is disallowed, no appellate or revisional court will allow the objection unless there has been consequent failure of justice.

Bengal P & I Co. -vs- Kamini, 22 CWN 517

Lacha vs- Virji, 62 IC 399

Section-22: Power to transfer suits which may be instituted in more than one Court.—Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity

and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

Section 22 would apply only if the suit in its entirety is cognizable by either of the courts in which the suit is filed or by the court to which the suit is sought to be transferred.

Zubeida -vs- Md., 1933 L 635

Application under section 22 should be registered as miscellaneous judicial case. See rule 774(a)(1) C.R. & O.

Section-23: To what Court application lies.—(1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.
(2) Where such Courts are subordinate to different Appellate Courts the application shall be made to the High Court Division.

For principles to be applied in deciding the question of transfer.

Umatool -vs- Kulsum, 10 CLJ 208

Section-24: General power of transfer and withdrawal.—(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court Division or the District Court may at any stage—

- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
- (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
 - (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

The section gives general power of transfer of all suits, appeals, and other proceedings and is not limited like section 22 to suits in which the plaintiff has the option of suing in more than one court. It may be exercised at any stage of the proceeding and even *suo motu* without an application.

Md. Habibullah -vs- Tikam, 49 A 57

The power conferred on the High Court Division under section 24(1)(b) of the Code regarding withdrawal and transfer of case is an unfettered one.

M. A. Hakim -vs- Bholanath Sen, 40 DLR 413

The effect of a transfer of a suit under sub-section (4) from a court of small causes is that the suit must be tried under the small cause court procedure without any right of appeal.

Chotteylal -vs- Lakshmi, 38 A 425
Shankarama -vs- Padmanabha, 38 M 25

The transferee court shall be deemed to be a small cause court if it has no small cause court power.

Vidyardhi -vs- Ram, 1935 A 690

For Form of notice of application for transfer of a suit, Form No. 2, App. H Sch. I = H.C. Form No. (P) 54.

Section-24A: Appearance of parties on transfer of suit, etc.—(1)

Where any suit is transferred under section 22, or any suit, appeal or other proceeding is transferred or withdrawn under sub-section (1) of section 24 on the application of a party, the Court ordering the transfer or withdrawal shall fix a date for the appearance of the parties before itself, if the suit, appeal or other proceeding is to be tried or disposed of by itself, or before the Court to which the case is so transferred.

(2) Where any suit, appeal or other proceeding is transferred from one Court to another, otherwise than on the application of a party, the parties thereto shall appear before the Court from which the suit, appeal or other proceeding is to be transferred, on the day already fixed for their appearance before that Court, and such Court shall then communicate the order of transfer to such parties and direct them to appear before the Court, to which the suit, appeal or other proceeding is to be transferred, either on the same day, or on such earliest day as may be reasonable having regard to the distance at which the other Court is located.

Section-25: Omitted by the Central Laws (Statute Reform) Ordinance, 1960.

INSTITUTION OF SUITS

Section-26: Institution of suits.—Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

As to mode of institution, see Or. 4, r.1 and rule 48, C.R & O.

A suit is not duly instituted until it is registered.

Surendra -vs- Atabuddin 26 CWN 391

SUMMONS AND DISCOVERY

Section-27: Summons to defendants.—Where a suit has been duly instituted, a summon may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

Issue and service of summons - see Or. 5.

Section-28: Omitted by Act VIII of 1973 as amended by Act LIII of 1974.

Section-29: Service of foreign summonses.—Summonses and other processes issued by any Civil or Revenue Court situate outside Bangladesh may be sent to the Courts in Bangladesh and served as if they were summonses issued by such Courts:

Provided that the Government has by notification in the official Gazette declared the provisions of this section to apply to such Courts.

Provisions of section 29 have been applied to-

(i) the Civil Courts in the Federation of Malaya as respects service in East Bengal (now Bangladesh) of processes issued by such courts, see Dhaka Gazette, 1949, Part-I, Page-543.

(ii) all Civil and Revenue Courts of India, as respects service in the Province of East Bengal (now Bangladesh) of summonses issued by such Courts; and that service by such Courts of summonses issued under the said Code by a Court in the province of East Bengal (now Bangladesh) shall be deemed to be valid service, see Government of East Bengal, Judicial and Legislative Department (Judicial), Notification No. 3843-J, dated 30th August, 1951, published in the Dacca Gazette, Extraordinary, dated 1st September, 1951, Pt. I, pages 947 and 948.

(iii) all Civil and Revenue Courts of the Union of Burma; and service by such Courts of summonses issued under the said Code by a Court in East Bengal (now Bangladesh) shall be deemed to be valid service, see Dhaka Gazette, Extra. dated 18th October, 1954, Pt. I, p. 3053.

(iv) the summonses issued by any Civil or Revenue Court in Pakistan (applicable to Bangladesh) may be sent to the Courts in the Union of Bruma and served as if they had been issued by such courts, see Gazette of Pakistan, 1955, Pt., I, p. 143.

(v) service by any Court situated in Pakistan, (applicable to Bangladesh) of any summons issued by a Court of the Union of Burma shall be deemed to be valid service, see Gazette of Pakistan, 1955, Pt. I, p. 143.

(vi) all Civil and Revenue Courts in the Federal Republic of Germany; and service by such courts on any summons issued under the said Code by a Court in the Province of East Bengal (now Bangladesh) shall be deemed to be valid service, see Dacca Gazette, 1955, Pt. I, p. 1051.

(vii) all Civil Courts in Switzerland and the service by such Courts of any summons issued under this Code by a Court in the Province of East Pakistan (now Bangladesh) shall be deemed to be valid service, see Dhaka Gazette, 1959 Pt. I, p.778.

~~Section 30:~~ **Section 30: Power to order discovery and the like.**—Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

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

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(c) order any fact to be proved by affidavit.

For discovery and inspection see Or. 11

For discovery by interrogatories see Or. 11, rr. 1-11

For discovery by affidavit and production of document see Or. 11, rr. 12-14

For inspection of documents see Or. 11, r-15

For proof of facts by affidavits see Or. 19

For admission of documents and facts see Or. 12

For production, impounding and return of documents see Or. 13

See para 13, Civil Suit Instructions Manual and rules 130-131, C. R & O.

Affidavit of evidence-governing principle in practice-grounds of belief and verification rule.

The Vice Chairman, Enemy Property Management Board, Dhaka & ors -vs- Shah Golam Nabi and Others 27 DLR (AD) 156

This section enables the Court to make an order for discovery, which is necessary or reasonable.

British Commonwealth Ins. Co. -vs- Haji Adam Haji, 6 DLR 544

Section-31: Summons to witness.—The provisions in sections 27 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

For summons to witness see Or. 16

For production of documents see Or. 13

For production or inspections of material things [S. 94 (b)], see Or 18, r. 18, Or. 39, r. 7, and section 60, Evidence Act, 1872.

Section-32: Penalty for default.—The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

(a) issue a warrant for his arrest;

(b) attach and sell his property;

(c) impose a fine upon him not exceeding five hundred Taka;

(d) order him to furnish security for his appearance and in default commit him to the civil person.

For warrant, attachment and sale see Or. 16, rr. 10-13, 17, 18, 20, 21

For fine see Or. 16, r. 12

For security see Or. 16, r. 16

Penalty can be imposed only when a summons has been issued and not when there is an order to produce a document.

Rameshwar -vs- Riknath, 5 PLJ 550

JUDGMENT AND DECREE

Section-33: Judgement and decree.—The Court, after the case has been heard, shall pronounce judgement, and on such judgement a decree shall follow.

For judgement and decree see Or. 20.

For judgement in appeal see Or. 41, rr. 30, 31

A decree must automatically follow judgement and court can not stop preparation of decree until payment of deficit court fee.

Mohammad -vs- Mahabir, 1942 P 410

Kedar -vs- Chandra, 1932 P 410

When adjudication made is a “decree” omission or refusal to draw up a decree would not negative the right to prefer an appeal.

Kamini -vs- Pramatha, 19 CWN 755, 757

Monohar -vs- Nanak, 57 IC 479

INTEREST

Section-34: Interest.—(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit. •

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

The section applies only to decree "for payment of money."

Interest prior to the suit (i.e., interest which is part of the claim in the suit) is a matter of substantive law and does not come within this section.

Crewdson -vs- Ganesh, 32 CLJ 329

The award of interest from date of suit to date of decree is entirely discretionary.

Panna -vs- Nihal, 26 CWN 737 PC

The discretion is not excluded even if there was an agreement that interest should run up to realization.

Umes -vs- Fatima, 18 C 164 PC

The rate of interest is entirely discretionary even if there was an agreement.

Hakim -vs- Ganga, 47 CWN 113 PC

M/S M. M. Ispahani -vs- Sonali Bank 37 DLR (AD) 1

Under sub-sec (2) where a decree is silent as to interest, it shall be deemed to have been refused.

Hiralal -vs- Narsilal, 17 CWN 573 PC

Sonali Bank -vs- Mahbubul Amin, 42 DLR (AD) 107

Kadam Rosul Silicate -vs- Sonali Bank, 42 DLR (AD) 294

Right to interest depends upon contract, express or implied, or on some rule of law allowing it.

Kalyan -vs- Maqbul, 22 CWN 866 PC

For Form of simple money decree see Form No. 2 App. D. Sch. I= H.C. Form No. (J) 26.

COSTS

Section-35: Costs.—(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

(3) The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

Proportionate costs, see rules 164-165, C.R. & O.

“Subject to such conditions and limitations” - The following rules contain limitations regarding costs:- costs of interrogatories (Or. 11, r. 3); non-service of notice to admit documents (Or. 12, r. 2); costs of affidavit (Or. 19, r. 3); decree-holder's purchase without permission (Or. 21, r. 72); liability of minor's pleader to pay costs (Or. 32, r. 5); withdrawal from suit without permission (Or. 23, r. 1(3)); costs on payment into court (Or. 24, r. 4); costs of next friends and guardians (Or. 32, rr. 4-5); costs in pauper suits (Or. 33, rr. 10-11, 16); interpleader suits (Or. 35, r. 3).

“Incident to all suits” includes costs of all applications etc. made during the trial.

Appeal—Where costs are awarded in a “decree” an appeal lies for costs when-

(1) a matter of principle is involved;

Secy. of State -vs- Marjum, 11 C 359
Dildar -vs- Bhawani, 34 C 878;

(2) the order proceeds upon a misapprehension of fact or law;

Ranchordas -vs- Bai, 16 B 676
Justain -vs- Paull, 24 CWN 352;

(3) there has been no real exercise of discretion;

Moshingan -vs- Mozari, 12 C 271
Lalmani -vs- Chintamani, 41 A 254;

or,

(4) the order is erroneous in law and improper.

Ranchander -vs- Bai, 16 B 676;
Suddasook -vs- Ram, 17 C 620;
Radhey -vs- Bihari, 40 A 558

Section-35A: Compensatory cost in respect of false or vexatious claims or defences.—(1) If in any suit or other proceeding, (including an execution proceeding), not being an appeal, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector,

such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding five thousand Taka or exceeding the limits of its pecuniary jurisdiction, whichever amount is less:

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Small Cause Courts Act, 1887, and not being a Court constituted under that Act, are less than two hundred and fifty Taka, the High Court Division may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty Taka and not exceeding those limits by more than one hundred Taka:

Provided, further, that the High Court Division may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.

The general rule is that the successful party is entitled to costs unless he is guilty of misconduct, negligence or omission or unless there is some other good cause for not allowing costs.

Bhubaneswari -vs- Nilcomul, 12 C 18 PC

Court may in exceptional cases award costs even against strangers to the suit, provided he is given an opportunity of being heard.

Habibullah Khan -vs- Shah Ashrafuddin Ahmed and others 35 DLR (AD) 72.

Chandra -vs- Monohar, 1942, A 233 FB.

Costs under the section are compensatory and not penal.

Gaya Pd -vs- Ramji, 1949 A. 135

Conditions for awarding compensatory costs are that:-(1) the claim must be false or vexatious to the knowledge of the plaintiff; (2) the interests of justice require it and (3) objection was put forward by the defendant at the earliest opportunity.

Pedarangaswami -vs- State, 1953 M 583

Part II

EXECUTION

GENERAL

Section-36: Application to orders.—The provisions of the Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

The detailed procedure relating to execution of decrees is in Order 21 and this section makes the provisions of Order 21 applicable to all orders.

Applicability of s.36 in execution of pre-emption order and delivery of possession of a disputed property.

Haji Md. Shariatullah -vs- Asrafun Nessa Bibi and others, 28 DLR (AD) 91

The principle is that the court has inherent power to have its order carried out.

Jogendra -vs- Wajidunnessa, 11 CWN 856

Execution of decrees or orders should receive as much attention as original suits or appeals.

See rules 167, 168, C. R. & O and para 35, Civil Suit Instructions Manual

Section-37: Definition of Court which passed a decree.—The expression “Court which passed a decree”, or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

The meaning of this section is that in addition to the court which actually passed the decree, the expression “court which passed a decree” includes the courts mentioned in clauses (a) and (b).

Every decree whether it be of the court of first instance or of a court of first appeal or of the High Court Division or of the Appellate Division is to be executed by the court of first instance which passed the decree.

Krishna -vs- Raja, 38 M 832

Where the court of first instance which passed the decree has ceased to exist or ceased to have jurisdiction, the only court which can execute such a decree is the court mentioned in clause (b).

A court does not cease to exist because its head-quarters are removed to another place or the local limits of its jurisdiction are altered.

Latchman -vs- Madan, 6 C 513;
Sreenath -vs- Priyanath, 35 CWN 77;
Satrucherla -vs- Raja, 50 M 882

A court does not cease to exist if it is re-established after abolition, or merely because its business is transferred by the District Judge to another court, or because its pecuniary jurisdiction is curtailed.

Khodai -vs- Harihar, 4 P 688;
Kalipada -vs- Dino, 25 C 315;
Abdul -vs- Mohini, 37 CWN 679

Territorial jurisdiction is a condition precedent to a court executing a decree, but there is a distinction between jurisdiction to execute a decree and jurisdiction to entertain an application to execute a decree. So, where after the passing of a decree a court is removed to another place or property is transferred from its jurisdiction to the jurisdiction of another court by Government notification, the removed court or the original court may entertain an application for execution, and then send it to the court having territorial jurisdiction for executing the order for sale.

Sreenath -vs- Priyanath, 35 CWN 77;
Latchman -vs- Madan, 6 C 513;
Seeni -vs- Muthusamy, 42 M 821 FB

COURTS BY WHICH DECREES MAY BE EXECUTED

Section-38: Court by which decree may be executed.—A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

This section confers jurisdiction for execution on (1) the court which passed the decree or (2) the court to which the decree is transferred.

Court passing the decree can send the decree for execution to another court even after the judgment-debtor ceased residing within the jurisdiction of decreeing court having property therein.

Munshi Moizuddin Ahmed -vs- Mustafa Hossain, 14 DLR 828

A Court has no jurisdiction, in execution of a decree, to sell property over which it had no territorial jurisdiction at the time it passed the order of sale.

It was held that the sale must be set aside as being without jurisdiction.

Prem Chand Dey -vs- Mokshada Debi, 17 C 699

If after a court has passed a decree, the local jurisdiction in respect of the subject-matter of the suit is transferred by an order of the Govt. to some other court, the application for execution of the decree may be made either to the court which passed the decree or to the court to which the local jurisdiction has been transferred.

Jahar -vs- Kamini Debi, 28 C 238

It is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction, by a person not resident within the jurisdiction of that court.

No court can execute a decree in respect of property lying outside its territorial jurisdiction at the time of execution.

Begg Dunlop and Co.-vs- Jagannath Marwari, 39 C 104

A court passing a decree has power to execute it although by reason of accumulation of interest or mesne profits the amount under execution exceeds its pecuniary jurisdiction.

Bidyadhar -vs- Manindra, 53 C 14 FB

Can the executing Court go behind decree?

It has been universally held that the executing court cannot alter, vary or add to the terms of a decree.

Udwant -vs- Tokan, 28 C 353 PC

The executing court must take the decree as it stands and cannot question the legality or correctness or validity of the decree.

Kalipada -vs- Hari, 44 C 627;

Kali -vs- Bibhuti, 36 CWN 1120;

Tripali -vs- Biseswar, 55 CLJ 114

But, a decree against a dead man can be challenged in execution as it is nullity.

Haribandhu -vs- Harimohon, 34 CWN 36;

Basiruddin -vs- Saradindu, 38 CWN 1124

So, where a person dies during a litigation and his heirs are not substituted the decree cannot be executed against them.

Narendra -vs- Gopal, 17 CLJ 634

When a decree is of a court which on the face of it has no jurisdiction, pecuniary or territorial, the executing court may refuse to execute.

Gorachand -vs- Prafulla, 53 C 166; 29 CWN 948 FB

Section-39: Transfer of decree.—(1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

- (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or
- (b) if such person has no property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or
- (c) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or
- (d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

Court transferring a decree can simultaneously carry on execution proceedings, where it is satisfied that property would be insufficient to satisfy decree but the power should be exercise in exceptional cases.

Fateh -vs- Jitmul, 1929 B 418; Gurudas -vs- Ganendra 39 CWN 165

S.39 does not authorize the court passing decree for money to sell properties of judgment-debtor situate outside its jurisdiction, even if they have been attached before judgment.

*Ambika Raujan Majumder -vs- The Manikganj Loan Office Ltd.,
33 CWN 848*

“Decree-holder” includes transferee of a decree.

Chaloth -vs- Saidindavide, 26 M 258

Verification of application for transfer and particulars to be set out, see rule-228, C.R. & O. Notice under Or. 21, r. 22 to be given in all cases where notice is necessary. See also rule 228, C.R. & O. Transfer to High Court Division, Or. 21, r. 9 and rule 228, C. R. & O. Transfer to Small Cause Court, Or. 21, r. 4.

Section-40: Omitted by Act VIII of 1973, as amended by Act LIII of 1974.

Section-41: Result of execution proceedings to be certified.—The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

If no application for execution is made to the transferee court within six months from the date of the transfer, that court shall return the decree to the transferor court.

See rule 231, C. R &O.

Every court shall maintain a register of transferred decree in Form (R) 22.

See rule 232, C. R &O.

Transferee court retains jurisdiction to execute until execution has been withdrawn by calling back the decree or until it has sent the required certificate of execution or failure of execution under section 41.

Salig -vs- Ishar, 1930 L 508

Abda -vs- Muzaffar, 20 A 129

Manorath -vs- Ambika, 13 CWN 533

Section-42: Powers of Court in executing transferred decree.—(1) The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

(2) Without prejudice to the generality of the foregoing provision, the Court executing a decree sent to it shall have the following powers, namely:-

- (a) power under section 39 to transfer the decree to another Court, if necessary;
- (b) power under sub-section (1) of section 50 to permit execution to

proceed against the legal representatives of a deceased judgment-debtor;

- (c) power under section 152 to correct clerical or arithmetical errors;
- (d) power under rule 16 of Order XXI to recognise the assignment of a decree;
- (e) power under sub-rule (2) of rule 50 of Order XXI to grant leave to a decree-holder to proceed against a person not already recognised as a partner in a firm in an execution proceeding against the firm;
- (f) power under clause (b) of sub-rule (1) of rule 53 of Order XXI to give notice of attachment of decree passed by another Court.

Section-43: Execution of decrees by British Courts in places to which this Part does not extend or in foreign territory.—Any decree passed by a Civil Court established in any area in Bangladesh to which the provisions relating to execution do not extend, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in Bangladesh.

Section-44: Omitted by Act VIII of 1973 as amended by Act LIII of 1974.

Section-44A: Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory.—(1) Where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in Bangladesh as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provision of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

Explanation 1 — “Superior Courts” with reference to the United Kingdom, means the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham.

Explanation 2 — “Reciprocating territory” means the United Kingdom and such other country or territory as the Government may, from time to time, by notification in the official Gazette, declare to be reciprocating territory for the purposes of this section and “Superior Courts”, with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 3 — “Decree” with reference to a superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, and

(a) with reference to superior Courts in the United Kingdom, includes judgments given and decrees made in any Court in appeals against such decrees or judgments, but

(b) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment.

Although section 47 was omitted by Ordinance No. XLVIII of 1983, it continues to exist in sub-section (3) for want of consequential amendment.

Section-45: Ommitted by Act VIII of 1973 as amended by Act LIII of 1974.

Section-46: Precepts.—(1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree:

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the

attachment has been made and the decree-holder has applied for an order for the sale of such property.

The object of this section is to enable the decree-holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree.

A precept may be issued even after a decree is transferred to another court and the court to whom precept is issued cannot question its validity.

Galstaun -vs- Dinshaw, 31 CWN 653

Section-47: Omitted by Ord. XLVIII of 1983.

LIMIT OF TIME FOR EXECUTION

Section-48: Execution barred in certain cases.—(1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

- (a) the date of the decree sought to be executed, or,
 - (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.
- (2) Nothing in this section shall be deemed—
- (a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or
 - (b) to limit or otherwise affect the operation of article 183 of the First Schedule to the Limitation Act, 1908.

This section fixes a maximum period of twelve years after which no execution of a decree can be allowed. Twelve years is to be counted from the terminus quo in clauses (a) and (b) of sub-section (1). Although an outside period of twelve years has been fixed, the decree must during the period be kept alive under article 182 of the Limitation Act, 1908, which requires the first application for execution to be made within three years of the decree and each successive application to be made within three years of the final

order passed on the last application. Decree may also be kept alive without application for execution by payment and endorsement under section 20 of the Limitation Act, 1908.

In execution of a decree where an appeal has been taken and dismissed for default or for non-prosecution, the period of limitation under section 48 of the Code is to run from the date of the decree of the trial court and not from such appellate order dismissing the appeal for non-prosecution.

Md. Abdur Rahim -vs- Sree Sree Gradhari, 27 DLR 73.

12 years' limitation for execution of a decree is the maximum period allowed for its execution. First application for execution must, however, be made within 3 years from the date of the decree as provided by Article 182, Limitation Act and each successive application for its execution must be made within 3 years from the date of the last preceding application for execution. Section 48 is controlled by the provision of the Limitation Act.

Bangladesh Jatiya Samabaya Bank Ltd. -vs- Daily Sangbad newspaper and others, 36 DLR (AD) 5

"Fresh application" in sub-section (1) means a substantive application upon which an order has to be made granting or refusing application. It does not mean an application merely ancillary or incidental to the prosecution or continuation of the substantive application already made.

Rahim -vs- Phul, 18 A 482 FB

An execution application made within twelve years may carry the execution proceedings beyond twelve years for purpose of final completion.

Rahim vs- Phul, 18 A 482 FB;

Majibulla vs- Umed, 30 A 499

But a subsequent application for attachment and sale of fresh properties not included in the previous application and made after twelve years is not in connection with the original application nor was the substantive application pending for the purpose of giving the decree-holder its benefit.

Badri -vs- Dharmadas, 60 CLJ 123;

Hayatunnessa -vs- Ashia, 50 C 743,

Bandhu -vs- K.T. Bank, 54A 419

"Subsequent order" in clause (b) of sub-section (1) means an order in the suit in which the decree is made and not an order by the executing court.

Raja Kistanand -vs- Pirthe, 37 CWN 548 PC

Jurawan -vs- Mahabir, 40A 198

TRANSFEREES AND LEGAL REPRESENTATIVES

Section-49: Transferee.—Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

The principle embodied in S.49 is the same as in S.132 T.P. Act.

The right is not available where there is no cross- decree on the date of assignment.

Nagendra -vs- Haran, 37 CWN 758

Section-50: Legal representatives.—(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree- holder, compel such legal representative to produce such accounts as it thinks fit.

This section enables a decree-holder to execute his decree against the legal representatives of the judgment-debtor when he dies after decree. A decree against a dead person or against a person who died during the pendency of the suit without his legal representatives being brought on record is a nullity and cannot be executed against his legal representatives. But death of a defendant after hearing but before judgment does not affect its validity (see Or. 22, r. 6) and can be executed against his legal representatives. Death in this section means natural death and not civil death.

Sudhamoyee -vs- Bhujendra, 1935 C 713;

Madho -vs- Gur, 53 A 529

A mere trespasser is not a legal representative.

Satyanarjan -vs- Sarat, 30 CWN 565

Application under S. 50 to execute a decree against a legal representative is to be made to the court which passed the decree.

Seth -vs- Shankar, 17 A 431;

Hira -vs- Kastur, 18 B 224;

Manjula -vs- Pandurang, 1934 B 215

A transferee court has no jurisdiction to substitute the heirs of the judgment-debtor and execute the decree against them.

Abdur Rahman Sikdar -vs- Kalidas Basu, 10 DLR 277

The position has changed after enactment of section 42(2)(b) by Ord. XLIV of 1962, S.10.

Judgment-debtor dies before sale, heirs not brought on record.

Held: The sale having taken place without bringing the heirs of judgment-debtor on record should be treated as void and not violable, so far as the heirs are concerned.

Nowabjan Bibi -vs- Chandra Kumar Roy, 4 DLR 43

Pashupati -vs- Ushapati 1949 C 299

Shanti -vs- Khandubala 65 CWN 171 FB

Jung -vs- Bank of UI 1928 PC 162; 32 CWN 790 PC

When substitution is made by the executing court of the legal representatives of a judgment-debtor deceased since the transfer of the decree, it is an irregularity. But the irregularity may be waived by acquiescence and when it has been so waived, the party acquiescing cannot turn round and question the jurisdiction of the executing court.

PROCEDURE IN EXECUTION

Section-51: Powers of Court to enforce execution.—Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require:

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied-

- (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,-

- (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
 - (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property; or
- (b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or
- (c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation — In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

The section simply states generally the powers of the Court to enforce execution. Details are to be found in Or. 21.

Detention in civil prison shall not be ordered as a matter of course but only on fulfilment of the conditions laid in the proviso. The object is to protect poor but honest debtors.

Section-52: Enforcement of decree against legal representative.—

(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

To apply S. 52 three conditions are required to be satisfied: (1) legal representative must have received some property of the deceased; (2) he

must no longer be in possession of it and (3) he has failed to duly apply to discharge the debt of the deceased.

This section requires that the decree (1) must be passed against the legal representative as such, (2) must state that the amount is to be realised out of the estate of the deceased debtor.

Brijraj -vs- Manaranjan, 1947 P 365

Sub-section (2) says that in regard to property which came into the hands of the legal representative but which has not been duly applied by him, the decree may be executed against him as if the decree was to that extent passed against him personally.

Bhagwati -vs- Madan, 1930 L 354

The creditor of a deceased Mahamedan can not follow his estate into the hands of a bona fide purchaser for value from his heir.

Bazayet Hossain -vs- Dooli Chand, 4 C 402 PC

A decree against a wrong person as heir can not be executed against the rightful heir.

Kaliappan -vs- Varadarajulu, 33 M 75

Section-53: Liability of ancestral property.—For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

Section-54: Partition of estate or separation of share.—Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

See Or. 20, r. 18.

ARREST AND DETENTION

Section-55: Arrest and detention.—(1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the

detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Government may appoint for the detention of persons ordered by the Courts of such district to be detained:

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise:

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found:

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest:

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The Government may, by notification in the official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Government in this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he may be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree.

See also rules 220-224, C.R. & O. For exemption of certain persons from arrest see sections 133, 135 and 135A of the Code. For arrest of persons outside court's jurisdiction see section 136 of the Code. For arrest and detention see Or. 21, rr. 37-40. For period of detention and release see section 58 and Or. 21, r. 40. For release on ground of illness see section 59. For procedure when a person arrested is too ill to be removed see rule 221, C. R. & O. For arrest before judgment see Or. 38, r. 1 of the Code and rule 284, C. R. & O and para 34, Civil Suit Instructions Manual. Form of warrant of arrest, see Form No. 13 App. E Sch. I = H.C. Form No. (P) 26.

The provisions of section 55 are mandatory.

Dharani -vs- Kshitipati, 54 C 782;

Section-56: Prohibition of arrest or detention of women in execution of decree for money.—Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

A woman cannot also be imprisoned in execution of a decree for restitution of conjugal rights. See Or. 21, r. 32.

Section-57: Subsistence allowance.—The Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

See also rules 174 and 223, C. R & O.

Section-58: Detention and release.—(1) Every person detained in the civil prison in execution of a decree shall be so detained,—

- (a) where the decree is for the payment of a sum of money exceeding fifty Taka, for a period of six months, and,
- (b) in any other case for a period of six weeks:

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

- (i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or
- (ii) on the decree against him being otherwise fully satisfied, or
- (iii) on the request of the person on whose application he has been so detained, or
- (iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance:

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

This section does not apply to cases of imprisonment for contempt of court.

Martin -vs- Lawrence (1879) 4 C 655

The court has no power to fix shorter period than six months or six weeks as the case may be.

Sujan -vs- Sagar, 5 CWN 145

See also rule 222, C.R & O.

The immunity from re-arrest is applicable only when a judgment-debtor is released from detention in jail and not when he is arrested and released without being committed to prison.

Rajendra -vs- Chunder, 23 C 128;

Kanshi -vs- K. 1929 L 361

Form of warrant of committal, see Form No. 14, App. E, Sch. I = H. C. Form No. (P) 27. Form of Order of release, see Form No. 15, App. E, Sch. I = H. C. Form No. (P) 28.

Section-59: Release on ground of illness.—(1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom-

- (a) by the Government, on the ground of the existence of any infectious or contagious disease, or
- (b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

See also rules 221-223, C.R. & O.

Form of order of release, Form No. 15, App. E, Sch. I = H. C. Form No. (P) 28.

ATTACHMENT

Section-60: Property liable to attachment and sale in execution of decree.—(1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale, namely:—

- (a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman;
- (b) tools of artizans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section;

- (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him;
- (d) books of account;
- (e) a mere right to sue for damages;
- (f) any right of personal service;
- (g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the official Gazette by the Government in this behalf, and political pensions;
- (h) the wages of labourers and domestic servants, whether payable in money or in kind;
- (i) salary to the extent of the first hundred Taka and one-half the remainder:

Provided that where such salary is the salary of a servant of the Republic or a servant of the Railway or local authority, and the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree;

- (j) the pay and allowances of persons to whom the Army Act, 1952, Navy Ordinance, 1961 or the Air Force Act, 1953 applies;
- (k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1925, for the time being applies in so far as they are declared by the said Act not to be liable to attachment;
- (l) any allowance forming part of the emoluments of any servant of the Republic or of any servant of the Railway or local authority which the Government may by notification in the official Gazette declare to be exempt from attachment, and any subsistence grant or allowance made to any such servant while under suspension;
- (m) an expectancy of succession by survivorship or other merely contingent or possible right or interest;
- (n) a right to future maintenance;
- (o) any allowance declared by any Bangladesh law to be exempt from liability to attachment or sale in execution of a decree; and,

(p) where the judgment-debtor is a person liable for the payment of land revenue, any movable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation 1 — The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable, and in the case of salary other than salary of a servant of the Republic or a servant of the Railway or local authority the attachable portion thereof is exempt from attachment until it is actually payable.

Explanation 2 — In clauses (h) and (i) “salary” means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of clause (1) derived by a person from his employment whether on duty or on leave.

The proviso to sub-section (1) is mandatory and there is no jurisdiction to attach and sell even though no objection has been taken.

Aidat -vs- Khazan, 1930 A 707;

Mahomed Din -vs- Hirdu, 1935 L 942

Where the judgment-debtor transferred his property after the same was attached by the court such transfer would be void against all claims enforceable under the attachment but the validity of such transfer could not be questioned on that ground.

Haji Abul Quasem -vs- Abdur Rahman Adam, 22 DLR 822

Section-61: Partial exemption of agricultural produce.—The Government may, by general or special order published in the official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

Mode of attachment of agricultural produce, see Or. 21, rr. 44-45 and as to mode of sale, Or. 21, rr. 74-75.

Section-62: Seizure of property in dwelling house.—(1) No person executing any process under this Code directing or authorizing seizure of movable property shall enter any dwelling-house after sunset and before sunrise.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

A shop or a godown is not a dwelling house.

Damodar -vs- Iswar, 3 B 89

Section-63: Property attached in execution of decrees of several Courts.—(1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

The section does not require that the higher court should have appellate or revisional jurisdiction over the other court. It has reference only to the gradation of courts.

Gouri Shanker -vs- Kasi Prasad, 61 CWN 725

All that the court referred to in sub-section (1) is competent to do is to determine-

(1) any claim to property attached in execution of decrees of more courts than one, and (2) any objection to the attachment thereof i.e. claims which can be summarily enquired into under Or. 21, rr. 58-60.

Ramjas -vs- Gurucharan, 14 CWN 396

The duty of the superior court is to determine the above questions and no transfer of the decree to that court is necessary.

Clark -vs- Alexander, 21 C 200
Chettyar Firm -vs- C.F., 132 IC 832

Section-64: Private alienation of property after attachment to be void.—Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation — For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

A sues **B** for Taka 5000. **B** owns a house worth Taka 5000, and he has no other property. **B** may sell or mortgage the house notwithstanding the institution of the suit against him and he may sell or mortgage it even after a decree has been passed against him in the suit and the sale or mortgage in either case will be perfectly valid and pass a good title to the transferee. But if the house is attached in execution of the decree, any private transfer of the house by **B** contrary to such attachment shall be void as against all claims enforceable under the attachment. The section applies only to voluntary sale, gift or mortgage etc., in contravention of the attachment and not to sale by a court in execution of a valid decree.

This section secures in fact the rights of the attaching creditor against the attached property by prohibiting transfers pending the attachment.

Dinobandhu -vs- Jogmaya, 29 C 154 PC

The attachment affects the right, title and interest of the judgment-debtor at the date of attachment and so a conveyance after attachment but in pursuance of a contract before attachment is not affected.

Madan -vs- Rebat, 21 CWN 159

In a later case it was held that an agreement for sale creates no interest.

Tarak -vs- Sarat, 33 CWN 159

The later decision is in conformity with section 54 of the T.P. Act.

The section does not apply to transfer by operation of law.

Ghulam -vs- Dinonath, 23 A 467

If an attachment is raised by the executing court but is restored on appeal, the order relates back to the date of the first attachment.

Aziz -vs- Kaniz, 34 A 490; Bijai -vs- Raghunath, 48 A 698

Where a judgment-debtor transferred his property after the same was attached by the court, such transfer would be void against all claims enforceable under the attachment but the validity of such transfer could not be questioned on that ground.

Haji Abul Quasem -vs- Abdur Rahman Adam, 22 DLR 822

SALE

Section-65: Purchaser's title.—Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

What passes to the purchaser is only the right, title and interest of the judgment-debtor with all risks and defects of title.

Drab -vs- Executors, 3 C 806, 813 PC

The title of a stranger bona fide auction-purchaser is not affected by the reversal of the decree after confirmation of sale, but the case is otherwise if the decree-holder himself is the auction purchaser.

Zainalabdin -vs- Md. Ashgar 10 A 166 PC
Mokshada -vs- Gopal, 26 C 734

A purchaser at an execution sale is bound by the doctrine of *lis pendens* under S. 52, T.P. Act.

Radha -vs- Manohar, 15 CWN 756 PC
Fayaz -vs- Prag, 11 CWN 561 PC

Section-66: Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.—(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

The object is to discourage benami purchases at execution sales by debarring a suit by the real purchaser against the ostensible or certified purchaser. The bar is in respect of a suit by a person claiming to be the real and beneficial purchaser as plaintiff or on behalf of some one through whom he claims, against the certified purchaser or any person claiming through him.

Ramanthai -vs- Peria, 24 CWN 699 PC

Section 66 applies to real transactions. It does not apply to a case of fictitious sale held in execution of a fictitious decree obtained in a fictitious suit.

Akhil -vs- Manmatha, 18 CWN 1331

A suit for possession against an execution purchaser based on the ground of his being a benamdar for the plaintiff is not maintainable.

Durga -vs- Bhagwandas, 23 A 34

Section-67: Power of Government to make rules as to sales of land in execution of decrees for payment of money.—(1)The Government may, by notification in the official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the Government, to make it impossible to fix their value.

(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the Government may, by notification in the official Gazette, declare such rules to be in force, or may, by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVEABLE PROPERTY

Section-68: Power to prescribe rules for transferring to Collector execution of certain decrees.—The Government may, declare, by notification in the official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector.

Section-69: Provisions of Third Schedule to apply.—The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last proceeding section.

Section-70: Rules of procedure.—(1) The Government may make rules consistent with the aforesaid provisions-

- (a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for re-transmitting the decree from the Collector to the Court;
- (b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector;
- (c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

(2) **Jurisdiction of Civil Courts barred.**—A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

Section-71: Collector deemed to be acting judicially.—In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.

Section-72: Where Court may authorize Collector to stay public sale of land.—(1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be

made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

Form of authority to Collector, Form No. 42, App. E, Sch. I=H.C. Form No. (M) 15.

DISTRIBUTION OF ASSETS

Section-73: Proceeds of execution sale to be rateably distributed among decree-holders.—(1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons:

Provided as follows:—

- (a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;
- (b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;
- (c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—
 - first, in defraying the expenses of the sale;
 - secondly, in discharging the amount due under the decree;
 - thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any); and
 - fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government.

The object of the section is to prevent multiplicity of execution proceedings and to secure equitable distribution by placing all decree-holders upon the same footing.

Bithal -vs- Nand, 23 A 106

The following conditions are necessary for applying the section:- (1) the decree-holder should have applied for execution to the court which holds the assets (see Or. 21, r. 11); (2) such application should have been made before the receipt of assets by the court; (3) the assets must be assets held by the court; (4) the attaching creditor as well as the decree-holders claiming to participate in the assets should be decree-holders for the payment of money and (5) such decrees must have been obtained against the same judgment-debtors.

Ramjas -vs- Gurucharan, 14 CWN 396

Where property of the same judgment-debtor is attached in execution of decree of more courts than one and is sold by the court of the higher grade, the holders of decrees of inferior courts are entitled to rateable distribution by that court without getting the decrees transferred and making fresh applications for execution because in view of section 63 the court of the highest grade is to determine all claims relating to the attached property and such claims include claim for rateable distribution.

Bykant -vs- Rajendra, 12 C 333

Harbhagat -vs- Sheonandan, 2 CWN 626

Clark -vs- Alexander, 21 C 200

Girindra -vs- Kedar, 29 CWN 575

Kanai Lal Kripasankar -vs- Shah Mahmud Patwari, 11 DLR 326

Bank payment order not assets until it is cashed. Assets in section 73 refers only to money.

Kanai Lal Kripasankar -vs- Shah Mahmud Patwari, 11 DLR 326

Court acting under S. 73 cannot go into the question whether the decree was obtained by fraud.

Biswambhar -vs- Aparna, 39 CWN 490 FB

RESISTANCE TO EXECUTION

Section-74: Resistance to execution.—Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

See also rules 225-226 and 774 (a) (9), C. R & O.

For resistance to possession of immovable property, see Or. 21, r. 97; for resistance by judgment-debtor, Or. 21, r. 99; and dispossession by decree-holder or purchaser, Or. 21, r. 100.

As to resistance to execution (anticipated and actual) and requisition for police help in execution, see rule 226, C.R & O. As to procedure when a process-serving peon is resisted or when property attached or person arrested is snatched away, see rule 227, C. R & O.

Part III

INCIDENTAL PROCEEDINGS COMMISSIONS

Section-75: Power of Court to issue commissions.—Subject to such conditions and limitations as may be prescribed, the Court may issue a commission-

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition.

For general provisions regarding commissions, see Or. 26, rr. 15-18 and rules 234-246, C.R & O; to examine witness, see Or. 26, rr. 1-8 and rules 247-257, C.R & O; for commission for local investigation, see Or. 26, rr. 9-10 and rules 263-274, C.R & O ; for commission for taking accounts, see Or. 26, rr. 11-12 and rules 275-279, C.R & O; and commission to make partition, see Or. 26, rr. 13-14 and rule 274, C.R & O.

Section-76: Omitted by Act VIII of 1973 as amended by Act LIII of 1974.

Section-77: Letter of request.—In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within Bangladesh.

A court in Bangladesh has the jurisdiction to issue a commission, as much as a letter of request, to examine a witness in India.

*Kumar Ram Narayan Roy Chowdhury and another
-vs- Sonatanessa Bibi and others, 29 DLR (SC) 170*

Section-78: Commissions issued by foreign Courts.—Subject to such conditions and limitations as may be prescribed the provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by or at the instance of—

- (a) Courts situate beyond the limits of Bangladesh and established or continued by the authority of the Government or
- (b) [Clause (b) of section 78 was omitted by Act VIII of 1973].**
- (c) Courts of any State or country outside Bangladesh.

Part IV

SUITS IN PARTICULARS CASES

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY

Section-79: Suits by or against Government.—In a suit by or against the Government the authority to be named as plaintiff or defendant, as the case may be, shall be Bangladesh.

See also Or. 27, rr. 1-8 and rules 280-282, C.R & O.

Section-80: Notice.—(1) A suit may be instituted against the Government or against a public officer, in respect of any act purporting to be done by such public officer in his official capacity, after the expiration of two months next after notice in writing has been delivered to or left at the office of,—

(a) **Omitted by Act VIII of 1973 as amended by Act LIII of 1974.**

- (b) (i) in the case of a suit against the Government other than a suit relating to the affairs of the Railway, a Secretary to the Government or the Collector of the District; and
- (ii) in the case of a suit against the Government relating to the affairs of the Railway, the General Manager of the Railway,

and in the case of a public officer, delivered to him or left at his office stating the cause of action, the name, description of place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) Where any such suit is instituted without delivering or leaving such notice as aforesaid or before the expiration of the said period of two months or where the plaint does not contain a statement that such notice has been so delivered or left, the plaintiff shall not be entitled to any costs if settlement as regards the subject-matter of the suit is reached or the Government or the public officer concedes the plaintiff's claim, within the period of two months from the date of the institution of the suit:

Provided that in a suit instituted without such notice, the Court shall allow not less than three months to the Government to submit its written statement.

The object of notice under this section is nothing but to give a chance to the authority to examine the claim of the plaintiff before such suit is filed and that such a notice can also be waived by the authority. Notice under section 80 was mandatory before 1962 but it is no longer a mandatory provision in view of substitution of the said section by the Code of Civil Procedure (Amendment) Ordinance 1962 (XLIV of 1962).

Bangladesh -vs- Abdul Wadud & others, 25 DLR (SC) 90

Notice under the section afresh is necessary after amendment of the plaint in a suit against the Government if the amendment changes the character of the suit and not otherwise.

Federation of Pakistan -vs- Shamsul Huda, (1956) 8 DLR 692

Section-81: Exemption from arrest and personal appearance .—

In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

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

See also Or 27 r. 8 proviso.

Section-82: Execution of decree.—(1) Where the decree is against the Government or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Government.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

The decree cannot be executed unless all the conditions are complied with, though the decree is not void.

U.P. Government -vs- Brij Mohon Lal, 1953 A 96

**SUITS BY ALIENS AND BY OR AGAINST FOREIGN RULERS,
AMBASSADORS AND ENVOYS**

Section-83: When aliens may sue.—(1) Alien enemies residing in Bangladesh with the permission of the Government, and alien friends, may sue in the Courts in Bangladesh, as if they were citizens of Bangladesh.

(2) No alien enemy residing in Bangladesh without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation—Every person residing in a foreign country the Government of which is at war with, or engaged in military operations against, Bangladesh, and carrying on business in that country without a license in that behalf under the hand of a Secretary to the Government shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country.

Mere residence of Pakistani nationals in enemy territory would not make them alien enemies but they can be alien enemies if the residence is without the authority of the Government.

S.A. Latif -vs- J.B. Dubash, PLD 1970 Karachi 220;
Gurudas -vs- Deputy Custodian, Enemy Property, PLD 1969 Dacca 841;
Amiya -vs- Province of East Pakistan, 25 DLR 304

An alien enemy cannot file a writ petition.

ACC Ltd. -vs- Pakistan, PLD 1972 Lahore 201;
Gurudas -vs- Deputy Custodian, Enemy Property, PLD 1969 Dacca 841

Alien enemies as defendants can defend suits filed against them,

Hoshang -vs- Eddie, PLD 1968 Karachi 752;
Province of East Pakistan -vs- Allahabad Bank, PLD 1968 Dacca 1

It is for the executive to decide whether the state of war exists or not and its decision is conclusive.

Mansur Ali -vs- Arodhendu, PLD 1969 SC 37

Courts can take judicial notice of existence of the state of war from existing facts.

Amiya -vs- Province of East Pakistan, 25 DLR 304

An alien enemy cannot proceed with a suit.

United Oriental Steamship Co. -vs- Starbac Co., 25 DLR 114

Where there was no bar to the institution of the suit against the plaintiff at its commencement but during its pendency the plaintiff became disqualified to prosecute it as a result of the declaration of emergency the proper course by the court is to suspend the trial during the period of the plaintiff's disqualification and not to dismiss it.

S.N. Banerjee -vs- B.C. Chakraborty, 1976 C 267

Section-84: When foreign States may sue.—(1) A foreign State may sue in any Court in Bangladesh:

Provided that such State has been recognized by the Government.

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by the Government.

The section refers to those private rights of a State that must be enforced through a Court of Justice as distinguished from its political rights.

Hajon -vs- Būr Singh, 11 C 17

*Mirza Ali Akbar Kashani -vs- the United Arab Republic, 1 SCR 319;
1966 SC 230*

Section-85: Persons specially appointed by Government to prosecute or defend for Ruler of foreign State.—(1) Persons specially appointed by order of the Government at the request of the Ruler of any foreign State, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Ruler, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Ruler.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Ruler.

Raghunath -vs- Dy. Commissioner, 31 CWN 495 PC

Durga -vs- Jawahir, 18 C 23 PC

Guran -vs- Ram, 55 C 944

Section-111: Bar of certain appeals.—Notwithstanding anything contained in section 109, no appeal shall lie to the Appellate Division-

- (a) from the decree or order of one Judge of the High Court division, or of one Judge of a Division Court or of two or more Judges of High Court Division or of a Division Court constituted by two or more Judges of High Court Division, where such judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court Division at the time being, or
- (b) **Omitted by the Law Reforms Ordinance, 1978 (Ordinance XLIX of 1978).**

Section-112: Savings.—(1) Nothing contained in this Code shall be deemed-

- (a) to affect the powers of the Appellate Division under article 103 of the Constitution of the People's Republic of Bangladesh or any other provision of that Constitution; or
- (b) to interfere with any rules made by the Supreme Court, and for the time being in force, for the presentation of appeals to the Appellate Division, or their conduct before that Division.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

Part VIII

REFERENCE, REVIEW AND REVISION

Section-113: Reference to High Court Division.—Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court Division, and the High Court Division may make such order thereon as it thinks fit.

For detailed procedure, see Or. 46, rr. 1-7.

Under S.113 an opinion is to be sought when the Court itself feels some doubts about the question and not when it has formed an opinion and acted upon it and that opinion is disagreed with by another Court.

Tikaram -vs- Maheshwari, 1959 A 659

Section-114: Review.—Subject as aforesaid, any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed by this Code, or
- (c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

Review of the appellate order or decree, when will lie, see

Abul Basher Chowdhury -vs- Mehaf Khatun, 35 DLR 6

For detailed procedure, see Or. 47, rr. 1-9.

Section-115: Revision.—The High Court Division may call for the record of any case which has been decided by any Court subordinate to the High Court Division and in which no appeal lies thereto, and if such subordinate Court appears to have committed any error of law resulting in an error in the decision occasioning failure of justice, the High Court Division may make such order in the case as it thinks fit.

Glaring misconception of law and non-consideration of material evidence. Interference u/s. 115 by High Court Division called for.

Sartosh Kumar Chakraborty -vs- M.A. Motaleb Hossain, 36 DLR (AD) 248

Exercise of revisional jurisdiction can either be at the instance of a party or even *suo motu*, High Court Division can call for the records of a case from lower court and on perusal thereof make such order as it finds fit and proper. Order passed on due consideration of the facts and circumstances of the case valid despite absence of the Advocate for the petitioner.

Darasatullah -vs- Manik Mondal, 36 DLR (AD) 88

Safaruddin and others -vs- Fazlul Huq and others, 49 DLR (AD) 151

It is a discretionary power of the court to grant or not to grant injunction. If the court exercises its judicial discretion, the High Court is not to interfere u/s. 115.

Mansur Ahmed -vs- Kalipada Chattapadhyya, 11 DLR 103

Finding of facts based on due consideration of evidence was beyond the scope of revisional court to interfere with.

Jashimuddin Kanchan -vs- Md. Ali Ashraf, 42 DLR (AD) 289.

Remand not justified when the revisional court is competent to decide the case on the evidence on record when no further evidence is required.

Abdul Mannan -vs- Akram Ali, 43 DLR (AD) 125;

Attor Mia -vs- Mst. Mahmuda Khatun Chowdhury, 43 DLR (AD) 125

A revisional court acts beyond its jurisdiction in setting aside concurrent finding of fact, when there is no misreading and misappreciation of the evidence on record.

Shambhaji Nath Poddar -vs- Bangladesh Railway, 43 DLR (AD) 82

The revisional court is competent to interfere in a case of non-consideration of material evidence which is specifically material for determination of the material issue.

Abul Bakar Siddique -vs- Additional Deputy Commissioner and others, 48 DLR (AD) 154

Part IX

SPECIAL PROVISIONS RELATING TO HIGH COURT DIVISION

Section-116: Part to apply only to High Court Division.—This Part applies only to High Court Division.

Section-117: Application of Code to High Court Division.—Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to High Court Division.

“Rules” mean rules contained in Schedule I or made under section 122.

Section-118: Execution of decree before ascertainment of costs.—Where the High Court Division considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

Section-119: Unauthorized persons not to address Court.—Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court Division to make rules concerning advocates.

Section-120: Provisions not applicable to High Court Division in original civil jurisdiction.—(1) The following provisions shall not apply to the High Court Division in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

Part-X

RULES

Section-121: Effect of rules in First Schedule.—The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

In order to determine the jurisdiction of a Court both the body of the Code and the rules must be looked into.

Sachindra -vs- Usha, 1949 C 690

No rule inconsistent with the body of the Code can confer a jurisdiction upon any court.

Karam -vs- Kunwar, 1942 A 387

Section-122: Power of Supreme Court to make rules.—The Supreme Court may, from time to time after previous publication, make rules regulating the procedure of each Division of the Supreme Court and the procedure of Civil Courts subject to its superintendence and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

See also Article 107 of the Constitution and section 126.

Most of the rules in the C.R.&O are made in exercise of the power under this section.

Section-123: Constitution of Rule Committees.—(1) A Committee, to be called the Rule Committee, shall be constituted for the purpose referred to in section 122.

- (2) Such Committee shall consist of the following persons, namely:
- (a) three Judges of the Supreme Court, one of whom at least has served as a District Judge for three years;
 - (b) two advocates practising in that Court; and
 - (c) a Judge of a Civil Court subordinate to the High Court Division.

(3) The members of such Committee shall be appointed by the Chief Justice who shall nominate one of their number to be president.

Provided that, if the Chief Justice elects to be himself a member of the Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice shall be the President of the Committee.

(4) Each member of such Committee shall hold office for such period as may be prescribed by the Chief Justice in this behalf; and whenever any member retires, resigns, dies or becomes incapable of acting as a member of the Committee, the said Chief Justice may appoint another person to be a member in his stead.

(5) There shall be a Secretary to such Committee, who shall be appointed by the Chief Justice and shall receive such remuneration as may be provided in this behalf by the Government.

Section-124: Committee to report to Supreme Court.—The Rule Committee shall make a report to the Supreme Court on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the Supreme Court shall take such report into consideration.

Section 125: Omitted by the Central Laws (Statute Reform) Ordinance, 1960 (21 of 1969), s.3 and 2nd Sch. (with effect from the 14th October, 1955).

Section-126: Rules to be subject to approval by the President.—Rules made under the foregoing provisions shall be subject to the previous approval of the President.

See also Article 107 of the Constitution.

Section-127: Publication of rules.—Rules so made and approved shall be published in the official Gazette, and shall from the date of publication or from such other date as may be specified have the same force and effect as if they had been contained in the First Schedule.

Section-128: Matters for which rules may provide.—(1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely:-

- (a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service;
- (b) the maintenance and custody, while under attachment, of live-stock and other movable property, the fees payable for such maintenance and custody, the sale of such live- stock and property, and the proceeds of such sale;
- (c) procedure in suits by way of counterclaim, and the valuation of such suits for the purposes of jurisdiction;
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts;
- (e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not;
- (f) summary procedure-
 - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising-
 - on a contract express or implied; or,
 - on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
 - on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or
 - on a trust; or
 - (ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant;
- (g) procedure by way of originating summons;
- (h) consolidation of suits, appeals and other proceedings;
- (i) delegation to any Registrar, Prothonotary or master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and

- (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

Section-129: Omitted by Act VIII of 1973, as amended by Act LIII of 1974.

Section-130: Omitted by A. O. 1961, Article 2 Schedule (with effect from the 23rd March, 1956).

Section-131: Omitted by Act VIII of 1973 as amended by Act LIII of 1974.

Part XI

MISCELLANEOUS

Section-132: Exemption of certain women from personal appearance.—(1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

This section recognises the rights of the pardanashin ladies to have their evidence taken on commission. This is a right which the court cannot deny.

But the correct meaning of the section is that a pardanashin lady shall be exempted from personal appearance in court, that is, from being exposed to public gaze but she is not exempt from attendance. The court has therefore power to order examination in court, provided she does not become visible to the public gaze.

Re. Bilasroy, 56 C 865

Section-133: Exemption of other persons.—(1) The Government may, by notification in the official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of the Government, entitles him to the privilege of exemption.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court Division by the Government and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court Division shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

See also Or. 26, r. 1.

Section-134: Arrest other than in execution of decree.—The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

Section-135: Exemption from arrest under civil process.—(1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

As to immediate execution, see Or. 21, r. 11 (1) and as to attendance to show cause, see Or. 21, r. 37 (1).

Section-135A: Exemption of members of legislative bodies from arrest and detention under civil process.—(1) No person shall be liable to arrest or detention under civil process-

- (a) if he is a member of Parliament during the continuance of any meeting of Parliament;
- (b) if he is a member of any committee of Parliament, during the continuance of any meeting of such committee;

and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1).

Section-136: Procedure where person to be arrested or property to be attached outside district.—(1) Where an application is made that any person shall be arrested or that any property shall be attached under

any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Omitted by A. O. 1949

This section read with Or. 38, rr. 1 and 5 enables the court to arrest before judgement a person or attach before judgement any property outside the local limits of its jurisdiction. It may also under Or. 21, r. 58, read with Or. 38, r. 8 order removal of the attachment.

Firm M.S.M.M. -vs- Mg. Sein, 9 R 561

This section also enables a party to enforce an order of injunction against a person outside the local limits of the jurisdiction of the court passing the order.

A. Milton & Co. -vs- Ojha A.E. Co., 57 C 1280;
Salamchand -vs- Joogal, 55 C 777

Section-137: Language of subordinate Courts.—(1) The language which, on the commencement of this Code is the language of any Court subordinate to the High Court Division shall continue to be the language of such subordinate Court until the Government otherwise directs.

(2) The Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

Section-138: Power of High Court Division to require evidence to be recorded in English.—(1) The High Court Division may, by notification in the official Gazette, direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

Section-139: Oath on affidavit by whom to be administered.—In the case of any affidavit under this Code-

- (a) any Court or Magistrate, or
 - (b) any officer or other person whom the Supreme Court may appoint in this behalf, or
 - (c) any officer appointed by any other Court which the Government has generally or specially empowered in this behalf,
- may administer the oath to the deponent.

Sheristadars of all civil courts are ex officio commissioners of affidavits. See rule 27, C.R & O. See also rule 28 C.R & O. District Judges are empowered to appoint commissioners to administer oaths of affidavits vide Government Notification dated the 1st July, 1881, published in the Calcutta Gazette dated 6 July, 1881, Part-I, Page-694.

Section-140: Assessors in causes of salvage, etc.—(1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the

Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

Section-141: Miscellaneous proceedings.—The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

The "proceedings" as mentioned in Section-141 refers to original matters in the nature of a suit. The procedure in regard to suits can be extended only to proceedings of original nature.

Jamiruddin Sakhidar -vs- Raufun Nessa Bibi, 5 DLR 269
Serajul Mostafa -vs- Ali Ahmed Sikdar and others, 33 DLR 168
Haricharan -vs- Manmatha, 41 C 1
Asim -vs- Raj, 13 CLJ 642
Basaratullah -vs- Reazuddin, 53 C 679
Thakur Prasad -vs- Fakirullah, 17 A 106 PC

The provisions of section 141 C.P.C are to be strictly followed so far as they can be made applicable.

Sultan Ahmed -vs- Md. Islam, 36 DLR 81

When any special law does not provide any procedure to be followed in inquiries and proceedings under the Act- procedure prescribed in section 141 C.P.C will be applicable.

Naeem Finance Limited -vs- Bashir Ahmed Rafiqi, 23 DLR (SC) 81

Section-142: Orders and notices to be in writing.—All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

Section-143: Postage.—Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made:

Provided that the Government may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

Section-144: Application for restitution.—(1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

The underlying principle of restitution is that when a person is deprived of some right or property by an erroneous judgment, order or decree, then in the event of the reversal of that judgment, order or decree, he may become entitled to restitution of his right or property and that it is the duty of the court to see that the ends of justice be met.

Abdul Hamid -vs- Abdul Jabbar, 34 DLR (AD) 208

The power of a court to grant restitution is not confined to the cases covered by the provisions of section 144. The court has also inherent powers to grant restitution for ends of justice under section 151 in cases not covered by section 144.

Province of East Bengal -vs- Priya Nath Guha, 7 DLR 575

Asutosh -vs- Upendra, 21 CWN 564

Jai Berham -vs- Kedar, 49 IA 351

Gopal -vs- Harimohon, 21 CLJ 624

Raicharan -vs- Debi Prasad, 26 CWN 408

The right to get restitution under section 144 is mandatory, restitution under section 151 is discretionary.

Abdul Hamid -vs- Abdul Jabbar, 34 DLR (AD) 208

Section-145: Enforcement of liability of surety.—Where any person has become liable as surety-

- (a) for the performance of any decree or any part thereof, or
- (b) for the restitution of any property taken in execution of a decree, or
- (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

Although section 47 was omitted from the Code by Ord. XLVIII of 1983, it continues to exist in this section.

By treating a surety a party within the repealed section 47 a right of appeal is allowed against any order passed against him. The omission of section 47 from the Code by Ordinance XLVIII of 1983 has therefore created difficulty in interpreting this section.

Form of notice to surety under this section, see Form No. 13 App. H, Sch. I = H. C. Form No. (P) 155.

Section-146: Proceeding by or against representatives.—Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Confer sections 50 and 52. Decree against father cannot be charged into decree against son by invoking this section for purpose of rateable distribution.

Hemlata -vs- Bengal Coal Co. Ltd., 39 CWN 26

Section-147: Consent or agreement by persons under disability.—In all suits to which any person under disability is a party, any consent or agreement as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

Section-148: Enlargement of time.—Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

This section applies only where time is fixed for the doing of “any act prescribed or allowed by the Code”

Banshi -vs- Majaharuddin, 36 CWN 693

Extension of time to comply with court's order-effect of the expression used.

Fakaruddin and another -vs- Sri Sri Kalimata Bigrahe and others 3 BSCR 243

Court can extend time and condone delay if the order in question is not final.

Joynal Mondal -vs- Jahar Ali Khan, 21 DLR 371

Razia Khatun and Ors -vs- Syeda Sirajunnessa Khatun, 4 BSCR 115

Enlargement of time contemplated under the section has no application to a case where time is fixed by a Court in decree for performing an obligation arising out of a contract between the parties.

Rajendra Shirali -vs- Mahadev, 27 DLR 232.

When *ex-parte* decree is set aside on condition of defendants paying a certain sum of money within a certain time Court has power under section 148 to enlarge time.

Jagannath -vs- Kamta Parsad, 36 A, 772; 3 IC 38

When a certain time is fixed by a decree of the court for taking some steps and it directs that on failure of doing so within the time limited the case should stand dismissed, the court has no jurisdiction to extend the time limited by the decree.

When the court directs by its decree that unless payment is made within a certain date the suit or appeal will stand dismissed, the order is final order and the court cannot extend time.

Kshetra -vs- Gour, 37 CWN 878;

Purna -vs- Panchu, 61 CLJ 512

The court has no power to extend a time fixed by statute and not fixed or granted by the court.

Kalipada -vs- Basanta, 35 CWN 877

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

This section is an enabling section. It enables a Sovereign Prince or a Ruling Chief to prosecute or defend suits through recognised agents specially appointed in that behalf; it does not prevent the institution of a suit by a sovereign Prince in his own name.

Maharaja of Bharatpur -vs- Kacheru, 19 A 510;
Beer Chunder -vs- Ishan Chunder, 10 C 136

Section—86: Suits against Rulers.—(1) Any Ruler of a foreign State may, with the consent of the Government, certified by the signature of a Secretary to the Government but not without such consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Ruler may be sued; but it shall not be given unless it appears to the consenting authority that the Ruler-

- (a) has instituted a suit in the Court against the person desiring to sue him, or
- (b) by himself or another trades within the local limits of the jurisdiction of the Court, or
- (c) is in possession of immoveable property situated within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Ruler shall be arrested under this Code, and, except with the consent of the Government certified as aforesaid, no decree shall be executed against the property of any such Ruler.

(4) Omitted by Act VIII of 1973, as amended by Act LIII of 1974.

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Ruler from whom he holds or claims to hold the property.

Suit not maintainable at all in the absence of consent, Consent filed after period of limitation, held unavailing.

Khan Sher Dil Khan -vs- Sir Abdul Wadud Mia, 7 DLR (FC) 170

Section-86A: Suits against diplomatic agents.—(1) No proceeding in any Court shall lie against a diplomatic agent except in a case relating to-

- (a) any private immoveable property situated in Bangladesh held by him in his private capacity and not on behalf of the sending State for the purpose of the mission;
- (b) a succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) any professional or commercial activity exercised by the diplomatic agent in Bangladesh outside his official functions.

(2) No measures of execution shall be taken in respect of a diplomatic agent except in cases which come under clauses (a), (b) and (c) of sub-section (1) and in which such measures can be taken without infringing the inviolability of his person or of his residence.

(3) The initiation of any proceedings in a Court by a diplomatic agent shall preclude him from invoking immunity from jurisdiction under this section in respect of any counter-claim directly connected with the principal claim.

(4) The immunity of a diplomatic agent under sub-section (1) or sub-section (2) may be waived by the sending State; and any such waiver shall be express.

(5) Waiver of immunity in respect of any proceedings shall not be held to imply waiver of immunity in respect of any measure of execution for which a separate waiver shall be necessary.

(6) In this section, 'diplomatic agent' in relation to a State means the head of the mission in Bangladesh of that State and includes a member of the staff of that mission having diplomatic rank.

Section-87: Style of Rulers as parties to suits.—The Ruler of a foreign State may sue, and shall be sued, in the name of his State:

Provided that in giving the consent referred to in the foregoing section the Government, or the Government, as the case may be, may direct that any such Ruler shall be sued in the name of an agent or in any other name.

The words, "or the Government, as the case may be", after the amendment by Act VIII of 1973 and Act LIII of 1974 appear to be redundant and meaningless.

INTERPLEADER

Section-88: Where interpleader suit may be instituted.—Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:

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

See also Or. 35, rr. 1-2.

In an interpleader suit the real dispute must be between the defendants and the plaintiff's position must be one of impartiality. Where the defendants do not claim adversely to each other or the plaintiff does not admit the claim of any of the defendants the suit is not interpleader.

Asan -vs- Saroda, 1922 C 138.

An interpleader suit is one in which the real dispute is between the defendants only and the defendants interplead, that is to say, plead against each other instead of pleading against the plaintiff as in an ordinary suit.

A person having an interest in the subject-matter of the suit and is not strictly impartial cannot institute an interpleader suit. A holds in his hands a sum of rupees which is claimed by B and C adversely to each other. A institutes an interpleader suit and at hearing it is found that A had entered into an agreement with B before the institution of the suit that if B succeeded in the suit he should accept from A a part of the amount held by A in full satisfaction of his claim. Here by virtue of the agreement A has an interest in the subject-matter of the suit, and he is not, therefore, entitled to institute an interpleader suit. The suit must be dismissed.

Part V

SPECIAL PROCEEDINGS ARBITRATION

Section-89: Omitted by the Arbitration Act, 1940. (X of 1940), Section 49 and Third Schedule.

SPECIAL CASE

Section-90: Power to state case for opinion of Court.—Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

See also Or. 36, rr. 1-5.

SUITS RELATING TO PUBLIC MATTERS

Section-91: Public nuisances.—(1) In the case of a public nuisance the Attorney General, or two or more persons having obtained the consent in writing of the Attorney General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

Three kinds of remedies may be available against public nuisance: (1) the persons committing public nuisance may be criminally prosecuted; (2) he may be proceeded under this section and (3) he may be sued for damages at the instance of a private individual. These remedies are concurrent. The second class suit falls under this section.

Md. Reza -vs- Md. Askari, 46 A 470;

Manilal -vs- Ishwar, 1925 B 367;

Ardeshir -vs- Himi, 53 B 187.

Suit by a number of Mohamedans claiming right to take tazias along a certain road alleged to have been narrowed down is a suit within this section.

Raghubar -vs- Mardari, 157 IC 638.

Section-92: Public charities.—(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Attorney General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree-

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
- (d) directing accounts and inquires;
- (e) declaring what proportion of the trust- property or of the interest therein shall be allocated to any particular object of the trust;
- (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;
- (g) settling a scheme; or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowment Act, 1863, no suit claiming any of the reliefs specified in sub- section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

Section 92 was intended to govern representative suits brought for the benefit of the public by vindicating the rights of the public in public charitable trust.

Dildar Ahmed Chowdhury -vs- Farroque Ahmed, 27 DLR (SC) 138

In regard to public trust, religious endowment, etc. court is not bound to accept a compromise arrived at between the parties.

Senkaralinga -vs- Rajeswari, 31 M 236 PC

Suit under this section must be a representative one brought by individuals for the benefit of and as representatives of the general public and not for their own interests.

Buddree -vs- Chooni, 33 C 789;
Annadarao -vs- Ramdas, 48 C 493 PC

The suit being a representative one, the death of one of the plaintiffs does not cause abatement, and the court has power under Or. 1. r. 10(2) to add other persons interested in the trust as parties.

Annadarao -vs- Ramdas, 48 C 493 PC

The suit does not also abate on the death of the defendant.

Tula -vs- Tikam, 1934 A 315

Any member of the public may come in and carry on the suit or appeal and no fresh sanction is necessary.

Faizunnessa -vs- Golam, 39 CWN 951

If consent has been given to two or more persons, some only of them cannot sue without the others.

Ali Begum -vs- Badrul Islam, 1938 PC 184, 65 IA 198

If three persons sue with consent and two die, the other plaintiff can appeal alone.

Ali Begum -vs- Badrul Islam, 1938 PC 184, 65 IA 198

If the trust is not created mainly and substantially for the purpose mentioned in the section, it will not come within operation of the section, though it may contain some provisions for public purposes of a charitable or religious nature.

Mohd. Fakirullah -vs- Commissioner of Wakf, 4 DLR 173

The section has no application to suits against trespassers or against alienees from trustees for a declaration that the property in their hands is trust property and for possession i.e. a suit for a declaration that the property belongs to a wakf.

Abdur Rahim -vs- Barkat, 55 C 519 PC

The expression, "alleged breach of trust", presupposes the existence of a trust.

Jamaluddin -vs- Mujtabar, 25 A 631
Shihan -vs- Abdul, 34 CWN 1129

The expression does not also mean an "admitted" trust.

Saiyed -vs- Haji, 1934 B 257

So, where the defendant denies trust and claims property as private, it is open to the court to frame an issue whether it is trust property and a separate suit for that purpose is not necessary.

Abdul Majid -vs- Sheikh, 39 CWN 1103

Section-93: Exercise of powers of Attorney General.—The powers conferred by sections 91 and 92 on the Attorney General may be, with the previous sanction of the Government, exercised also by the Collector or by such officer as the Government may appoint in this behalf.

Part VI

SUPPLEMENTAL PROCEEDINGS

Section-94: Supplemental proceedings.—In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,-

- (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;
- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
- (e) make such other interlocutory orders as may appear to the Court to be just and convenient,-

Clause (a)- Arrest before judgment (Or. 34 rr. 1-4; S. 136);

Clause (b)- Attachment before judgment (Or 38, rr. 5-12; Or. 39, r. 7);

Clause (c) - Temporary injunction (or 39, rr. 1-5);

Clause (d) - Receiver (Or. 40, rr. 1-5; S.51(d));

Clause (e) - Such other interlocutory orders (Or. 39, rr. 6-10).

Section-95: Compensation for obtaining arrest, attachment or injunction on insufficient grounds.—(1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last proceeding section,-

- (a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or
- (b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand Taka, as it deems a reasonable compensation to the defendant for the expense or injury caused to him:

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

Compensation for obtaining arrest, attachment or injunction on insufficient grounds. Mode of assessment of damages.

Bhupendra -vs- Trinayani, 48 CWN 348

Moheen -vs- Gokul, 5 WR 91 PC

In order that the section may apply, the arrest or attachment before judgment must have been effected, i.e. actually made or the temporary injunction must have been actually granted. Merely procuring an order is not sufficient.

Rama -vs- Govinda, 39 M 952

The court may award compensation when it appears that (1) the application was made on insufficient grounds, or (2) when the plaintiff fails in the suit and there was no reasonable or probable ground for instituting the suit. Proof of actual malice is not required in order to succeed in an application under this section.

Nanjappa -vs- Ganapathi, 35 M 598

An aggrieved person may avail himself of this section or he may bring a regular suit for damages but after an application under this section is determined on merit, a fresh suit is barred being res judicata.

Harakumar -vs- Jagat, 53 C 1008

Mohini -vs- Surendra, 18 CWN 1189

Nand -vs- Gour, 13 WR 305

Part VII

APPEALS

APPEALS FROM ORIGINAL DECREES

Section-96: Appeal from original decree.—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex- parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

Decrees (S.2(2))

Procedure regarding appeal (Or. 41)

Pauper appeals (Or. 44)

Power of appellate court (S. 107; Or. 41, rr. 4, 33).

The section gives right of appeal from every decree passed by any court exercising original jurisdiction unless such right is denied by any other law for the time being in force.

To enable a person to appeal - (1) he should be a party to the suit or legal representative; (2) he should have an interest in the subject-matter of the suit; (3) he should be prejudicially affected by the decree.

Srinath -vs- Probodh, 11 CLJ 580;

Rustomjee -vs- Official Liquidator, 49 IC 381

It is well settled that a right of appeal must be given by a statute or by some equivalent authority.

Rangoon B. Co. -vs- Collector, 16 CWN 961 PC

The decree contemplated by S. 96 of the Code is a decree made in a suit. A proceeding under S. 34 (6) of the Sylhet Tenancy Act is started by an application and not by a plaint, and consequently the order under S. 34 (6) of the Sylhet Tenancy Act is not an order in a suit. The order complained against, therefore, is not appealable before the District Judge.

Harmey Ali & Ors -vs- Mafiz Ali & Ors, (1955) 8 DLR 80

Sections 96 and 104 C.P. Code do not prohibit stranger from filing an appeal and if adversely affected by an order or decree he (stranger) may file an appeal.

H. M. Sava & Co. -vs- Wazir Ali Industries, Ltd., 21 DLR (SC) 50

Ex-parte decree (Concurrent remedy by way of appeal u/s.96 C.P.C and application u/o. 9. r. 13 C.P.C). It is for the party concerned to choose either or both but within the period of limitation in each case.

Abdul Hamid -vs- Nazrul Islam Chowdhury, CPSLA No. 138 of 1981

Section-97: Appeal from final decree where no appeal from preliminary decree.—Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

This section lays down that if a party who considers himself aggrieved from a preliminary decree fails to appeal within the period of limitation prescribed, he is debarred from disputing its correctness or raising any objection to it in an appeal preferred from the final decree.

Ahmed -vs- Hashim, 19 CWN 449 PC
Surendra -vs- Mahendra, 36 CWN 490

Section-98: Decision where appeal heard by two or more Judges.—(1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed:

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the letters patent of High Court Division.

When the judges differ on a question of fact, there can be no reference but the decree shall be confirmed.

Goswami -vs- Raman, 17 C 3

When two Judges agree in their opinion in respect of part of the claim, but differ as to the rest, the judgment on the portion on which they concur will be in accordance with the concurring opinion and in respect of the portion on which they differ the judgment of the lower court must be confirmed.

Rajagopala -vs- Subbammal, 51 M 291

Section-99: No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.—No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

For:- misjoinder of plaintiffs, see O. 1, r. 1;
 misjoinder of defendants, see O. 1, r. 3;
 misjoinder and non-joinder of parties, see O. 1, r. 9;
 misjoinder of plaintiffs and causes of action, see O. 2, r. 3;
 misjoinder of defendants and causes of action, see O. 2, rr. 3-5;
 objections to misjoinder, see O. 2, r. 7;
 irregularity affecting jurisdiction, see S. 21.

No decree to be reversed or modified for error or irregularity not affecting merit or jurisdiction.

Mere fact of misjoinder of parties or causes of action is not sufficient to have the proceedings set aside or the action dismissed.

Mahanth -vs- Chowdhury, 41 CWN 418 PC

Error, defect or irregularity not affecting merits of the case. Appellate court not to interfere.

Mohim -vs- Bengshi, 17C 580 PC;

Nagendra Nath Sen Roy -vs- Saiyal Ali Jamadar, 8 DLR 100;

Syed Ahmed -vs- Profullah Kr. Dev, 13 DLR 676

The principle underlying S.99 is of general application and is not to be confined to suits only but is applicable to pre-emption proceedings.

Matilal Sikdar & Ors. -vs- Bipu Behari Das & Ors., 28 DLR (AD) 5

APPEALS FROM APPELLATE DECREES

**Sections 100-103: Omitted by the Law Reforms Ordinance, 1978
(Ordinance XLIX of 1978)**

APPEALS FROM ORDERS

Section-104: Orders from which appeal lies.—(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being force, from no other orders:-

Clauses (a) to (f) omitted by the Arbitration Act, 1940 (X of 1940), s.49 and 3rd Schedule.

- (ff) an order under section 35A;
- (g) an order under section 95;
- (h) an order under any of the provisions of this 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;
- (i) any order made under rules from which an appeal is expressly allowed by rules:

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section.

This section should be read with Or. 43, r.1. They contain a complete list of orders from which an appeal shall lie.

The words, "save as otherwise expressly provided in the body of this Code," refer to other express provisions in regard to appeal from orders, e.g., ss. 144 & 145.

Section-105: Other orders.—(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is

appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

Sub-section (1) bars appeal from any order unless right of appeal from such order is expressly given by the Code. A party is not, however, bound to prefer an immediate appeal from an interlocutory order although such appeal may lie. The sub-section also provides that if he waits until the whole cause has been decided, he can make the error, defect or irregularity of the order a ground of objection when an appeal is subsequently preferred against the decree in the suit in which the order is made. The section also applies to non-appealable orders in this way that although there is no right of appeal from such orders, similar objection to error, defect or irregularity of the order may be taken in the memo. of appeal if and when an appeal is filed against the final decree. The section, therefore, allows an appeal from a non-appealable order in an indirect manner. The advantage of an appealable order is that there is an immediate right of appeal from such an order. Sub-section (2) is an exception to sub-section (1). An order of remand under Or. 43, r. 23 is appealable under Or. 43, r. 1 but if a party does not appeal against an order of remand, he is precluded from disputing its correctness when subsequently appealing from the decree in the suit. He must appeal from the order of remand directly or be precluded from questioning its correctness.

Sheikh Salim -vs- Hajera, 55 C 506;

Janaki -vs- Pramatha, 15 CWN 830

Interlocutory order subject to other provisions of the Code, could be challenged in appeal from the decree, if it affects the decision of the case, but it cannot be so done, if once appeal or revision has been filed against such orders.

Md. Yusuf -vs- Mofzal Ahmed Sowdager, 1981 BLD (AD) 456.

Section-106: What Courts to hear appeals.—Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being the High Court Division) in the exercise of appellate jurisdiction, then to the High Court Division.

GENERAL PROVISIONS RELATING TO APPEALS

Section-107: Powers of Appellate Court.—(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

For:- Clause (a), see Or. 41, rr. 24, 33
 Clause (b), see Or. 41, r. 23
 Clause (c), see Or. 41, rr. 25
 Clause (d), see Or. 41, rr. 27-29.

Where a decision by a trial judge is based on oral evidence the appellate court must, in order to reverse, not merely entertain doubt but be convinced that it is wrong.

Prem -vs- Deb, 1948 PC 20

Provisions of S.107(1) (b) C.P.C. as elucidated by Or. 41, r. 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and fill up omissions in the appellate court.

Sunil Krishna Banik -vs- Kailash Chandra Saha, 36 DLR (AD) 220
Haran Chandra Daradi -vs- Ejahar Molla, 36 DLR 41

Appeal filed against an interlocutory order and against an order finally disposing of the case - no difference in law even whether such interlocutory order is passed by an appellate court.

Eshaque Ali Howlader -vs- Jahangir Alam Matbar, 35 DLR 398

Section-108: Procedure in appeals from appellate decrees and orders.—The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals-

- (a) from appellate decrees; and
- (b) from orders made under this Code or under any special law in which a different procedure is not provided.

APPEALS TO THE APPELLATE DIVISION

Section-109: When appeals lie to the Appellate Division.—Subject to such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of Bangladesh, and to the provisions hereinafter contained, an appeal shall lie to the Appellate Division-

- (a) from any Judgment, decree or final order passed on appeal by the High Court Division or by any other Court of final appellate jurisdiction;
- (b) from any Judgment, decree or final order passed by the High Court Division in the exercise of original civil jurisdiction; and
- (c) from any Judgment, decree or final order, when the case, as hereinafter provided, is certified to be a fit one for appeal to the Appellate Division.

S.109 is not only qualified by the opening words of S.111 but also by S.112.

Md. -vs- Saadat. 43 CWN 733 PC.

Section-110: Value of subject-matter.—In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject -matter of the suit in the Court of first instance must be twenty thousand Taka or upwards, and the amount or value of the subject-matter in dispute on appeal to the Appellate Division must be the same sum or upwards, or the Judgment, decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value, and where the Judgment, decree or final order appealed from affirms the decision of the Court immediately below the Court passing such Judgment, decree or final order, the appeal must involve some substantial question of law.

“Substantial question of law” does not mean a question of general importance but a substantial question of law as between the parties in the case involved.

Raghunath -vs- Dy. Commissioner, 31 CWN 495 PC
Durga -vs- Jawahir, 18 C 23 PC
Guran -vs- Ram, 55 C 944

Section-111: Bar of certain appeals.—Notwithstanding anything contained in section 109, no appeal shall lie to the Appellate Division-

- (a) from the decree or order of one Judge of the High Court division, or of one Judge of a Division Court or of two or more Judges of High Court Division or of a Division Court constituted by two or more Judges of High Court Division, where such judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court Division at the time being, or
- (b) **Omitted by the Law Reforms Ordinance, 1978 (Ordinance XLIX of 1978).**

Section-112: Savings.—(1) Nothing contained in this Code shall be deemed-

- (a) to affect the powers of the Appellate Division under article 103 of the Constitution of the People's Republic of Bangladesh or any other provision of that Constitution; or
- (b) to interfere with any rules made by the Supreme Court, and for the time being in force, for the presentation of appeals to the Appellate Division, or their conduct before that Division.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

Part VIII

REFERENCE, REVIEW AND REVISION

Section-113: Reference to High Court Division.—Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court Division, and the High Court Division may make such order thereon as it thinks fit.

For detailed procedure, see Or. 46, rr. 1-7.

Under S.113 an opinion is to be sought when the Court itself feels some doubts about the question and not when it has formed an opinion and acted upon it and that opinion is disagreed with by another Court.

Tikaram -vs- Maheshwari, 1959 A 659

Section-114: Review.—Subject as aforesaid, any person considering himself aggrieved-

- (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
- (b) by a decree or order from which no appeal is allowed by this Code, or
- (c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

Review of the appellate order or decree, when will lie, see

Abul Basher Chowdhury -vs- Mehaf Khatun, 35 DLR 6

For detailed procedure, see Or. 47, rr. 1-9.

Section-115: Revision.—The High Court Division may call for the record of any case which has been decided by any Court subordinate to the High Court Division and in which no appeal lies thereto, and if such subordinate Court appears to have committed any error of law resulting in an error in the decision occasioning failure of justice, the High Court Division may make such order in the case as it thinks fit.

Glaring misconception of law and non-consideration of material evidence. Interference u/s. 115 by High Court Division called for.

Sartosh Kumar Chakraborty -vs- M.A. Motaleb Hossain, 36 DLR (AD) 248

Exercise of revisional jurisdiction can either be at the instance of a party or even *suo motu*, High Court Division can call for the records of a case from lower court and on perusal thereof make such order as it finds fit and proper. Order passed on due consideration of the facts and circumstances of the case valid despite absence of the Advocate for the petitioner.

Darasatullah -vs- Manik Mondal, 36 DLR (AD) 88

Safaruddin and others -vs- Fazlul Huq and others, 49 DLR (AD) 151

It is a discretionary power of the court to grant or not to grant injunction. If the court exercises its judicial discretion, the High Court is not to interfere u/s. 115.

Mansur Ahmed -vs- Kalipada Chattapadhyaya, 11 DLR 103

Finding of facts based on due consideration of evidence was beyond the scope of revisional court to interfere with.

Jashimuddin Kanchan -vs- Md. Ali Ashraf, 42 DLR (AD) 289.

Remand not justified when the revisional court is competent to decide the case on the evidence on record when no further evidence is required.

Abdul Mannan -vs- Akram Ali, 43 DLR (AD) 125;

Attor Mia -vs- Mst. Mahmuda Khatun Chowdhury, 43 DLR (AD) 125

A revisional court acts beyond its jurisdiction in setting aside concurrent finding of fact, when there is no misreading and misappreciation of the evidence on record.

Shambhu Nath Poddar -vs- Bangladesh Railway, 43 DLR (AD) 82

The revisional court is competent to interfere in a case of non-consideration of material evidence which is specifically material for determination of the material issue.

*Abul Bakar Siddique -vs- Additional Deputy Commissioner and others,
48 DLR (AD) 154*

Part IX

SPECIAL PROVISIONS RELATING TO HIGH COURT DIVISION

Section-116: Part to apply only to High Court Division.—This Part applies only to High Court Division.

Section-117: Application of Code to High Court Division.—Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to High Court Division.

“Rules” mean rules contained in Schedule I or made under section 122.

Section-118: Execution of decree before ascertainment of costs.—Where the High Court Division considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

Section-119: Unauthorized persons not to address Court.—Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court Division to make rules concerning advocates.

Section-120: Provisions not applicable to High Court Division in original civil jurisdiction.—(1) The following provisions shall not apply to the High Court Division in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

Part-X

RULES

Section-121: Effect of rules in First Schedule.—The rules in the First Schedule shall have effect as if enacted in the body if this Code until annulled or altered in accordance with the provisions of this Part.

In order to determine the jurisdiction of a Court both the body of the Code and the rules must be looked into.

Sachindra -vs- Usha, 1949 C 690

No rule inconsistent with the body of the Code can confer a jurisdiction upon any court.

Karam -vs- Kunwar, 1942 A 387

Section-122: Power of Supreme Court to make rules.—The Supreme Court may, from time to time after previous publication, make rules regulating the procedure of each Division of the Supreme Court and the procedure of Civil Courts subject to its superintendence and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

See also Article 107 of the Constitution and section 126.

Most of the rules in the C.R.&O are made in exercise of the power under this section.

Section-123: Constitution of Rule Committees.—(1) A Committee, to be called the Rule Committee, shall be constituted for the purpose referred to in section 122.

- (2) Such Committee shall consist of the following persons, namely:
- (a) three Judges of the Supreme Court, one of whom at least has served as a District Judge for three years;
 - (b) two advocates practising in that Court; and
 - (c) a Judge of a Civil Court subordinate to the High Court Division.

(3) The members of such Committee shall be appointed by the Chief Justice who shall nominate one of their number to be president.

Provided that, if the Chief Justice elects to be himself a member of the Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice shall be the President of the Committee.

(4) Each member of such Committee shall hold office for such period as may be prescribed by the Chief Justice in this behalf; and whenever any member retires, resigns, dies or becomes incapable of acting as a member of the Committee, the said Chief Justice may appoint another person to be a member in his stead.

(5) There shall be a Secretary to such Committee, who shall be appointed by the Chief Justice and shall receive such remuneration as may be provided in this behalf by the Government.

Section-124: Committee to report to Supreme Court.—The Rule Committee shall make a report to the Supreme Court on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the Supreme Court shall take such report into consideration.

Section 125: Omitted by the Central Laws (Statute Reform) Ordinance, 1960 (21 of 1969), s.3 and 2nd Sch. (with effect from the 14th October, 1955).

Section-126: Rules to be subject to approval by the President.—Rules made under the foregoing provisions shall be subject to the previous approval of the President.

See also Article 107 of the Constitution.

Section-127: Publication of rules.—Rules so made and approved shall be published in the official Gazette, and shall from the date of publication or from such other date as may be specified have the same force and effect as if they had been contained in the First Schedule.

Section-128: Matters for which rules may provide.—(1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely:-

- (a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service;
- (b) the maintenance and custody, while under attachment, of live-stock and other movable property, the fees payable for such maintenance and custody, the sale of such live- stock and property, and the proceeds of such sale;
- (c) procedure in suits by way of counterclaim, and the valuation of such suits for the purposes of jurisdiction;
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts;
- (e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not;
- (f) summary procedure-
 - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising-
 - on a contract express or implied; or,
 - on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
 - on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or
 - on a trust; or
 - (ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant;
- (g) procedure by way of originating summons;
- (h) consolidation of suits, appeals and other proceedings;
- (i) delegation to any Registrar, Prothonotary or master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and

- (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

Section-129: Omitted by Act VIII of 1973, as amended by Act LIII of 1974.

Section-130: Omitted by A. O. 1961, Article 2 Schedule (with effect from the 23rd March, 1956).

Section-131: Omitted by Act VIII of 1973 as amended by Act LIII of 1974.

Part XI

MISCELLANEOUS

Section-132: Exemption of certain women from personal appearance.—(1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

This section recognises the rights of the pardanashin ladies to have their evidence taken on commission. This is a right which the court cannot deny.

But the correct meaning of the section is that a pardanashin lady shall be exempted from personal appearance in court, that is, from being exposed to public gaze but she is not exempt from attendance. The court has therefore power to order examination in court, provided she does not become visible to the public gaze.

Re. Bilasroy, 56 C 865

Section-133: Exemption of other persons.—(1) The Government may, by notification in the official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of the Government, entitles him to the privilege of exemption.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court Division by the Government and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court Division shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

See also Or. 26, r. 1.

Section-134: Arrest other than in execution of decree.—The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

Section-135: Exemption from arrest under civil process.—(1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

As to immediate execution, see Or. 21, r. 11 (1) and as to attendance to show cause, see Or. 21, r. 37 (1).

Section-135A: Exemption of members of legislative bodies from arrest and detention under civil process.—(1) No person shall be liable to arrest or detention under civil process-

- (a) if he is a member of Parliament during the continuance of any meeting of Parliament;
- (b) if he is a member of any committee of Parliament, during the continuance of any meeting of such committee;

and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1).

Section-136: Procedure where person to be arrested or property to be attached outside district.—(1) Where an application is made that any person shall be arrested or that any property shall be attached under

any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Omitted by A. O. 1949

This section read with Or. 38, rr. 1 and 5 enables the court to arrest before judgement a person or attach before judgement any property outside the local limits of its jurisdiction. It may also under Or. 21, r. 58, read with Or. 38, r. 8 order removal of the attachment.

Firm M.S.M.M. -vs- Mg. Sein, 9 R 561

This section also enables a party to enforce an order of injunction against a person outside the local limits of the jurisdiction of the court passing the order.

A. Milton & Co. -vs- Ojha A.E. Co., 57 C 1280;
Salamchand -vs- Joogal, 55 C 777

Section-137: Language of subordinate Courts.—(1) The language which, on the commencement of this Code is the language of any Court subordinate to the High Court Division shall continue to be the language of such subordinate Court until the Government otherwise directs.

(2) The Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

Section-138: Power of High Court Division to require evidence to be recorded in English.—(1) The High Court Division may, by notification in the official Gazette, direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

Section-139: Oath on affidavit by whom to be administered.—In the case of any affidavit under this Code-

- (a) any Court or Magistrate, or
 - (b) any officer or other person whom the Supreme Court may appoint in this behalf, or
 - (c) any officer appointed by any other Court which the Government has generally or specially empowered in this behalf,
- may administer the oath to the deponent.

Sheristadars of all civil courts are ex officio commissioners of affidavits. See rule 27, C.R & O. See also rule 28 C.R & O. District Judges are empowered to appoint commissioners to administer oaths of affidavits vide Government Notification dated the 1st July, 1881, published in the Calcutta Gazette dated 6 July, 1881, Part-I, Page-694.

Section-140: Assessors in causes of salvage, etc.—(1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the

Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

Section-141: Miscellaneous proceedings.—The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

The "proceedings" as mentioned in Section-141 refers to original matters in the nature of a suit. The procedure in regard to suits can be extended only to proceedings of original nature.

Jamiruddin Sakhidar -vs- Raufun Nessa Bibi, 5 DLR 269
Serajul Mostafa -vs- Ali Ahmed Sikdar and others, 33 DLR 168
Haricharan -vs- Manmatha, 41 C 1
Asim -vs- Raj, 13 CLJ 642
Basaratullah -vs- Reazuddin, 53 C 679
Thakur Prasad -vs- Fakirullah, 17 A 106 PC

The provisions of section 141 C.P.C are to be strictly followed so far as they can be made applicable.

Sultan Ahmed -vs- Md. Islam, 36 DLR 81

When any special law does not provide any procedure to be followed in inquiries and proceedings under the Act- procedure prescribed in section 141 C.P.C will be applicable.

Naeem Finance Limited -vs- Bashir Ahmed Rafiqi, 23 DLR (SC) 81

Section-142: Orders and notices to be in writing.—All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

Section-143: Postage.—Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made:

Provided that the Government may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

Section-144: Application for restitution.—(1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

The underlying principle of restitution is that when a person is deprived of some right or property by an erroneous judgment, order or decree, then in the event of the reversal of that judgment, order or decree, he may become entitled to restitution of his right or property and that it is the duty of the court to see that the ends of justice be met.

Abdul Hamid -vs- Abdul Jabbar, 34 DLR (AD) 208

The power of a court to grant restitution is not confined to the cases covered by the provisions of section 144. The court has also inherent powers to grant restitution for ends of justice under section 151 in cases not covered by section 144.

Province of East Bengal -vs- Priya Nath Guha, 7 DLR 575

Asutosh -vs- Upendra, 21 CWN 564

Jai Berham -vs- Kedar, 49 IA 351

Gopal -vs- Harimohon, 21 CLJ 624

Raicharan -vs- Debi Prasad, 26 CWN 408

The right to get restitution under section 144 is mandatory, restitution under section 151 is discretionary.

Abdul Hamid -vs- Abdul Jabbar, 34 DLR (AD) 208

Section-145: Enforcement of liability of surety.—Where any person has become liable as surety-

- (a) for the performance of any decree or any part thereof, or
- (b) for the restitution of any property taken in execution of a decree, or
- (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

Although section 47 was omitted from the Code by Ord. XLVIII of 1983, it continues to exist in this section.

By treating a surety a party within the repealed section 47 a right of appeal is allowed against any order passed against him. The omission of section 47 from the Code by Ordinance XLVIII of 1983 has therefore created difficulty in interpreting this section.

Form of notice to surety under this section, see Form No. 13 App. H, Sch. I = H. C. Form No. (P) 155.

Section-146: Proceeding by or against representatives.—Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Confer sections 50 and 52. Decree against father cannot be charged into decree against son by invoking this section for purpose of rateable distribution.

Hemlata -vs- Bengal Coal Co. Ltd., 39 CWN 26

Section-147: Consent or agreement by persons under disability.—In all suits to which any person under disability is a party, any consent or agreement as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

Section-148: Enlargement of time.—Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

This section applies only where time is fixed for the doing of “any act prescribed or allowed by the Code”

Banshi -vs- Majaharuddin, 36 CWN 693

Extension of time to comply with court's order-effect of the expression used.

Fakaruddin and another -vs- Sri Sri Kalimata Bigrahe and others 3 BSCR 243

Court can extend time and condone delay if the order in question is not final.

Joynal Mondal -vs- Jahar Ali Khan, 21 DLR 371
Razia Khatun and Ors -vs- Syeda Sirajunnessa Khatun, 4 BSCR 115

Enlargement of time contemplated under the section has no application to a case where time is fixed by a Court in decree for performing an obligation arising out of a contract between the parties.

Rajendra Shirali -vs- Mahadev, 27 DLR 232.

When *ex-parte* decree is set aside on condition of defendants paying a certain sum of money within a certain time Court has power under section 148 to enlarge time.

Jugannath -vs- Kamta Parsad, 36 A, 772; 3 IC 38

When a certain time is fixed by a decree of the court for taking some steps and it directs that on failure of doing so within the time limited the case should stand dismissed, the court has no jurisdiction to extend the time limited by the decree.

When the court directs by its decree that unless payment is made within a certain date the suit or appeal will stand dismissed, the order is final order and the court cannot extend time.

Kshetra -vs- Gour, 37 CWN 878;
Purna -vs- Panchu, 61 CLJ 512

The court has no power to extend a time fixed by statute and not fixed or granted by the court.

Kalipada -vs- Basanta, 35 CWN 877

Section-149: Power to make up deficiency of court fees.—Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

This is an empowering section and it enlarges the power of the court to give time to make up deficiency of court-fees in a proper case. The power is subject to the discretion of the court and is not claimable as of right by a party.

Brijbukhan -vs- Tota, 50 A 980

Principal ground for extension of time to pay court-fee would ordinarily be deficiency in stamp due to bonafide mistake. Deliberate attempt to avoid payment of sufficient court-fee or to defer the day of payment to suit a party's own convenience is no ground.

Saidunnessa -vs- Tejendra, 44 IC 398

* Court should not extend the period of limitation of a suit by allowing time for payment of deficit court-fee on plaint when there is no question of any mistake on the part of the plaintiff.

Sambhu -vs- Harihar, 41 C 1092; 18 CWN 1071

See also paras 1(2) and 37(1), Civil Suit Instructions Manual as to exercise of power regarding plaints with deficite court-fees. Regarding appeal filed with deficite court-fees, see rule 288, C.R & O and section 6 (2), Court Fees Act, 1870.

Seciton-150: Transfer of business.—Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

This section is intended to meet the difficulty sometimes caused by the abolition of a court or the transfer of any local area from the jurisdiction of one court to that of another involving the transfer of the business of one

court to another court. Under section 13 (2) of the Civil Court Act, 1887, business may be assigned to the several judicial officers having the same local jurisdiction. Such assignment of business is not the same thing as transfer of business under this section.

Munshi -vs- Munshi, 26 CWN 216
Dagunath -vs- Biswambhar 61 CLJ 543

The general power of transfer and withdrawal of cases from one court to another court is contained in section 24.

Section-151. Saving of inherent powers of Court. ~~Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.~~

Where specific relief is available, inherent powers of court under this section cannot be invoked.

Punjab Ali Paramanik -vs- Md. Kqkrram Hossain, 29 DLR (SC) 185;
Nazir Ahmed -vs- Habibar Rahman, 7 DLR 192

~~Court's inherent powers to make any order necessary for the ends of justice includes setting aside its own order obtained by practising fraud upon it.~~

Master Abdul Aziz -vs- Abani Mohan Mukherjee and others
30 DLR (SC) 221

Jurisdiction under S.151 cannot be invoked *suo motu* by the court unless any formal prayer is made by any party seeking to have recourse to it.

Md. Shahidul Hoque -vs- Mst. Rahima Bibi and another, 32 DLR (AD) 52

Illustration of Court's inherent powers:

Where Court has inherent power:-

✓(1) To consolidate suits normally before trial begins.

Hukum Chand -vs- Kamalanand, 33 C. 927

✓(2) To postpone the hearing of suits pending the decision of a selected action.

Hukum Chand -vs- Kamalanand, 33 C. 927

- ✓(3) To stay cross-suits on the ground of convenience.

Hukum Chand -vs- Kamalanand, 33 C. 927
Nanda Kishore -vs- Ram Golam, 40 C. 955, 959-960
Syed Abdul -vs- Badaruddin, 28 CWN 295

- ✓(4) To order joint trial of suits.

Kalicharan -vs- Suryakumar, 17 CWN 526

- ✓(5) To entertain the application of a third person to be made a party.

Oriental Bank -vs- Chariol, 12 C. 642

- (6) To stay execution or operation of the order appealed from so that the order which might be passed in appeal might not be rendered infructuous.

State of Uttar Pradesh -vs- Mukthar Singh 1957 A. 505

- ✓(7) To apply the principles of res judicata to cases not falling within section 11 of the Code.

- ✓(8) To add a party, or to transpose parties.

Lakhmichand -vs- Kuchubhat, 35 B. 393, 14 IC 559
Surya Kanta -vs- Taraknath 44 CLJ 243
Sailabala -vs- Nirmala, 1958 SC 394

- (9) To stay proceedings pursuant to its own order in view of an intended appeal.

Sarat Kumar -vs- Official Assignee, 34 CWN 631

- ✓(10) To pass a conditional order providing for dismissal of the suit in case the order is not complied with.

Hati Pratihari -vs- Alekh, 1954 Orissa 136

- ✓(11) To amend decrees and orders in cases not covered by section 152.

Inherent power to amend decrees and orders.

Mohabir -vs- Chundra, 19 CWN 1021

- ✓(12) To correct its own mistakes.

Keshardo -vs- Radhakishen, 1953 SC 23
Jankiram Iyer -vs- Nilakanta Iyer, 1962 SC 633

- (13) To correct an error due to the laches or negligence of the officers of court.

Ali Mondal -vs- Ghulam Bari, 1955 AC 526, 59 CWN 513

- (14) To amend the sale certificate and correct miss—description of the property.

Sobla -vs- Jethmal, 1961 Rajsthan, 191

- (15) To set aside an order obtained by fraud practised upon the court, or where it is misled by the party or the court itself commits a mistake which prejudices a party who is not to blame, e.g. when a pleader not engaged by the defendant at all consents to a decree on behalf of the defendant.

Peary Choudhury -vs- Sonoo Dass, 19 CWN 419

Basangowda -vs- Churchigirigowda, 34 B 408

- (16) To set aside an order recording compromise obtained by fraud.

Bindeswari Prasad -vs- Debendra Prasad, 1958 P. 618

- (17) To restore a suit dismissed for default in cases not provided for by Order 9, rule 9.

Subash Chand -vs- Sarju Devi, 1960 A 569

- To restore an application under Order 9, rule 13 which had been dismissed for default.

Madanlal -vs- Tripura Modern Bank Ltd.,

1953 Assam 539, 1954 Assam 1 (FB)

- (19) An application for setting aside ex parte order may lie under section 151.

- (20) To restore an application under Order 9, rule 13 dismissed for default. An application for restoration of the application for setting aside the ex parte order which was dismissed for default is competent.

Nathuni Singh -vs- Naipal Singh, 1958 P. 107

- (21) To reconstruct records as and where they are lost by accident.

Marakarutti -vs- Verran, 46 M. 679

- (22) To strike off the defence and proceed ex parte where a suit is adjourned on the condition that the defendant should pay the costs of the adjournment within a prescribed period and he fails to do so.

East Indian Railway Co. -vs- Jit Mal 47 A. 538

- ✓(23) To mould the relief in accordance with the law as on date of the decree. To grant relief on the basis of subsequent legislation.

Nair Service Society -vs- K.C. Alexander, 1968 SC 1165

- ✓(24) To correct date where date of decree differs from the date of judgment.

Rehmat Ali -vs- Abdul Hamid, 1979 SCMR 423

- ✓(25) To permit examination of witnesses not mentioned in the list of witnesses.

- ✓(26) To issue an injunction in cases not falling under O.39. Contrary decisions are not good law.

Monoharlal -vs- Seth Hiralal, 1962 SC 527

- ✓(27) To stay a suit even if it dose not come within section 10.

Atulbala Dasi -vs- Nirupama Dasi, 1951 AC 561

- ✓(28) To hold a trial or part of it in camera if satisfied that ends of justice required such a course.

Narsh Sridhar -vs- Maharashtra, 1967 SC 1

Messrs Crescent Films, Lahore -vs- Messrs Shah Noor Films Ltd. Lahore and 8 others, PLD 1978 Lah. 721.

There is no limitation for application u/s 151.

Chandra -vs- Sudhagshu, 80 IC 55

The expression, "ends of justice" used in section 151 recognises wide powers inherently possessed by the court to do justice in a given case. From this, it must not be supposed that the court can, in disregard of the established principles and norms of law, make an order.

Bangladesh Shilpa Bank -vs- Bangladesh Hotels, 38 DLR (AD) 70

Section-152: Amendment of judgments, decrees or orders.—

Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

Anomaly can be corrected.

Mvi Mir Mahbubur Alam -vs- Kazi Mvi Salahm Ahmed BCR 1984 AD 164

Mistake may be corrected.

*Golam Nabi -vs- Mohammadul Hoque Chowdhury, 3 BCR 1982 AD 166;
Bazlur Rahman Bhuiyan -vs- B.S. Corporation,
34 DLR (AD) 42= 1980 BLD (AD) 443*

There is no time limit to amend a decree to make it in conformity with judgment.

Chandra Kumar Mukhapadhya -vs- Shudhansu Badani Debi, 28 CWN 873

The section is confined only to the kind of mistakes, errors, slips or omissions mentioned therein. The section contemplates amendment of decree in respect of any clerical or arithmetical mistake, it does not contemplate amendment of a substantial nature.

Abdul Hakim -vs- Ganendra Nath Bashu Roy, 47 DLR (AD) 9

Amendment of decree does not give a fresh start of limitation to file an appeal.

Kedar -vs- Golam 4 CWN 83.

Section-153: General power to amend.—The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

Or.6, r.17 is confined to amendments of “pleading” and S. 152 to correcting errors in “judgments, decree and orders.” The present section confers a general power on the court to amend defects and errors “in any proceeding in a suit” and to make “all necessary amendments” for the purpose of determining the real question at issue between the parties to the suit. An incorrect description of a property in a mortgage deed was repeated in the plaint, judgment and decree and the court allowed an amendment of the decree and connected proceedings.

Azizallah -vs- Court of Wards, 54 A 800

The powers of amendment conferred by the Code are very wide but they must be exercised in accordance with legal principles, and an amendment would not be allowed which would involve setting up of a new case.

Section-154: Saving of present right of appeal.—Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

Section-155: Amendment of certain Acts.—The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in fourth column thereof.

Section-156: Repealed by the Second Repealing and Amending Act, 1914 (XVII of 1914).—

Sections-157 and 158: Repealed by Act VIII of 1973 as amended by Act LIII of 1974.

THE FIRST SCHEDULE**Order I****PARTIES TO SUITS**

Rule-1: Who may be joined as plaintiffs.—All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

This order deals with joinder of parties and also to a certain extent with joinder of causes of action.

Harendra -vs- Purna, 55 C 164

Provisions regarding impleading of parties in proceedings under section 96 of the State Acquisition and Tenancy Act, 1950, are governed by the provisions of Order I.

Matilal Sikder -vs- Benodini Dasi, 28 DLR (SC) 5

This rule should be read with Order 1, rule 3 (joinder of defendants) and Order 2, rule 3 (joinder of causes of action)

Rule-2: Power of Court to order separate trials.—Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient

When it appears to the court that a single suit brought by several plaintiffs in respect of the same transaction may embarrass or delay the trial on account of the causes of action being distinct, the court instead of dismissing the suit may put the plaintiffs to their election, i.e. ask them to decide which of them should proceed with the suit or order separate trials.

Aldridge -vs- Barrow, 34 C, 662
Gur Pada -vs- G. 19 CLJ 316

Rule-3: Who may be joined as defendants.—All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if

separate suits were brought against such persons, any common question of law or fact would arise.

This rule deals with joinder of defendants. This rule should be read with Order 1 rule 4 (b) and rule 5. Order 2 rule 3 is subject to the provision of this rule.

Ramendra -vs- Brajendra, 45 C. III

In order to determine whether a suit satisfies the condition in this rule the factors are: (1) could the right to relief against the defendants be said to be in respect of or arising out of the same act or transaction or series of acts or transactions? and (2) would any common question of law or fact arise if separate suits were brought against the different defendants?

Krishna -vs- Muhammad, 33 CLJ 369
Anukul -vs- Province of Bengal 51 CWN 295

In a suit for ejectment of a tenant, the sub-tenants are necessary parties in order to make the decree effective.

Sk. Md. Amir Ali -vs- Abdur Rahim, 9 DLR 102

Rule-4: Court may give judgment for or against one or more of joint parties.—Judgment may be given without any amendment—

- (a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;
- (b) against such one or more of the defendants as may be found to be liable, accounting to their respective liabilities.

Rule-5: Defendant need not be interested in all the relief claimed.—It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

Every defendant need not be interested as to all the reliefs, but there must be a cause of action in which all the defendants are more or less interested.

Umabai -vs- Bhau Balwant, 34 B. 358

Rule-6: Joinder of parties liable on same contract.—The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

This rule applies to joinder of parties in suits based on contracts. Liability upon a contract may be (a) several; (b) joint and several; or (c) joint. This rule applies to joinder of parties in cases (a) and (b).

Rule-7: Where plaintiff in doubt from whom redress is to be sought.—Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

Rule-8: One person may sue or defend on behalf of all in same interest.—(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

This section lays down the conditions necessary for bringing a representative suit on behalf of persons having the same interest. The requisites for application of this rule are (a) numerous parties; (b) same interest; (c) permission of court; and (d) notice of suit.

The proper course is to obtain permission of the court before filing the suit.

Oriental Bank -vs- Govind, 9 C. 604
Giribala -vs- Chander, 11 C. 213

The permission may also be granted after filing of the suit.

Ahmed -vs- Abdul, 44 C. 258

A person appointed a representative under Order 1 rule 8 is not a party in his personal capacity. On his death, his rights do not survive to his heirs. On his death, the proper procedure is for the remaining persons to apply for directions whether the court will permit the remaining persons to continue to prosecute or defend the suit or directions should be given authorising an additional person to join the survivors, and after the court's order, the suit should proceed.

Haidarullah -vs- Gajindha Suklabaidya, 8 DLR 60

Rule-9: Misjoinder and non-joinder.—No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

This rule is a rule of procedure and has no application in cases where under the substantive law no effective decree can be passed without the absent parties.

This rule does not do away with the necessity to bring a necessary party.

Probodh vs- Neelratan, 62 C 324

Rule-10: Suit in name of wrong plaintiff.—(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may, at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

Court may strike out or add parties.—(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

Where defendant added, plaint to be amended.—(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Limitation Act, 1908, section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

Sub-rule (1) applies when a suit has been brought in the name of a wrong plaintiff or when there is doubt whether the right person has come as plaintiff. In either case, the mistake must be a *bona fide* mistake. No person can be added or substituted as a plaintiff without his consent.

Sub-rule (2) provides for the addition of the proper parties and necessary parties. The power to strike out an improper party or to add a necessary party may be exercised at any stage of the suit. The court can also transpose a defendant as plaintiff.

Bhupendra -vs- Rajeswar, 59 C 80
Debendra vs-Narendra, 24 CWN 110

The striking, addition, substitution or transposition may be made on the application of the plaintiff or defendant or the party wishing to come in or *suo motu*.

The question of *bona fide* mistake arises only in case of sub-rule (1) and not in case of sub-rule (2).

A suit against a dead man is a nullity from the beginning and as such, there can be no amendment by substitution of his legal representatives.

Veerappa -vs- Tindal, 31 M 86

A person may be added as a defendant or plaintiff under Order 1 rule 10 (2) to enable the court to completely adjudicate on all relevant questions in the suit.

Abdul Hashem -vs- Sale Ahmed, 36 DLR 303

Reasons should be assigned by the court for an order under Order 1, rule 10 (1) or rule-10 (2).

Court has discretionary power to add parties at any stage of the proceeding.

Amal Kumar Mitra -vs- Md. Mashiur Rahman, 30 DLR (SC) 244

A transferee during pendency of the suit cannot apply for being impleaded as a party under Order 1, rule 10 (2) as the transfer is hit by the doctrine of *lis pendens*.

Jamaluddin -vs-Rabeya Begum, 32 DLR 63

Form of notice to person who, the court considers should be added as co-plaintiff. No. 5, App. B=H.C. Form No. (P) 1.

Rule-11: Conduct of suit.—The Court may give the conduct of the suit to such person as it deems proper.

“Person” in this rule means a person who is a party to the suit and not a stranger.

Mirpur Ceramic Works Ltd. -vs- A.I. Khan, 20 DLR 902
Tarapada -vs-Bagala, 46 CLJ 530

Rule-12: Appearance of one of several plaintiffs or defendants for others.—(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

Rule-13: Objections as to non-joinder or misjoinder.—All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objection not taken at the earliest opportunity must be deemed to have been waived.

Paramasiva -vs- Krishna, 14 M. 489
Matilal Sikdar -vs-Benodini, 28 DLR (SC) 6
Mohor Ali -vs-Zafar Ali, 27 DLR 452
Akhtaruzzaman and another -vs- Habibullah and others, 31 DLR (AD) 88
Sultan Ahmed -vs- Md. Islam, 36 DLR 81
Abu Saber Aziz Mohammad and others -vs- Government of Bangladesh and others, 31 DLR (AD) 218

Objection will not be allowed in appeal.

Parshottam -vs- Kala, 26 B 301
Obhoy -vs- Hurychurn, 8 C. 277

Order II

FRAME OF SUIT

Rule-1: Frame of suit.—Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

The object of the rule is that all matters in dispute between the parties relating to the same transaction should be disposed of by the same suit.

Sarat -vs- Mohan, 25 C 371; 2 CWN 201

Rule-2: Suit to include the whole claim.—(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim.—(2) When a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several reliefs.—(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

ILLUSTRATION

A lets a house to B at a yearly rent of Taka 1200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

This rule means that where a plaintiff omits to sue in respect of or intentionally relinquishes any part of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Pramatha N. Das -vs- Barindra N. Das, 8 DLR, 604

This rule is founded on the principle that a person should not be vexed twice for one and the same cause.

Balmakund -vs- Sangari, 19A 379 FB
Rohini -vs- Jodu, 30 CWN 873

The rule is directed against two evils, namely, (1) splitting up of claims and (2) splitting up of remedies.

The rule applies not only to plaintiff in a suit, but also to a defendant who claims a set-off under Or. 8, r. 6.

Nawbut -vs- Mahesh, 32 C 654

An exception to this rule is to be found in Or. 34, r. 14

Indar -vs- Mewalal, 36 A 264

The rule is no bar to a suit when cause of action is different.

Payana -vs- Pana, 18 CWN 617 PC

This rule does not apply to application for execution

Radha -vs- Radha, 18 C 515

It does not apply to restitution proceedings under section 144

Ram -vs- Magan, 1935 A 135
Samasundaram -vs- Chokalingam, 40 M 780

The tests for applying this rule are—

- (1) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment;
- (2) Whether the claim in the new suit was in fact the foundation for the former suit;
- (3) If the evidence to support the two claims is different, then the causes of action are also different;
- (4) The causes of action in the two suits may be considered to be the same if in substance they are identical; and
- (5) The cause of action has no relation to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.

Md. Islam -vs- Munshi Abdur Rahman, 6 DLR 81

Suit not barred under this rule if cause of action giving rise to the second suit did not arise when the first suit was filed.

Abdul Hakim -vs- Sādullah Khan, 22 DLR (SC) 3

Rule-3: Joinder of causes of action.—(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

A plaintiff may unite several causes of action against the same defendant or defendants jointly, but in order to enable him to do so the defendants must be jointly interested i.e. all the defendants must be jointly liable in respect of each and all the causes of action which are united.

Bhagwati -vs- Bindeshri, 6 A 106

Mullik -vs- Sheo Pd. 23 C 821

Umabai -vs- Bhau, 34 B 358

Order 2, rules 6 and 7 should also be read with this rule.

Rule-4: Only certain claims to be joined for recovery of immoveable property.—No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except—

- (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;
- (b) claims for damages for breach of any 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:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

This rule is in part an exception to the general principle laid down in Or. 2, r. 3 providing for the joinder of several causes of action. It is also an exception to Or. 2, r. 2 (1) and 3, which deal with the same cause of action and prohibit splitting. Or. 2, r. 2 has to be read with this rule.

“Claims” in clauses (a), (b) and (c) of this rule mean “cause of action” used in the opening part of the rule.

Where in a suit it is sought to join claims other than those mentioned in clauses (a), (b) and (c) leave of the court is necessary. Clause (c) makes it clear that no leave is necessary when the claims joined in a suit arise out of the same cause of action.

Shiba -vs- Prayag, 59 C 1399 PC

Rule-5: Claims by or against executor, administrator or heir.—

No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

Where two claims which this rule does not allow to be joined are joined in one suit, the practice is to amend the plaint by striking out one of them and the suit may then be proceeded with.

Ashabai -vs- Haji Tyeb, 6 B 390

Rule-6: Power of Court to order separate trials.—Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

This rule applies to cases in which there is a proper joinder of causes of action but the causes of action so joined cannot conveniently be tried together.

Muthapa -vs- Muthu, 27 M. 80

A court has no power to dismiss a suit for misjoinder of causes of action, but can take action under this rule.

Gur Prasad -vs- Gur Prasad, 19 CLJ 316

Rule-7: Objections as to misjoinder.—All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Order III

RECOGNIZED AGENTS AND PLEADERS

Rule-1: Appearances, etc., may be in person, by recognized agent or by pleader.—Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

“Otherwise expressly provided,” see Or. 33, r. 3 and Or. 44, r. 1. The proviso should be read with Or. 5, r. 3 empowering the court to order the plaintiff or the defendant to appear in person. For consequence of non-appearance, see Or. 9, r.12. The proviso should be read with Or. 5, r.3.

Rule-2: Recognized agents.—The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

- (a) persons holding powers-of – attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;
- (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

For recognized agent of government, see Or. 27, rr. 2, 4.

Rule-3: Service of process on recognised agent.—(1) Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

Rule-4: Appointment of pleader.—(1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.

(2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings, in the suit are ended so far as regards the client.

(3) For the purposes of sub-rule (2) an application for review of judgment, an application under section 144 or section 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit.

(4) The High Court Division may, by general order, direct that, where a person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.

(5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf any party, unless he has filed in Court a memorandum of appearance signed by himself and stating—

- (a) the names of the parties to the suit,
- (b) the name of the party for whom he appears, and
- (c) the name of the person by whom he is authorized to appear:

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.

This rule makes a distinction between a pleader (i) appointed by a party to act in court (sub-rule (1)); (ii) engaged by a party for pleading only (sub-rule (5)); and (iii) engaged to plead by a pleader duly appointed by a party to act

(Proviso to sub-rule (5)). In case (i) the appointment must be made by a document in writing called Vakalatnama and filed in court. In case (ii) the pleader engaged for pleading only, shall file a memorandum containing the particulars required by sub-rule (5). In case (iii) no memorandum or Vakalatnama need be filed (proviso to sub-rule (5)).

See also rules 816-819 and 822, C. R. & O.

Government pleader need not file Vakalatnama

See also rule 281, C. R & O.

A party cannot be heard in person unless appointment by Vakalatnama of an advocate is determined.

See also rule 823, C.R. & O.

Rule-5: Service of process on pleader.—Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

Rule-6: Agent to accept service.—(1) Besides the recognized agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

Appointment to be in writing and to be filed in Court.—(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court.

Order IV

INSTITUTION OF SUITS

Rule-1: Suit to be commenced by plaint.—(1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

See also rule 47, C.R. & O.

Hours of presentation of plaints, See rule 10, C.R. & O.

See also rules 48-55, C.R. & O. and Para 1 Civil Suit Instructions Manual

Date of presentation is the date of institution.

Heerendra -vs- Dheerendra, 62 C 1115

Rule-2: Register of suits.—The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

See also rules 50 and 51, C.R. & O.

Order V

ISSUE AND SERVICE OF SUMMONS

ISSUE OF SUMMONS

Rule-1: Summons.—When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified:

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

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

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

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

See also rules 57, 59, 60, 61, 177, 877 and 878, C.R. & O.

Form of summons, Form No. 1-A, 2 App. B, Sch. I = H.C. Form No. (P) 5.

Rule-2: Copy or statement annexed to summons.—Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

Rule-3: Court may order defendant or plaintiff to appear in person.—(1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

For consequence of non-appearance, see Or. 9, r.12. As to appearance of pardanashin women, see section 132.

Rule-4: No party to be ordered to appear in person unless resident with certain limits.—No party shall be ordered to appear in person unless he resides—

- (a) within the local limits of the Court's ordinary original jurisdiction, or
- (b) without such limits but at a place less than fifty (or where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the court-house.

Rule-5: Summons to be either to settle issues or for final disposal.—The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, for the ascertainment whether the suit will be contested, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for final disposal of the suit.

The words, "for the ascertainment whether the suit will be contested," were inserted by rule made by the Calcutta High Court under section 122 of the Code vide Notification No. 12421-G, dated the 25th August, 1927 published in the Calcutta Gazette dated 1-9-1927 Part-I, Page 1825.

See also Para 9, Civil Suit Instructions Manual. Form of summons, see Form Nos. 1, 1A, 2, App. B. Sch. 1 = H.C. Form No. (P) 5.

Rule-6: Fixing day for appearance of defendant.—The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

As to fixing of first hearing date in S.C.C cases, see also rule 315, C. R. & O. See also Para 8 (3), Civil Suit Instructions Manual.

Rule-7: Summons to order defendant to produce documents relied on by him.—The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

Form of summons, Form Nos. 1, 1-A, 2, App. B. Sch 1 = H. C. Form No. (P) 5.

Rule-8: On issue of summons for final disposal, defendant to be directed to produce his witnesses.—Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

Form of summons, Form No. 1, App. B, Sch I = H. C. Form No. (P) 5.
See also para 6, Civil Suit Instructions Manual.

SERVICE OF SUMMONS

Rule-9: Delivery or transmission of summons for service.—(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 to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

If a summons sent by registered post is returned with the endorsement "refused" it is *prima facie* good evidence that addressee had an opportunity to accept it.

Hari -vs- Joy, 39 CWN 934

Registered letter correctly addressed and posted is presumed to have reached addressee although signature on acknowledgement not proved.

Rajani -vs- Baikuntha, 39 CWN 1041

The endorsement "refused" is presumptive evidence of due service.

Nirmala -vs- Prabhat, 52 CWN 659

Harihar -vs- Ramshashi, 23 CWN 77

See also sections 16 and 114, Illustration (f), Evidence Act and section 27, General Clauses Act, 1897.

Rule-10: Mode of service.—Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

See also rules 71-72 and note (e) of rule 84, C. R. & O.

If the person addressed refuses to receive the process or refuses to acknowledge, service shall be effected under Order 5, rule 17.

See also rules 69-89, 91-92, C. R. & O.

Rule-11: Service on several defendants.—Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

See also rule 84, C.R. & O.

For service on partners, see Or. 30, r. 3 and rule 81, C. R. & O.

Rule-12: Service to be on defendant in person when practicable or on his agent.—(1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

See also rules 69, 78 and 84 (d), C. R. & O.

When a notice is served by way of summons issued by the court the authority issuing the notice has to prove that the service had been effected in accordance with the provision of this rule.

R.P. Shah -vs- Commr. of Tax E.B., 7 DLR 587

Non-compliance with the requirements of this rule amounts to non-service.

Hazari Das -vs- Daiba Charan Mandal, 26 DLR 3

Rule-13: Service on agent by whom defendant carries on business.—(1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

A mere servant employed to carry out orders or to execute a particular commission or a factor or commission agent who is not identified with the firm for which he acts, is not such an agent.

Gokuldas -vs-Ganeshlal, 4 B 416

A notice on a corporation may be served on the Secretary or on the Director or on other Principal Officer of the corporation. The service by hanging the notice on the outer dwelling of the Manager-in-charge is no service on the corporation.

Mahaluxmi Bank Ltd. -vs- Idris Barry Co. 19 DLR (SC) 170

Rule-14: Service on agent in charge in suits for immoveable property.—Where in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

See rules 75 and 76 note, C. R. & O.

Rule-15: Where service may be on male member of defendant's family.—Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him:

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of Article 164 of Schedule I of the Limitation Act, 1908, not to have been duly served.

Explanation— A servant is not a member of the family within the meaning of this rule.

The rule was substituted for the old rule 15 by rule made by the Calcutta High Court under section 122 vide Notification No. 10428-G dated the 25th July, 1928 published in the Calcutta Gazette dated 2-8-1928 Part-I, Page-1643.

See also rules 73, 74, 76 Note and 84 Note (f), C.R. & O

Rule-16: Person served to sign acknowledgment.—Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons

See also rule 69 Note 2, C.R. & O.

Rule-17: Procedure when defendant refuses to accept service, or cannot be found.—Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgement, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

The words, "or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time," were introduced for the words, "or where the serving officer, after using all due diligence, cannot find the defendant", by the Calcutta High Court by rule made under section 122 vide Notification No. 10428-G dated the 25th July, 1928 published in the Calcutta Gazette dated the 2nd August, 1928 Part-I, Page-1643.

See also rules 73, 76 Note, 83 and 84 notes (c), (d) and (f), C.R. & O.

This rule as amended by the Calcutta High Court is applicable to Dhaka High Court. Under the provisions of the amended rule the service of a summons by affixation of a copy of the summons on the outer door can only be done, either under the first part of the rule, where the defendant refuses to sign the acknowledgement, or under the second part of the rule, where three conditions exist, viz. (1) the defendant is absent from his residence, (2) there is no likelihood of his being found thereat within a reasonable time, and (3) there must be no agent or other person upon whom service can be made.

District Board Tipperah -vs- Sarafat Ali, 3 DLR 317

Rule-18: Endorsement of time and manner of service.—The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person

(if any) identifying the person served and witnessing the delivery or tender of the summons.

See also rule 84 (2) and rule 70 note 2, C.R. & O.

A party shall not ordinarily be required to supply an identifier, see rule 70 (1), C. R. & O.

Form of declaration of process-server to accompany return, Form No. 11, App. B, Sch I. Form of return of service, H. C. Form No. (P) 1-A.

Rule-19: Examination of serving officer.—Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

This rule was substituted for the old rule by rule made by the Calcutta High Court under section 122 vide Notification No. 10428-G dated the 25th July, 1938 published in the Calcutta Gazette dated the 2nd August, 1928 Part-I, Page-1643, the only alteration thereby made is substitution of the word, “declaration”, for the word, “affidavit,” after the words, “return under that rule has not been verified by the”. It is incumbent upon the court to make a distinct declaration of due service.

See also rule 83, C. R. & O.

Court must in terms declare whether the summons has been duly served or order fresh service.

Santosh Kumar Chakrabarty -vs- M.A. Motaleb Hossain, 36 DLR (AD) 248

Compliance with the provisions of rule 19 is mandatory. Non-compliance legally amounts to non-service of summons.

Rezia Khatun -vs- Delwar Hussain, 36 DLR 260

Rule-19A: Declaration of serving officer.—A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons.

This rule was inserted by rule made by the Calcutta High Court under section 122 vide notification No. 10428-G dated the 25th July, 1928 published in the Calcutta Gazette dated 2-8-1928 Part-I, Page-1648. Although the rule was in existence in the statute book, it was again sought to be included by Ordinance XLVIII of 1983.

See also rule 82, C.R & O.

Rule-19B: Simultaneous issue of summons for service by post in addition to personal service.—(1) The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive), also direct the summons to be served by registered post with acknowledgement due addressed to the defendant or his agent empowered to accept the service at the place where the defendant or his agent actually and voluntarily resides, carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post where, in the circumstances of the case, the Court considers it unnecessary.

(2) When an acknowledgement purporting to be signed by the defendant or his agent is received by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons when tendered 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 with acknowledgement due, the declaration referred to in this sub-rule may 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 the summons.

This rule was inserted by Ordinance XLVIII of 1983.

Rule-20: Substituted service.—(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

Effect of substituted service.—(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Where service substituted, time for appearance to be fixed.—(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

Where personal service or service on a male member of the family is not possible, leave of the court should be taken to effect substituted service.

District Board Tippera -vs- Sarafat Ali, 3 DLR 317

See also rule 76. C. R. & O.

Rule-21: Service of summons where defendant resides within jurisdiction of another Court.—A summons may be sent by the Court by which it is issued, either by one of its officers or by post to any Court (not being the High Court Division) having jurisdiction in the place where the defendant resides.

See also rules 68, 85 and 86-90, C. R. & O.

Form of order for transmission of summons for service in the jurisdiction of another court, Form No. 7, App. B, Sch. I = H. C. Form No. (M) 17.

Rule-22: Omitted by A. O. 1949.

Rule-23: Duty of Court to which summons is sent.—The Court to which a summons is sent under rule 21 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.

See also rules 85 and 86-91, C.R. & O.

The court issuing the summons must determine for itself whether service was sufficient or not and the return made by the serving court does not carry any presumption either way.

Ramanath -vs- Guggodo, 22 C 889

Form to accompany returns of summons to another court, Form No. 10, App. B, Sch. I = H. C. Form No. (M) 18.

Rule-24: Service on defendant in prison.—When the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

Form of order for transmission of summons, Form No. 8, App. B, Sch. I.

Rule-25: Service where defendant resides out of Bangladesh and has no agent.—Where the defendant resides out of Bangladesh and has no agent in Bangladesh empowered to accept service, the summons shall,

except in the cases mentioned in rule 26 A, be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

See also rules 109-112, C. R. & O.

Rule-26: Service in foreign territory through Political Agent or Court.—Where—

- (a) in the exercise of any foreign or extra territorial jurisdiction vested in the Government, a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or
- (b) the Government has, by notification in the official Gazette, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued under this Code by a Court of Bangladesh shall be deemed to be valid service,

the summons may be sent to such Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Court returns the summons with an endorsement signed by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

Rule-26A: Service on civil public officer or on servant of railway company or local authority in India.—Where the defendant is a servant (not belonging to the military, naval or air forces) of any Government in India, or a servant of a railway company or local authority in India, the summons together with a copy of it to be retained by the defendant shall be sent, with a request that it may be served on the defendant,—

- (a) in the case of a defendant serving in connection with the affairs of the Government of India or a servant of a Railway in India, to the Secretary to the Government of India in the Ministry of Home Affairs, and
- (b) in the case of a defendant serving in connection with the affairs of any other Government in India, or in the case of a servant of a local authority in India, to the Home Secretary to that Government or, as the case may be, to the Home Secretary to the Government in whose territories the local authority has its jurisdiction.

Rule-27: Service on civil public officer or servant of the railway company or local authority.—Where the defendant is a public officer (not belonging to the armed forces of Bangladesh) or is the servant of the railway or local authority, the Court may, if it appears to it that the summons may be conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant.

Form of the summons, Form No. 9, App. B, Sch. I= H. C. Form No. (M) 19.

Rule-28: Service on soldiers, sailors or airmen.—Where the defendant is a soldier, sailor or airman, the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant.

Form of the summons. Form No. 9, App. B, Sch I= H. C. Form No. (M) 19.

Rule-29: Duty of person to whom summons is delivered or sent for service.—(1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgement of the defendant, and such signature shall be deemed to be evidence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service:

Rule-30: Substitution of letter for summons.—(1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

Order VI

PLEADINGS GENERALLY

Rule-1: Pleading.—“Pleading” shall mean plaint or written statement.

Rule-2: Pleading to state material facts and not evidence.—Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.

See also rules, 17, 20, 21 and 23, C.R & ☉ and pages-38-41, Civil Suit Instructions Manual.

Names of parties should bear consecutive numbers and a separate line should be allotted to the name and description of each person. See rule 21, C. R & ☉.

Pleading or petition shall be written legibly and Bengali dates should be followed by corresponding English dates. See rule 20, C. R. & O.

Pleadings and petitions shall be signed by the person writing or typing stating the capacity in which he writes or types and if he is the registered clerk of an advocate, his registered number. See rule 17, C. R. & O.

For model plaints, see Forms Nos. (1),(2),(3), plaints Nos. 1-49, App. A, Sch. I.

Rule-3: Forms of pleading.—The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.

Rule-4: Particulars to be given where necessary.—In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

If there is disobedience to the order of the court directing giving particulars, in the case of the plaintiff his action should be stayed and in the case of the defendant his defence should be struck out.

Particulars of statements, in a petition or affidavit can also be directed to be furnished.

Sitaram -vs- Hariram, 40 CWN 913

Rule-5: Further and better statement or particulars.—A further or better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

See also paras 9, 10 and 11, Civil Suit Instructions Manual.
For Form of particulars, see Form No. 16, App. A, Sch. I.

Rule-6: Condition precedent.—Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

For examples, see forms No. 13, para 2; No. 20, para 2; No. 37, para 2; No. 47, para 3; No. 48, para 5; App. A, Sch. I.

Rule-7: Departure.—No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

Rule-8: Denial of contract.—Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

Rule-9: Effect of document to be stated.—Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

Rule-10: Malice, knowledge, etc.—Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

Rule-11: Notice.—Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

See also Or. 19, r.23.

In a suit under section 80 the precise terms of the notice are to be stated.

Rule-12: Implied contract, or relation.—Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

Rule-13: Presumptions of law.—Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (e.g., consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim).

Cf. Sections 79-90 and section 114, Evidence Act.

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

Omission to sign or defect in signature may be cured at any stage by amendment.

Syed Mohiuddin -vs- Pirthi, 19 CWN 1159

Sasi -vs- Rashik, 17 CWN 989

Ramgopal -vs- Dhirendra, 54C 380

Unintentional failure to sign the pleadings can be rectified by permitting the person concerned to sign subsequently and this rule is equally applicable to the stage of an appeal.

Messes Nabi Baksh -vs- Secretary, Ministry of Industries, Govt. of Pakistan, Karachi, 22 DLR (WP) 99.

Rule-14A: Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in rule 14 of this Order, of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purposes of execution, and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat.

This rule was inserted by rule made by the Calcutta High Court under section 122 vide Notification No. 10428-G dated the 25th July, 1928 published in the Calcutta Gazette dated 2-8-1928 Part-I, Page-1643.

See also rule 18, C.R. & O.

For Form of registered address, see H. C. Form No. (J) 17.

Rule-15: Verification of pleadings.—(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

Omission to verify or defective verification can be remedied at a later stage of the suit and is a mere irregularity within section 99

Ramgopal -vs- Dhirendra, 54 C 380

All petitions requiring judicial investigation or determination should be verified.

See also rule 19, C.R. & O.

Failure to affix the official seal on the pleading is a mere irregularity.

Md. Moslemul Haque -vs- The Comomissioner of Income Tax and Sales Tax, Pakistan, 14 DLR 66

Rule-16: Striking out pleadings.—The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

The rule deals with amendments which a party desires to be made in his opponent's, pleadings.

See also paras 14 and 15, Civil Suit Instructions Manual and rule 17 (3), C.R & O.

Rule-17: Amendment of pleadings.—The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

This rule deals with amendments which a party desires to be made in his own pleadings. This rule allows amendment at any stage and has enlarged the court's power to amend considerably. But, amendment should be refused where (1) it is not necessary to decide the real questions in controversy;

Nagendrabala -vs- Secretary of State, 14 CLJ 83

(2) It would take away the defendant's legal right which has accrued to him by lapse of time;

Charan -vs- Amir, 48 C 110 P.C

Niranka -vs- Atul, 28 CWN 1009

(3) It would introduce a totally different, new and inconsistent case or its effect would be to substitute one distinct cause of action for another or change the character of the suit;

Upendra -vs- Janaki, 45 C 305

Padma -vs- Giris, 46 C 168;

Ma Shwe Mya -vs- Mg. Po. 48 C 832 PC

Ardeshir -vs- Flora Sassoon, 32 CWN 953 PC

Nurul Islam -vs- Abdur Rashid, 32 DLR 259

(4) The application is not made in good faith.

Krishna -vs- Pachiappa, 1924 M 883

Bhukhi -vs- Ram Khelawan, 17 CWN 311

Manilal -vs- Harendra, 12 CLJ 556

The ultimate test is: Can the amendment be allowed without injustice to the other side or can it not?

Injury to the opposite party caused by an amendment can be generally compensated for by costs but there are amendments which cannot be compensated in cost, such as, amendment which deprives a party of the defence of limitation.

Kisan -vs- Rachappa, 33 B 644

Amendment of plaint should be attended with opportunity to defendant to amend his written statement and vice versa.

Amendment may be granted in appeal but the power should be used in exceptional cases.

Laliteshwar -vs- Rameshwar, 36 C 481

Padmalochan -vs- Girish, 46 C 168

Gajadhar -vs- Ambika, 47 A 459 PC

Chartered Bank -vs- Imperial Bank, 57 C 398

Md. Fakirullah Mia -vs- Bimalendra N. Maitra, 12 DLR 704

Where amendment of plaint is allowed it relates back to the date of institution of the suit.

Nripendra -vs- Hemanta, 63 IC 701

Effect of addition of party by amendment, see section 22, Limitation Act, 1908.

Amendment can be allowed if it does not change the nature or character of the case.

Zamiruddin Ahmed -vs- Government of Bangladesh, 34 DLR 34

Amendment of the plaint can be allowed when it does not alter the averment of the plaint.

Sultan Ahmed -vs- Purna Chandra, 28 DLR 130

Rule-18: Failure to amend after order.—If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

Time may be extended under section 148.

Order VII

PLAINT

Rule-1: Particulars to be contained in plaint.—The plaint shall contain the following particulars:—

- (a) the name of the Court in which the suit is brought;
- (b) the name, description and place of residence of the plaintiff;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
- (e) the facts constituting the cause of action and when it arose;
- (f) the facts showing that the Court has jurisdiction;
- (g) the relief which the plaintiff claims;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
- (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

The word, “shall”, in this rule shows that to give the particulars as per this rule is imperative.

Sheo Prasad -vs- Lalit, 18 A 403

See also rule 25, C.R & O and para-4, Civil Suit Instructions Manual.
Forms of plaints, App. A, (1), (2), (3) Nos. 1 to 49, Sch. I.

Every plaint should show clearly how the valuation has been calculated. See rule 25, C.R. & O. Valuation and under valuation, see rule 25, C.R. & O and para 4, Civil Suit Instructions Manual. See also section 8A, Court Fees Act.

Rule-2: In money suits.—Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed:

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

Decree for mesne profits, Or. 20, r. 12.

Decree in suit for account, Or. 20, r. 16.

Rule-3: Where the subject-matter of the suit is immoveable property.—Where the subject-matter of the suit is immoveable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers, and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures.

The words, “and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures,” were inserted by rule made by the Calcutta High Court under section 122 vide Rule No-11 of 1918 published in the Calcutta Gazette dated 17-4-1918 Part-I, Page-653.

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

A suit by an executor or administrator as such is a suit in his representative capacity.

See also sections 212-214, Succession Act

The executor or legatee may sue without the probate but no decree can be passed until probate is obtained.

Chandra -vs- Prasanna, 38 C 327 PC

Rule-5: Defendant's interest and liability to be shown.—The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Rule-6: Ground of exemption from limitation law.—Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

See sections 12-20, Limitation Act, 1908 for grounds of exemption.

Where the court is closed when the period of limitation expires, the suit may be filed on the day the court reopens.

See section 4, Limitation Act, 1908.

If the suit appears to be barred by limitation from the statement in the plaint, it shall be rejected under Or. 7, r.11 (d).

Rule-7: Relief to be specifically stated.—Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

It is not necessary to ask for general relief but if a plaintiff omits, except with the leave of the court, to sue for all the reliefs arising out of the same cause of action he will not afterwards be allowed to sue for any relief so omitted. See Or. 2, r. 2(3).

Rule-8: Relief founded on separate grounds.—Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

Rule-9: Procedure on admitting claim.—(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(1A) The plaintiff shall present with his plaint: –

- (i) as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements;
 - (ii) draft forms of summons and fees for the service thereof.
- (2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.
- (3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

- (4) The chief ministerial officer of the Court shall sign such list and copies or statement if, on examination, he finds them to be correct.

Sub-rule (I-A) was substituted for the old sub-rule (I) by dividing it into two and omitting the words, "and if the plaint is admitted", which occurred before the words, "The plaintiff shall present with his plaint", by the Calcutta High Court by rule made under section 122 vide Notification No. 10428-G dated the 25th July, 1928 published in the Calcutta Gazette dated 2-8-1928 Part-I, Page-1643. By this amendment clause (ii) to sub-rule (IA) was inserted and this clause (ii) was again substituted by Notification No. 3516-G dated the 3rd February, 1933 published in the Calcutta Gazette dated 9-2-1933 Part-I, Page-245.

Production of documentary evidence and marking of exhibits, see rules 393-405, C. R. & O. See also para 26, Civil Suit Instructions Manual. Examination of plaint by the chief ministerial officer. See rules 54-55, C. R. & O.

The requirements of the rule as it stands now are:- (1) Copies of plaint for service on each of the defendants, (2) draft forms of summons duly filled in, and (3) process fee for service of summons must be presented with the plaint by the plaintiff.

Form of list of document, H. C. Form No. (J) 22. Form as to description of parties in particular cases, Form (2), App. A, Sch. I.

Rule-10: Return of plaint.—(1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Procedure on returning plant.—(2) On returning a plaint the Judge shall endorse thereon, the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

This rule provides for return of plaint for want of jurisdiction, territorial, pecuniary or other causes.

When a plaint is returned before any action is taken on it, for filing in the proper court, all the papers filed with it should also be returned to the person who filed it. See rule 406, C. R. & O.

Rule-11: Rejection of plaint.—The plaint shall be rejected in the following cases:-

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law.
- (e) Where any of the provisions of rule 9 (1A) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so.

Clause (e) was added by rule made by the Calcutta High Court under section 122 vide Notification No. 10428-G dated the 25th July, 1928, published in the Calcutta Gazette dated 2-8-1928 Part-I, Page-1643.

It is the duty of the court under this rule to examine a plaint before issuing summons and to ascertain whether any cause of action has been pleaded and whether any relief has been claimed against the defendants and to determine whether the plaint should be rejected or returned for amendment.

Sadhu -vs- Dhirendra, 55C 590

✶ The provisions of the rule are mandatory.

Midnapore Zemindary Co. -vs- Secretary of State 44C 352

Court is bound to give time at least once to make up defects in suits falling under clauses (b), (c) and (e).

Radhakant -vs- Debendra, 49C 880

See also para 4, Civil Suit Instructions Manual and rule 25, C. R. & O.

Rule-12: Procedure on rejecting plaint.—Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

Rule 13. Where rejection of plaint does not preclude presentation of fresh plaint.—The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

DOCUMENTS RELIED ON IN PLAINT

Rule-14: Production of document along with the plaint.—(1) Where a plaintiff relies upon documents in his possession or power as evidence in support of his claims, he shall produce them in Court when the plaint is presented and shall at the same time deliver the documents to be filed with the plaint.

(2) The Court may return such documents on their being substituted by photostat or true copies attested by the plaintiff's pleader on the undertaking that they will be produced at the time of hearing or whenever asked for by the Court.

(3) Where the plaintiff relies on any other documents not in his possession or power in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint and state in whose possession or power they are.

Rule 14 was substituted by Ordinance XLVIII of 1983

Rule-15: Statement in case of documents not in plaintiff's possession or power.—Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

Rule-16: Suits on lost negotiable instruments.—Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

Rule-17: Production of shop-book.—(1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

Original entry to be marked and returned:—(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.

See section 4, Bankers' Books Evidence Act, 1891

See also rule 394, C. R. & O.

Rule-18: Inadmissibility of document not produced when plaintiff filed.—(1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit:

Provided that the Court shall not grant such leave save in exceptional circumstances.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendants or handed to a witness merely to refresh his memory.

The proviso was added by Ordinance XLVIII of 1983.

See also section 159, Evidence Act.

Nothing

Order VIII

WRITTEN STATEMENT AND SET-OFF

Rule-1: Written statement.—The defendant shall, at or before the first hearing or within such time not exceeding two months as the Court may permit, save as provided in the proviso to sub-section (2) of section 80, present a written statement of his defence.

(2) Where the defendant relies upon documents in his possession or power as evidence in support of his defence or claim of set-off, he shall produce them in Court when the written statement is presented and shall at the same time deliver the documents to be filed with the written statement.

(3) The Court may return such documents on their being substituted by photostat or true copies attested by the defendant's pleader on the undertaking that they will be produced at the time of hearing or whenever asked for by the Court.

(4) Where the defendant relies on any other documents not in his possession or power in support of his defence or claim of set-off, he shall enter such documents in a list to be added or annexed to the written statement and state in whose possession or power they are.

(5) A document which ought to be produced in Court by the defendant when the written statement is presented, or to be entered in the list to be added or annexed to the written statement, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit:

Provided that the Court shall not grant such leave save in exceptional circumstances.

(6) Nothing in sub-rule (5) applies to documents produced for cross-examination of the plaintiff's witnesses, or in answer to any case set up by the plaintiff or handed to a witness merely to refresh his memory.

Rule 1 was substituted by Ordinance XLVIII of 1983

See Pages 38-41, Civil Suit Instructions Manual.

See also Paras 10-11, Civil Suit Instructions Manual.

Copies of written statement must be served on the lawyer of each set of parties whose interests are not joint before filing the written statement.

See also rule 24, C.R. & O.

Forms of written statements, Forms (4) Written statements No. 1-15, App. A, Sch. I.

Rule-2: New facts must be specifically pleaded.—The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

Rule-3: Denial to be specific.—It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

Facts not specifically denied will be taken to be admitted. See Or. 8, r. 5.

Rule-4: Evasive denial.—Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

Rule-5: Specific denial.—Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

The rule means that where the material averment is passed over and not specifically denied, it is taken to be admitted.

The rule also says that an allegation of fact must be denied either specifically or by necessary implication and if a plea is not taken in that manner then the allegation of fact should be taken to be admitted.

Syed Ali Sardar -vs- Shahabuddin Ahmed Chowdhury 18 DLR 198
Cf. Section 58, proviso, Evidence Act.

Rule-6: Particulars of set-off to be given in written statement.—

(1) Where in a suit for 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 limits of the jurisdiction of the Court, and both parties fill the same character as they fill 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 particulars of the debt sought to be set-off.

Effect of set-off.—(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

ILLUSTRATIONS

(a) A bequeaths Taka 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Taka 1,000 as surety for D; then D sues C for the legacy. C cannot set-off the debt of Taka 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Taka 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

(d) A sues B on a bill of exchange for Tk. 500/-. B holds a judgment against A for Tk. 1000/-. The two claims being both definite pecuniary demands may be set-off.

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

(f) A and B sue C for Tk. 1,000/-. C cannot set-off a debt due to him by A alone.

(g) A sues B and C for Tk. 1,000/-. B cannot set-off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Tk. 1,000/-. B dies, leaving C surviving. A sues C for a debt of Tk. 1,500/- due in his separate character. C may set-off the debt of Tk. 1,000.

The sum to be set-off cannot be unascertained, see illustration (c).

The sum to be set-off must be ascertained, see illustrations (d) and (e).

But, the rule is not exhaustive of all cross-claims by way of set-off and the defendant may be allowed to claim an equitable set-off for an unascertained sum in exercise of his general right under the provisions of the Code.

Nandram -vs- Ram Prasad, 27 A 145;

Ramdhari -vs- Parmanand, 19 CWN 1183

Kishorechand -vs- Madhowji, 4 B 407

Equitable set-off can be claimed also in respect of ascertained amount.

Hari -vs- Mahomed, 40 CWN 751

“Legally recoverable” means that the claim to set-off must not be barred by limitation or otherwise legally barred.

Narendra -vs- Tarubal, 25 CWN 800

See Or. 20 r. 19 (3) which recognises equitable set-off.

Court fee payable on the written statement pleading set-off is the same as in a plaint.

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

Rule-8: New ground of defence.—Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

Rule-9: Subsequent pleadings.—No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

Minor defendant attaining majority can only file additional written statement under this rule if court permits.

Venkataswami -vs- Uppilipalayam, 1935 M 117

Rule-10: Procedure when party fails to present written statement called for by Court.—Where any party from whom a written statement is so required fails to present the same within the time permitted or fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

See as para 10, Civil Suit Instructions Manual.

The penalty provided in this rule applies only to a written statement and set-off. Where defendant pleads set-off and the court directs the plaintiff to put in a counter written statement and plaintiff fails to comply with the order, this rule does not apply.

Chimawa -vs- Gangawa, 1929 B 413

Order IX

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE

Rule-1: Parties to appear on day fixed in summons for defendant to appear and answer.—On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

Rule-2: Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.—Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed:

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

Rule-3: Where neither party appears, suit to be dismissed.—Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

The dismissal under this rule not being a decree is not appealable and the remedy lies by an application under Or. 9, r. 4 or a fresh suit. There is also no review.

Kailash -vs- Nawadwip, 2 CWN 318

Rule-4: Plaintiff may bring fresh suit or Court may restore suit to file.—Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

No notice to defendant is necessary in an application under this rule but if the order of dismissal is set aside and the suit is restored, the defendant is entitled to notice of date of hearing of the suit

Moolchand -vs- Ganga, 55 A 684

If an application under Or. 9, rule 4 is dismissed, another application lies under the rule if it is within the period of limitation

Bipin -vs- Abdul, 21 CWN 30

Period of limitation is 30 days from the day of dismissal (Article 163 of the Limitation Act.).

Rule-5: Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons.—(1)

Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

- (a) he has failed after using his best endeavors to discover the residence of the defendant who has not been served, or
- (b) such defendant is avoiding service of process, or
- (c) there is any other sufficient cause for extending the time.

in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

The rule does not apply to appeal

Babanna -vs- Parava, 50 B. 815

Rule-6: Procedure when only plaintiff appears.—Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

When summons duly served. (a) If it is proved that the summons was duly served, the Court may make an order that the Court may proceed

ex-parte,

When summons not duly served. (b) If it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

When summons served, but not in due time. (c) If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the ~~plaintiff's~~ default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

The court should not in ex-parte cases act upon anything short of personal service until it is satisfied that personal service could not reasonably be effected.

See rule 69, C. R. & O.

Form of notice under r. 6 (1) (c). Form No. 12, App.B. Sch. I=H.C. Form No. (P) 8.

Rule-7: Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.—Where the Court has adjourned the hearing of the suit *ex-parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

Rule-8: Procedure where defendant only appears.—Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

In this rule the court has no option but to dismiss the suit if the defendant appears and the plaintiff does not appear unless the defendant admits the claim or part of it. The day fixed for settlement of issue is a date fixed for hearing within this rule.

Firm of Harchand -vs- Ram 48 IC 192
Kesri -vs- National Jute Mills Co. 40 C 119
Parbati -vs- Tulsi, 18 CWN 604

When once there has been a preliminary decree the suit can not be dismissed for default or failure to appear to take step for making the decree final. In such case, disciplinary action may be taken by adjourning the proceeding sine die.

Lakshminarain -vs- Balmukund, 29 CWN 391 PC

Rule-9: Decree against plaintiff by default bars fresh suit.—(1)

Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) The plaintiff shall, for service on the opposite parties, present along with his application under this rule either—

- (i) as many copies thereof on plain paper as there are opposite parties, or
- (ii) if the Court by reason of the length of the application or the number of opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements.

(3) No order shall be made under the rule unless notice of the application with a copy thereof (or concise statement as the case may be) has been served on the opposite party.

Sub-rule 2 and the words, “with a copy thereof” and, “(or concise statement as the case may be)” in sub-rule (3) were inserted by rule made by the Calcutta High Court under section 122 Vide Notification No. 3516 dated the 3rd February, 1933, published in the Calcutta Gazette dated 9-2-1933 Part-I, P. 245.

The filing of copies of the application along with the application is a mandatory rule. An order of dismissal under Order 9, rule-8 not being a decree is not appealable. The remedy is an application under this rule. Limitation for an application under this rule is 30 days from date of dismissal (Article 163, Limitation Act)

“Appearance” may be by a party, or by a pleader, or by a party in person along with his pleader.

Satis -vs- Aparaj, 34 C 403 FB
Soonder -vs- Goorprasad, 23 B 414
Lalta -vs- Nand, 22 A. 66 FB
Manickam -vs- Mahudam, 47 M 819 FB

“Appearance” has a well-recognized meaning and means appearance in person or through pleader for conducting the case. When a pleader asks for an adjournment, which is refused but has no further instructions to represent the client, there is no appearance within the Code though the party was present in person in court.

Mahant -vs- Rajkumar, 1 P 188
Sikandar -vs- Kushal, 59 C 756
Sardarmal -vs- Jaharmal, 59 C 906

✓ If an application under this rule is itself dismissed for default, another application lies if filed within the period of limitation.

Bepin -vs- Abdul, 21 CWN 30

✓ In proper cases section 151 may be invoked for the restoration of such application.

Sarat -vs- Biseswar, 54 C 405
Sourendra -vs- Jatindra, 32 CWN 811

Rule-10: Procedure in case of non-attendance of one or more of several plaintiffs.—Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

Rule-11: Procedure in case of non-attendance of one or more of several defendants.—Where there are more defendants than one, and one or more of them appear, and the other do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

Rule-12: Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.—Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

SETTING ASIDE DECREES EX PARTE.

Rule-13: Setting aside decree *ex-parte* against defendant.—(1) In any case in which a decree is passed *ex-parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

(2) The defendant shall, for service on the opposite party, present along with his application under this rule either-

- (i) as many copies thereof on plain paper as there are opposite parties, or,
- (ii) if the Court by reason of the length of the application or the number of opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements.

(3) Provisions of section 5 of the Limitation Act, 1908, shall apply to the application under rule 13 (1) of the Order.

Sub-rule (2) was added by rule made by the Calcutta High Court under section 122 of the Code Vide Notification No. 3516-G dated the 3rd February 1933, published in the Calcutta Gazette dated the 9th February, 1933, Part-1, Page-245.

Sub-rule (3) numbered as sub-rule "(2)" was added by Orders and Notification by the High Court of Judicature, Dhaka, being Notification No. 2351-G dated the 10th May, 1967 published in the Dhaka Gazette dated 18-5-1967. Overlooking that there was already sub-rule (2) in rule 13, this sub-rule was also numbered as sub-rule "(2)". This is a simple legislative arithmetical error.

Knowledge about institution of the suit does not dispense with the requirement of service of summons. If summons is not served on the

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defendant the decree is liable to be set aside, even if the defendant knew about the institution of the suit provided the application is within time.

Kasim -vs- Johumull, 43 C 447

The remedies open in case of an ex parte decree are:- (i) an application under this rule; (ii) an application for review under Order 47, rule 1.

Lala Chet -vs- Ram Pal, 16 CWN 643;

Bibi Mutto -vs- Ilahi, 6 A 65

and (iii) an appeal under section 96. The remedies are concurrent.

Rajnarain -vs- Ananga, 26 C 598

Where there is an appeal there is nothing in the Code to confine the investigation only to the cause of non-appearance.

Bamacharan vs- Gadadhar, 56 C 21

No ex parte decree can be set aside under this rule when the defendant fails to establish either of the two grounds on which such a decree can be set aside.

Alfen Mia and others -vs- Government of the Peoples Republic of Bangladesh. 45 DLR (AD) 112

The court has no power to set aside an *ex-parte* decree under section 151 if no case can be made out under Or. 9, r.13.

Dutt -vs- Shamsuddin, 34 CWN 419

Harihar -vs- Bejoy, 34 CWN 222

Neelaveni -vs- Narayana, 43 M 94 FB

Rule-14: No decree to be set aside without notice to opposite party.—No decree shall be set aside on any such application as aforesaid unless notice together with a copy thereof (or concise statement as the case may be) have been served on the opposite party.

The words, "together with a copy thereof" (or concise statement as the case may be) have been substituted for the word, "there of" by rule made by the Calcutta High Court under section 122 of the Code vide Notification No. 3516-G, dated the 3rd February 1933 published in the Calcutta Gazette dated the 9th February, 1933, Part-I, Page-245.

Rule-15: Where the dismissal of a suit is set aside under rule 4 or rule 9, or a decree is set aside under rule 13, the suit shall, on restoration, proceed from the stage where it was immediately before the making of the order of dismissal or passing of the decree.

Rule 15 was added by Ordinance No. XLVIII of 1983

Order X

EXAMINATION OF PARTIES BY THE COURT

Rule-1: Ascertainment whether allegations in pleadings are admitted or denied.—At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

See para 16, Civil Suit Instructions Manual.

Rule-2: Oral examination of party or companion of party:—At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

See para -16, Civil Suit Instructions Manual.

Rule-3: Substance of examination to be written.—The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Rule-4: Consequence of refusal or inability of pleader to answer.—(1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

An order dismissing a suit under this rule operates as a decree and bars another suit on the same cause of action.

Punnam -vs- Mollison, - 13 Bombay Law Report, 658