The plaintiff claims Rs.2,000 as general damages for pain and bodily suffering, and Rs.8,000 as special damages, total Rs.10,000 with interest from the date of suit to that of payment.

(*Minor Veeran* v. *Krishnamoorthy*, A 1966 Ker 172). The tort must have been committed by the defendant himself. A tort committed by defendant's guardian cannot be the basis of a suit against the defendant (*Sohanlal* v. *Sree Chand*, A 1941 Cal 247, 194 IC 119). But in certain cases suit will lie against a person for tort committed by his deceased predecessor (for such cases see notes under "Legal Representatives" below). In certain cases, master and principal are liable for torts committed by servant and agent respectively, but government is not liable for the acts of its servants done in the exercise of "Sovereign Powers" (*Kadar* v. *Secretary of State*, A 1931 Oudh 29, 128 IC 77, 7, OWN 1209; *Shanti Prasad Gupta* v. *State of U.P.*, A 1973 All 28). This point has been discussed at length in *Ram Gulam* v. *The Govt. of India U.P.*. 1950 ALJ 46. It is liable if the act is not done in exercise of sovereign powers e.g. commercial ventures (*State of Rajasthan* v. *Mst. Vidyawati*, A 1962 SC 933; *Union of India* v. *Jasso*, A 1962 Punj, 315; *Union of India* v. *Abdul Rahman*, A 1981 J & K 60).

(a) There are two kinds of dangerous animals; (1) those which are presumed to be dangerous, e.g., lions, bears, monkey, elephant, etc., though individuals may be tamed; and (2) those which are presumed to be harmless though individuals may be ferocious and dangerous, e.g., dog, cow, horse, etc., The owner is liable for any mischief done by the former class of animals without proof of knowledge of their ferocious nature, and, in a suit for damages for injury caused by such an animal, it is not necessary to plead defendant's knowledge of its ferocity (*Vedapurti* v. *M. Koppan Nair*, 35 M 708, 21 MLJ 434, 10 IC 108). **It is sufficient to allege that the animal belonged to the defendant and that it caused injury to the plaintiff. But if injury is caused by any animal of the latter class, it is necessary to allege in the plaint (and to prove) that the particular animal was ferocious, and was known by the defendant to be ferocious.** Negligence of the defendant need not be alleged as that is not necessary to be proved to make the defendant liable (*Ganda Singh* v. *Chunnilal*, 29 IC 862, 19 CWN 916). Facts showing defendant's knowledge of the ferocious character of the animal are mere evidence of that knowledge and should not be alleged in the plaint. Chasing by dogs of sheep or cattle which causes real and present danger or serious harm to the animals chased constitutes an "attack" which entitles the owner to take effective means of protection. The right of protection extends even to the extent of shooting the dogs if shooting is necessary for protection of animals against attack or renewed attack (*Cronwell* v. *Sirl*, 1947 All ER 730).

Limitation : Three years under Article 113.

Defence : The defendant may plead that the animal was not ferocious and was perfectly tame, or, in the case of the second class of animals, that he did not know that it was ferocious or vicious. He may plead that the plaintiff had himself

No. 166—Suit for Damages done to Plaintiff's Crop by Defendant's Cattle *(b)*

1. On November 4, 1995, four bullocks belonging to the defendants strayed on to the plaintiff's field No.512 in village Ram Nagar and caused damage to the sugarcane crop growing on the said field and belonging to the plaintiff.

Particulars of Damages

The whole crop was destroyed by being partly grazed and partly trampled by the bullocks. Loss of value of crop at Rs.15,000 per hectare on 2 hectares Rs.30,000.

2. The plaintiff claim Rs.30,000 with interest from the date of suit to that of payment.

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acted in such a manner as to bring the injury upon himself, e.g., that he himself irritated the dog or teased it. He cannot plead that he had lost control of the animal, as his liability continues until some other person has assumed dominion of the animal (*Krishna Rao* v. *Maroti*, A 1936 Nag 272).

(*b*) The owner of an animal is liable for damage caused to another's crop by the animal straying upon the latter's field and it is immaterial whether the animal escapes by negligence of the defendant or in spite of his diligent care (*Holgate* v. *Bleazard*, 1916 WN 431). But he is not liable to an adjoining occupier for their straying where the straying was due to defect in fencing which was the adjoining occupier's duty to maintain, neither is he liable for straying of his cattle on land adjoining highway, when being driven on the highway, unless negligence of the owner is proved (*Madho* v. *Akaji*, 17 IC 899, 8 NLR 190). Therefore in such a suit **all that has to be alleged is the defendant's ownership of the cattle, the straying of the cattle on the plaintiff's land and the damage caused. If field is on a highway, defendant's negligence in allowing the cattle to stray on the field must also be alleged, with particulars.** The damage claimed may be not only the actual damage caused, but compensation for loss of future profits may also be claimed (*Sreebyre Roy* v. *James Hill*, 9 WR 156). In a case of damage done by cattle belonging to several persons, where there was no evidence of conspiracy or to show the amount of damage done by the cattle of each separately, the court awarded nominal damages against each owner (*Har Krishna Lal* v. *Haji Qurban Ali*, A 1942 Oudh 73). The question as to what duty, if any, is cast upon the owner of a land with regard to trespassing animals was considered in *Herbert Richard Fanington* v. *D. Manisami*, A 1950 Mad 58.

The only exceptions to the general law that a person is under no duty towards a trespasser are (1) that he cannot do something which is dangerous to a trespasser if he knows or has reason to believe that the trespasser is already or may be, on his property, and (2) that he cannot do anything to lure on his land and kill animals who

No. 167—Like Suit, when Plaintiff's Field is on a Highway

1. The plaintiff is the Bhumidhar of the field No.512 in village Ram Nagar and had grown wheat and gram crops in the *Rabi* of 1390 *fasli*.

2. The said field is on a highway which goes from Jansath to Mirapur.

3. On February 14, 1995, four bullocks belonging to the defendant, who were being driven along the said highway, strayed through the negligence of the defendant's servant who was incharge of them, on to the plaintiff's said fields and caused damage to the plaintiff's crops.

Particulars of Negligence

The defendant left the said bullocks in the charge of his servant Chhiddu, a lad of 8 or 9. When the bullocks were passing in front of the plaintiff's field, the said Chhiddu left them and went to a neighbouring grove of *berries* where several other boys of the village were plucking *berries* and began to play with those boys and to pluck *berries* without caring to attend to the bullocks, who therefore strayed on to the plaintiff's field.

Particulars of Damage

The plaintiff's crops were partly grazed and partly trampled by the bullocks and the plaintiff lost the value of the whole crop of 2 hectares which was worth Rs.30,000, at Rs.15,000 per hectare.

The plaintiff claims Rs.30,000 with interest from the date of suit to that of payment.

ASSAULT AND BATTERY *(c)*

No. 168—Suit for Assault and Battery

1. On November 5, 1995, the defendant assaulted and beat the plaintiff at the plaintiff's house, by first spitting on his face and then by

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would keep outside his land but for allurement.

Limitation : Three years from the date of trespass (Article 87).

Defence : The defendant may plead that the plaintiff was bound to fence his field, or that the cattle strayed from the highway without any negligence of the defendant.

(*c*) Assault is an attempt at battery with a menacing attitude. Battery is the actual beating, or using criminal force, such as spitting on the face, throwing water

striking him with a *lathi* and thus fracturing the *ulna* of his left arm.

2. In consequence, the plaintiff was for a long time unable to transact his business as a pleader and incurred expenses of surgical and medical treatment.

Particular of Special Damage

(1) Expenses of medical treatment :

	Rs.
Fee paid to Dr. Smith for setting the fractured bone	...
Fee paid to Dr. Amba Prasad for assisting Dr. Smith	...
Fee paid to Dr. Smit for . ...visits	...
Fee paid to Dr. Amba Prasad for ....visits	...
Paid to Ramlal Compounder for attendance	...
Paid to Banerji and Sons, Chemists, for price of medicines, bandages, etc.	...
Total	...
(2) Loss of legal practice for one and a half month at Rs.............per mensem...	...

over a person, throwing over a chair in which one is sitting, etc. For distinction between mere insult or intimidation and assault, *see Venkata Surya Rao* v. *Muthayya*, A 1964 AP 382. **The plaint must describe the assault or battery, and must also allege the injury caused.** The occasion on which the assault was made and the minute details about the altercation which resulted in the assault should not be alleged in the plaint. The fact that the defendant was prosecuted and convicted or acquitted of the assault is no bar to a civil suit. It should not, however, be alleged in the plaint, much less proved, as the civil suit is decided on independent evidence. But damages awarded by the criminal court should be taken into account in assessing the damages which the plaintiff claims. Plaintiff may claim general and special damages, the former for non-pecuniary losses and the latter for losses computable in money. The nature of these damages is well discussed in *Bharon Din* v. *Phul Chand*, A 1967 MP 48. For mode of assessment of damages in cases of personal injury, see, *Deepa Tewari* v. *Banwari Lal*, A 1968 MP 239; *Swaraj Jotors* v. *T.R. Raman*, A 1968 Ker 315 and *Roshan Lal Balle* v. *Sudesh Kumar*, A 1968 J & K 2. Where a 9 year old child died as a result of assault and beating given by a police-officer, the Supreme Court awarded Rs.75,000/- as compensation (*Jay Ram Das* v. *State of Assam*, (1995) 1 Gauhati LR 193).

If the battery causes death, the legal representatives of the deceased can bring a suit for damages under the Fatal Accidents Act (*see* foot note (u) *post*).

The plaintiff claims:

(1) Rs..... general damages for humiliation, pain and bodily suffering.

(2) Rs...... as special damages.

(3) Interest from date of suit to that of payment.

ATTACHMENT

No. 169—Suit for Damages for Wrongful Attachment *(d)*

1. On December 15, 1994, the defendant caused the following property of the plaintiff to be wrongfully attached in execution of his decree No.107 of 1994 of the munsif's court, Basti, against one Ramlal:

(Description of property attached)

* * * *

Such a suit would be possible only when the person causing death is not sentenced to death.

Limitation. Three years under Article 113.

Defence : The defendant may plead provocation, self-defence, accident or consent, as a defence. It is necessary to give particulars of these pleas. But infancy or lunacy is no defence to such a suit.

(*d*) It is an act of tort to attach property of one person in execution of a decree against another, and the owner is entitled to recover damages. **He should allege the attachment and facts showing that it was wrongful, in addition** to those showing his right to sue. His right to sue may be based on his title to the property or his possession or control over it at the time of attachment (*Jawahar Mal* v. *Punjab National Bank*, A 1936 Lah 524).

It is not necessary to plead that the attachment was made maliciously (*Ramaswami* v. *Muthuswami*, 13 IC 799, 1912 MWN 423; *Kishori Mohan* v. *Harsukh*, 17 C 436; *Firm Mangal Chand* v. *Musammat Zainab*, 90 IC 266, A 1926 All 177; *Kainthessain* v. *L. Pirbhu Lal*, A 1938 All 508; *N. Lobo* v. *Babulal*, A 1925 Nag 390; *Chunnilal* v. *Deo Ram*, A 1948 Nag 118). A decree-holder would, therefore, be liable for his mistake even if he acted in perfect good faith in attaching the property of a stranger (*K.S.R.M. Chattyar* v. *Lakshmi*, A 1940 Rang 43, 186 IC 879). The plaintiff can claim recovery of the property and all the damage which he has sustained by reason of the attachment, whether by loss resulting from default or dishonesty of the custodian of the property, or by the property deteriorating, or by the plaintiff being temporarily deprived of its use, though for recovery of property the procedure of O.21, R.58 would be better. It is not necessary to show that the defendant has taken away the property. So long as it is not available to be delivered back to the plaintiff, the defendant is liable (*Bishambhar* v. *Gaddar*, 33 A 306, 8 ALJ 92, 9 IC

2. The property remained under attachment from December 15, 1994 to February 14, 1995, and the plaintiff has suffered damage.

Particulars of Damage

* * * *

The plaintiff claims Rs........with interest from the date of suit to that of payment.

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317). Even if no special and actual damage has resulted, or the plaintiff fails to prove the actual damage alleged by him, he can be awarded general damages, which may be nominal, but his suit cannot be entirely dismissed (*Mudhun Mohan* v. *Gokul Dass*, 10 MIA 563).

If, however, the attachment was not wrongful no action would lie even if it was made maliciously (*Haji Nasirudin* v. *Patel Haji*, A 1941 Bom 286). If the attachment is wrongful, and the attached goods are damaged while in the custody of government, the attaching officer in his official capacity and the government were held liable for damages (*Lasalgaon Merchant's Cooperative Bank* v. *Prabhudas Lasalgaon*, A 1966 Bom 134).

Limitation : For such suits in case of movable property is only one year *from the date of seizure* (Article 80). Date of sale is immaterial, and so are the proceedings under O.21, R.58. But standing crop is not included in movable property and a suit for its wrongful attachment can be brought within three years under Article 113 (*Katagiri* v. *Patabandi*, 21 IC 213). It is not a continuing wrong to which section 22 could be applied but the seizure being illegal *ab initio*, cause of action arises only once, on the date of seizure (*Pannaji* v. *Senaji*, 1930 MWN 305; *Eng Gin Moh* v. *Chinese Merited Banking Co.*, A 1940 Rang 276).

Defence : The defendant may deny plaintiff's ownership of the property, but if the property has been released on plaintiff's objection under O.21, R.58, the defendant cannot have the question of plaintiff's ownership re-agitated (*Jawahar Mal* v. *Punjab National Bank*, A 1936 Lah 524; *K.S.R.M. Chettyar* v. *P.S. Lakshmi*, A 1940 Rang 43, 186 IC 879). He may prove, though it is not necessary to plead, that the special damages claimed have not been suffered. It is no defence to plead innocence, or a *bona fide* mistake of the defendant (*Bhuthnath* v. *Chandra Binode*, 16 IC 443, 16 CLJ 34), though that fact may mitigate the amount of damages, but that is only when the defendant does not try to justify the act (*Bishambhar* v. *Gaddar*, 33 A 306).

He may plead that loss was caused purely by *vis major*, e.g., by storm, rain, earthquake, etc., if it can in no way be attributed to any negligence of the defendant or of any one acting on behalf of the defendant, for instance, if the attached cattle die or are washed away by flood, the defendant would not be liable for their price, provided he had taken all necessary precautions.

No. 170—Suit for Damages for Attachment before Judgment *(e)*

1. The defendant instituted a suit (being suit No.500 of 1984) in the court of the munsif of Agra against the plaintiff, for recovery of Rs.500 due on a bond.

2. In connection with that suit, the defendant on August 4, 1984, applied for, and obtained, an order of attachment before judgment, of the plaintiff's stock-in-trade, and the plaintiff's stock-in-trade, was attached on August 7, 1984 in pursuance of the said order.

3. The defendant obtained the said order maliciously, without any reasonable or probable cause, and on a false allegation that the plaintiff was intending to dispose of his stock-in-trade.

4. The plaintiff suffered damage.

Particulars of Special Damages

Loss of business by reason of the plaintiff's shop remaining closed for two months ... ... Rs. ....

(e) Mere attachment does not give any cause of action, unless it was obtained maliciously and without a reasonable or probable cause (*Nanjappa* v. *Ganpathi*, 35 M 598, 21 MLJ 1052, 12 IC 507; *Gaylord Restaurant* v. *M. Chabbarai*, A 1975 Mad 108). **Malice and want of reasonable and probable cause must, therefore, be alleged, in addition to the fact of such attachment.** Section 95, CPC provides an easier remedy for such cases. The defendant whose property is attached may move the court, by an application to award him compensation for such attachment and can, obtain an order simply by proving that the attachment was applied for on insufficient grounds, or, if the suit, in connection with which the attachment order was passed, is dismissed, that there was no reasonable or probable cause for instituting it. The advantage of this summary procedure is the saving of court fees, and the absence of necessity to prove malice. But by an application, the defendant cannot obtain more compensation than the pecuniary jurisdiction of the court, and the determination of an application under section 95 will bar a regular suit.

Limitation : One year from the date of distress (Article 79) or seizure (Article 80).

Defence : The defendant in such a suit may plead that he had sufficient ground for making the application or that he was not actuated by malice. But the fact that the object of the defendant was to enforce speedy payment by putting pressure on the debtor and not to prevent any intended transfer is no defence, as this itself amounts to malice (*Nanjappa* v. *Ganapathi*, 35 M 598, 21 KIJ 1052, 12 IC 507).

The plaintiff claims :

(1) Rs.______ as damages for loss of reputation and credit.

(2) Rs.______ as special damages.

(3) Interest from the date of suit to that of payment.

CONSPIRACY *(f)*

No. 171—Suit for Conspiracy to Defraud Decree-holder

1. Defendant No.2 is the brother of the wife of defendant No.1; defendant No.3 is the son of the mother's sister of defendant No.1; and defendant No.4 is the son of the sister of defendant No.1.

He may plead that the plaintiff had made an application under section 95 which was dismissed. It is no defence that the order of attachment was set aside on notice.

(f) If a combination of persons use unlawful means to achieve their object and damage results to the plaintiff, he will be entitled to sue the persons combining for conspiracy if their predominant purpose was to injure the plaintiff. Further, if the unlawful means employed by the combiners are themselves actionable by the plaintiff, even without the combination, the plaintiff will be entitled to sue the persons combining as joint tort-feasors for the damage caused to him without taking the aid of the tort of conspiracy. If the means employed are not actionable though they are unlawful (*Rohtas Industries Ltd.* v. *Rohtas Industries Staff Union*, (1976) 2 SCC 82; *Lonrho Ltd* v. *Shell Petroleum Co. Ltd.*, (1981) 2 All ER 456 (HL)), then the persons combining to use such unlawful means cannot be sued for conspiracy by the plaintiff suffering damage unless the purpose of the combination was to injure him. But the purpose to injure the plaintiff need not be predominant purpose if unlawful means are used; it is sufficient if it is one of the purposes (*A Lonrho PLC* v. *Fayed*, (1991) 3 WLR 188 (HL); *see also*, Ratan Lal's Law of Torts, 22nd 1993 Reprint Ed. Page 313). The mere fact that two or more persons conspired to do an unlawful or fraudulent act will give no cause of action against them, unless an overt act is committed in pursuance of the conspiracy and special damage is caused to the plaintiff. **The conspiracy, the overt acts committed in pursuance of it, and special damage should be alleged in the plaint.** In a case of conspiracy, all the conspirators will be jointly and severally liable for the whole damage suffered by the plaintiff, irrespective of the fact that the tort was actually committed by only some of them (*Baboran* v. *Chandandhar*, 99 IC 399 Nag).

Defence : The object of the conspiracy may be shown to have been perfectly legitimate, e.g., to safeguard the defendant's own interest (*Rajlal* v. *Kaka & Co.*, A 1985 MP 219). The overt acts may be justified and shown to have been done in the defendant's own right without any fraudulent intention. It may be shown that the

2. The plaintiff obtained a decree against defendant No.1 for recovery of Rs.75,000 (being decree No.125 of 1995), from the court of the Civil Judge at Agra.

3. On September 4, 1995, the plaintiff applied for attachment of the residential house, two transistors and a scooter belonging to defendant No.1. On November 5, 1995, a warrant of attachment was issued by the court, for the sum of Rs.85,450 which was the amount of the plaintiff's decretal debt and costs.

4. Before the issue of the said warrant, the defendants unlawfully and fraudulently conspired and agreed together to defraud the plaintiff and to prevent him from recovering the money due to him under the said decree by means of the said execution.

5. In pursuance of the said conspiracy, the defendants did the following acts :

(*i*) Defendant No.1 transferred his transistors to defendant Nos.2 and 3, and the said defendant Nos.2 and 3 took away the said transistors to their respective houses.

(*ii*) Defendant No.1, sold to defendant No.4 the said house sought to be attached.

(*iii*) Defendant No.2 took away the scooter from the house of defendant No.1 to his own house.

6. For the above reasons, the *Amin* who went to execute the warrant was unable to attach the said movables, and, though the house had been attached, yet it has been released on the objection of defendant No.4 and the plaintiff has thus been unable to recover the amount of his decree.

The plaintiff claims Rs.85,450 as damages, with interest from the date of suit to that of payment.

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plaintiff has not suffered any damage or that the damage claimed is imaginary or too remote.

When conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary or predominant purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful and their intent was to injure the plaintiff (*A Lonrho PLC* v. *Fayed*, (1991) 3 WLR 188 (HL)).

* see also Trespass and Detention.

CONVERSION OF GOODS* (g)

No. 172—Suit for Conversion of Goods Entrusted to the Defendant

1. The plaintiff is the official receiver of the estate of Ram Gopal of Meerut, who was adjudged insolvent on May 3, 1981, in insolvency case No.5 of 1981.

2. Prior to May 3, 1981, the said Ram Gopal delivered two scooters to the defendant that he might sell them.

3. The defendant did not re-deliver the said scooters to the said Ram Gopal or the plaintiff. Since his appointment as receiver, the plaintiff demanded them by registered notice in writing, dated June 20, 1981, but the defendant refused to deliver them, and has sold them and converted the proceeds of sale to his own use.

4. The defendant thereby wrongfully deprived the plaintiff of the said scooters, the value of which was Rs.25,000.

(g) Conversion is wrongful taking or using or destroying of the goods or an exercise of dominion over them, inconsistent with the title of the lawful owner. It differs from trespass in that the latter is essentially a wrong to the *actual possession* and cannot, therefore, be committed by a person himself in possession, while conversion is a wrong *against the person entitled to immediate possession.* Conversion is a wider term than trespass. A mere wrongful taking of the goods is trespass but if the defendant further intends some use to be made of them by himself or by those for whom he acts, or, owing to this act, the goods are destroyed or consumed to the prejudice of the lawful owner, the tort becomes a "conversion". Such an action for conversion resembles one for detention. For difference between trespass, conversion and detention, see *State of Rajasthan* v. *Gangadar*, A 1967 Raj 199. Where goods belonging to the plaintiff were seized by the Land Custom authorities maliciously and without authority of law and the goods were converted into money which was deposited with the Union of India, the plaintiff was held entitled to refund of the money (*Union of India* v. *Sat Pal*, A 1969 J & K 128 DB).

Any appropriation by the defendant of goods, taken possession of by him, whether by trespass or in a rightful manner, is conversion. The plaintiff's remedy is by a claim for damages. **He must allege his right to immediate possession, and the defendant's appropriation of the goods.** He must show a right to immediate possession of the goods and not merely a property in reversion. So an owner of goods lent to another for a term, cannot sue, nor can the owner of goods in possession of another who has lien on them; but any temporary or special ownership with immediate possession, as under a lien, pledge or bailment is sufficient to give a right to sue. **If the property was rightfully in possession of the defendant a**

The plaintiff claims Rs.25,000 damages for such conversion with interest from the date of suit to that of payment.

No. 173—Suit for Conversion by sending Cattle to the Pound

1. On November 20, 1995, the defendant wrongfully seized 4 bullocks belonging to the plaintiff and grazing in the plaintiff's field, and sent them to the pound, where they were detained for 2 days and released on the plaintiff paying Rs. 480 as fees and feeding charges.

2. The plaintiff was deprived of the use of the said bullocks for 2 days and has suffered damage.

Particulars : Hire paid for 4 bullocks hired by plaintiff for ploughing his fields at Rs.30 per bullock per day for 2 days : Rs.240/-.

The plaintiff claims Rs.720 as damages, with interest from the date of suit to that of payment.

COPYRIGHT *(h)*

No. 174—Suit for Infringement of Copyright in a Book

1. The plaintiff is the author of a book in English entitled "The Law of Partnership," and is the owner of the copyright therein.

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demand by the plaintiff or by his authority and a refusal by the defendant should be alleged to prove conversion by the defendant (*Vishva Nath* v. *Bombay Municipality*, A 1938 Bom 410, 177 IC 636), if no overt act evidencing the conversion is shown or can be proved. The amount of damages will be the value of the property on the date of conversion (*Shiva Prasad* v. *Prayag*, 61 C 711; *Srirama Finance Corporation* v. *Chatta Yellaiah Reddy*, (1976) 1 An WR 107). In a case when defendant plucked tea leaves from plaintiff's garden and manufactured tea and sold it, the Calcutta High Court passed a decree for the sale price of manufactured tea as damages and did not allow a deduction for cost of the manufacture (*Carrit Morgan* v. *Manmath Nath*, A 1941 Cal 691). In cases of bonds the value will be that of actionable claims which can be based on them but if they are void damages will be nominal. Additional special damages may be claimed, if reasonable and not remote (*Sitaram* v. *Ishwari*, A 1934 Pat 57).

Limitation : Two years under Article 68, from the date of knowledge of conversion.

(h) The law of copyright is governed by the Copyright Act, 1957. The Copy Right Act, 1957 has been drastically amended by the Copy Right Amendment Act,

2. The defendant has infringed the plaintiff's copyright in the said work by publishing in January, 1995; a literal translation of the said book in Hindi language, and by putting it in the market for sale, without the plaintiff's consent.

1994 (38 of 1994). The pleaders are advised to go through the amended provisions of the Act. Section 14 of the Act gives the meaning of word "Copyright" and section 17 provides who will be the first owner of a copyright. The terms of copyright in various kinds of work are mentioned in Ch. V, consisting of sections 22-29. Registration of copyrights is provided for in Ch. X and infringement thereof in Ch. XI. But registration of work is not necessary in order to entitle the author of literary work to have a remedy for infringement (*Satsang* v. *Kiran Chandra*, A 1972 Cal 533; *Kuman Kanka* v. *Sundarajan*, 1972 Ker LR 536; *Sundarajan* v. *A.C. Thirulok Chander*, (1973) 2 MLJ 290; *Radha Kishna Sinha* v. *State of Bihar*, 1979 Cr LJ 757 Pat; A 1981 All 260; *R. Madhavan* v. *S.K. Nayar*, A 1988 Ker 39; *Misra Bandhu Karyala* v. *Shivratan Koshal*, A 1970 MP 261 dissented from). Civil remedies for infringement are mentioned in Ch. XII and offences relating to the infringement of copyright are dealt with in Ch. XIII. See also TRADE MARK (dd) *post* and Designs Act, 1911.

Where two persons jointly make intellectual contribution in writing a book, they are joint-authors within the meaning of section 20(b) of the Copyright Act (*Najma Heptulla* v. *Orient Longman Ltd.*, A 1989 Delhi 63). Showing of video film of cable T.V. network to subscribers is infringement of copyright (*Garware Plastics and Polyester Ltd.* v. *Telelink*, A 1989 Bom 331). For discussion on Literary Work' in section 2(O) of the Copy Right Act - see *Fateh Singh Mahta* v. *O.P. Singhal*, A 1990 Raj 8.

Artistic copyright-infringement-test-see *Associated Electronics* v. *Sharp Tools*, A 1991 Kant 406 DB). Whether there has been violation of copyright principles and tests pointed out-*R.G. Anand* v. *Delux Films*, A 1978 SC 1613.

The owner of a copyright may sue for its infringement. He may be the original owner or his assignee or exclusive licensee (*Penguin Books* v. *India Book Distributors*, A 1985 Del 29). It also includes the publisher in case of anonymous or pseudonymous works until the identity of the author or authors is established (section 54). If the work is done by an author for consideration for a publisher, the copyright of it would rest in the publisher subject to any contract to the contrary as provided in section 17 of the Act. If copyright has been assigned, it would vest in the assignee (*Khemraj Shrikrishnadas* v. *Garg & Co.*, A 1975 Delhi 130). Assignment of copyright can be made only in writing signed by the owner or by his duly authorised agent (section 19). Oral assignment of copyright is not permissible and is invalid (*K.A. Venugopala Setty* v. *Dr. Suryakantha U. Kamath*, A 1992 Kant 1 (DB)). An assignment of a copyright in a future work takes effect only when the work comes into existence [proviso to section 18 (1)]. But in a case in which the author who used to prepare annual almanacs had agreed to give them to the plaintiff

(*Or*, the defendant has infringed the plaintiff's copyright in the said book by copying out *verbatim*, without the plaintiff's consent, the following portions of the plaintiff's book in his book entitled "Partnership in India" which he has published in January 1995.

1.

2.

3.

etc.).

3. Since the publication of the defendant's said book, the sale of the plaintiff's said book has considerably fallen. The plaintiff estimates this loss at Rs.2,00,000.

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for publication for a period of 5 years. the Madras High Court held that it was a case of equitable assignment and therefore the plaintiff could maintain a suit against a third person to whom the author gave the almanac for publication (*P.R. Vishwanath* v. *Mithukumara-Swami*, A 1948 Mad 139, ILR 1947 Mad 768, (1947) 1 MLJ 382). A mere selling agent cannot bring a suit (*Petty* v. *Taylor*, (1897) 1 Ch 465); nor can a person who is not an exclusive licensee bring a suit in his own name. The exclusive licensee should join with him as the owner either as plaintiff or as defendant. The plaintiff can claim injunction and damages or an account of profits or such other remedies as are or may be conferred by law for the infringement of a copyright (section 55). Injunction can be claimed by showing either that damages have resulted to the plaintiff or there is a probability of damages (*Borhwick* v. *Evening Post*, (1888) 37 CH D 449), and that the defendant is likely to continue his infringement and that this is not simply trivial (*Cox* v. *Land and Water*, 1869 IR 9 Ex. 324). As damages, the plaintiff can claim the loss suffered by him by diminution of sale of his work or the loss of profits which he might otherwise have made. The plaintiff may pray for an account of profits made (*Biren* v. *Keen*, (1918) 2 Ch. 281) by the defendant by sale of his work and may claim the amount of such profits. As this is also in the nature of damages, the plaintiff cannot claim both, this relief as well as damages (*The Tata Oil Mills* v. *Hansa Chemical Pharmacy*, ILR (1979) 2 Delhi 236). The plaintiff is owner of all infringing copies under section 58 and may claim recovery of all infringing copies or damages in respect of conversion thereof. Damages for conversion are not limited to the profits but extend to the full value of copies converted. Damages for conversion on the basis of full price should be specifically claimed and the relief for damages for infringement of copyright will not cover damages for detention of infringing copies (*Biren* v. *Keen*, (1918) 2 Ch. 281). Remedies available are independent of each other and aggrieved parties can sue for all or some relief (*The Tata Oil Mills* v. *Hansa Chemical Pharmacy*, ILR (1979) 2 Delhi 236).

4. The defendant has, in his possession, a large number of copies of the said book complained of as an infringement. The plaintiff demanded the same from the defendant by a notice sent, by post, of September 14, 1995, but the defendant refused to deliver them.

5. The defendant threatens and intends to repeat the infringement of the said copyright of the plaintiff.

The plaintiff claims :

(1) Rs.2,00,000 damages.

(*Or*, that an account be taken from the defendant of the profits he has made by sale of his said book, and a decree for the amount of those profits be passed).

(2) An order to the defendant to deliver to plaintiff all the copies of the said book of the defendant that may be in his possession.

(3) An injunction to restrain the defendant, his agents and servants, from continuing or repeating any such infringement of the plaintiff's copyright, and from doing any act to infringe or injure the said copyright.

The suit should be brought in District Court having jurisdiction (section 62). District Court for the purpose of Sec. 62 the Copyright Act means the District Court as defined in CPC (*Mohan Meakin Ltd.* v. *Kashmir Dreamland Distilleries*, A 1990 J & K 42). The ordinary Civil Court has no jurisdiction in a suit for injunction in defence of a copyright (*K. I. George* v. *Cheriyan*, A 1986 Ker 12). The District Court which will have jurisdiction is the court in whose local limits the plaintiff or where there are more than one, any of them resides. It has been held in *Glaxco Operations* v. *Samrat Pharmaceuticals*, A 1984 Delhi 265, that where the plaintiff company had its registered office at Bombay and a local office at Delhi where it carried on business it was open to it to file a suit at Delhi. A single suit in respect of the infringement of the provisions of Copy Right Act, 1957 and Trade and Merchandise Marks Act 1958, is maintainable (*Jay Industries* v. *Nakson Industries*, A 1992 Delhi 338).

In the plaint **the facts entitling the plaintiff to sue including the capacity, e.g., owner, assignee, licensee, etc., in which he sues and facts showing how the right has been infringed by the defendant should be set up in detail**. Infringement may be proved by providing similarities, omissions, mistakes, plan, phraseology, etc. If direct evidence is not forthcoming but as similarities can be explained by coincidence or common source, evidence must be cogent (*Decks* v. *H.G. Wells*, 142 IC 815, 1933 ALJ 393, A 1933 PC 26). For proving infringement, exact reproduction need not be proved because every intelligent copying must introduce few changes (*K.R.V. Sarma* v. *S. Ganeshan*, 1972 Cr. LJ 1098). The test is whether a colourable imitation has been made (*Misra Bandhu* v. *Shiv Ratan Lal*, A 1970 MP 261). What

DETENTION OF GOODS *(i)*

No. 175—Suit for Movables Inherited by the Plaintiff

1. One Rahim Baksh was, at the time of his death, owner of the movable property entered in the schedule appended to the plaint.

2. The said Rahim Baksh died on November 4, 1995. He left no widow, sister, parents or grand-parents or any issue except the plaintiff.

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has to be seen is whether impugned work is a slavish imitation and a copy of another person's work or it has been produced by author's own labours and exertions (*Shyam Lal* v. *Gaya Prasad*, A 1971 All 192).

The author is the first owner of the copyright (section 17). The person whose name appears on the work as the author or the publisher shall, in proceedings relating to infringement be presumed to be the author or publisher as the case may be [section 55 (2)]. If the defendant wishes to deny that fact he will to do so specifically alleging the grounds on which he bases his denial. For other presumptions in plaintiff's favour in such a suit *see* section 6. "Title" of the work does not involve a literary composition and is not sufficiently substantial to justify protection and is not therefore by itself a proper subject-matter of copyright, but in particular cases a title may be on so extensive a scale and of so important a character as to be a proper subject of protection (*Francis Day* v. *T.O.F. Corporation*, A 1940 PC 55, 187 IC 449). If a plaintiff claims copyright in "title" he should allege such special facts as would support that claim.

Limitation : Three years under Article 88 from the date of the infringement. This is a continuing wrong and secton 22 will apply.

Defence : The defendant may show that the copyright does not subsist in the work, e.g., 50 years have expired since the work was first published, or that the plaintiff is not the owner of the copyright or that his act does not amount to an infringement, and falls under one of the clauses of section 52 of the Act of 1957. He may plead that the work is of a libellous, immoral, obscene or irreligious nature, in which no copyright should be enforced (*Glyn* v. *W.F. Film Co.*, (1916) 1 Ch 261). If the defendant denies the plaintiff's ownership, it is not necessary for him to plead who is the owner. There is at present no law for compulsory registration of books. Copyright also can be registered under Ch. X of Act of 1957, and the entries in the register of copyrights maintained under the Act are *prima facie* evidence of the particulars entered therein. Want of knowledge of infringement of the right of the plaintiff is no defence but defendant may prove that there was no reasonable ground for suspecting that he was infringing the plaintiff's right (*Performing Right Society* v. *Urban Council of Bray*, 1930 AC 377).

(i) Detention or detinue is the tort of wrongful holding of the goods of another. The injurious act being the wrongful detention, and not the original taking

The plaintiff is his only son. The defendant was the kept mistress of the said Rahim Baksh.

3. At the time of the death of the said Rahim Baksh, the defendant took into her possession the said property and has retained it since and deprived the plaintiff of its use and has refused to deliver it to the plaintiff, although, the plaintiff demanded it by a notice sent by registered post on January 20, 1996.

4. The plaintiff has thereby suffered damage.

Particulars

Value of the property as given in the schedule	Rs. 11,000
Loss of profit which the plaintiff would have made by the sale of milk of 2 cows and 2 she buffaloes included in the schedule	3,000

The plaintiff claims:

(1) Return of the said property by the defendant.

(2) Rs. 3000 as damages.

In the alternative, Rs. 14,000 as damages.

No. 176—Suit for Movables Wrongfully Detained

(Form No. 32 , Appendix A, C.P.C.)

1. On the ___ day of _________ 19__, the plaintiff owned [*or state facts showing a right to the possession*] the goods mentioned in the schedule hereto annexed [*or, describe the goods*] the estimated value of which is _____ rupees.

2. From that day until the commencement of this suit, the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the ___ day of _________ 19__, the plaintiff demanded the same from the defendant, but he refused to deliver them.

The plaintiff claims:

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or obtaining of the possession. It is immaterial whether they were obtained by the defendant by lawful means, as by bailment or finding, or by a wrongful act, as by a trespass or conversion. The usual evidence of detention is the refusal to deliver or return the goods when demanded. **The plaintiff must have the right to the immediate**

(1) Delivery of the said goods, or ___ rupees, in case delivery cannot be had.

(2) ____ rupees compensation for the detention thereof.

The Schedule

No. 177—Suit for Detention of Goods Hired by the Defendant

1. On December 29, 1995 the defendant hired from the plaintiff a sugarcane crusher on the verbal agreement that the defendant should have the use of the said crusher upto January 31, 1996 and should return the same to the plaintiff not later than February 2, 1996.

2. The defendant has not returned the said crusher to the plaintiff but still detains the same.

3. In consequence of such detention the plaintiff has been prevented from letting the said crusher to other customers and has lost the profits which he would have earned thereby.

The plaintiff claims:

(1) Return of the crusher or Rs.10,000, its value.

(2) Rs.2,000 damages for its detention.

No. 178—Suit for Goods Lent to Defendant

1. On January 20, 1995 the plaintiff lent 2 *daris* of the value of Rs.1,150 and a carpet of the value of Rs.4,000 to the defendant for a period of 15 days.

2. The defendant detained the said goods and has not returned them to the plaintiff, though the plaintiff demanded them from him on February 10,1995.

The plaintiff claims return of the said *daris* and carpet or Rs.5,100, their value.

possession of the goods at the time of suit arising out of an absolute or a special property, an interest in reversion not being sufficient. Such right should, therefore, be alleged in the plaint in addition to the fact of defendant's detention. The plaintiff may sue for recovery of the specific goods, if the case falls under section 8, Specific Relief Act; in all other cases he must sue for damages. In any case he can add a claim for damages for the detention. Even when he sues for recovery of the goods,

No. 179—Suit for Restoration of Movable Property and Injunction

(Form No. 39, Appendix A, C.P.C.)

1. Plaintiff is, and at all times hereinafter mentioned, was the owner of [a portrait of his grandfather which was executed by an eminent painter] and of which no duplicate exists [*or state any facts showing that the property is of a kind that cannot be replaced by money*].

2. On the ___ day of ______ 19___, he deposited the same for safe keeping with the defendant.

3. On the ___ day of ______ 19___, he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

The plaintiff claims:

(1) That the defendant be restrained by injunction from disposing of, injuring, or concealing the said painting.

(2) That he be compelled to deliver the same to the plaintiff.

EASEMENTS, WRONGS TO *(j)*

No. 180—Suit for Obstruction to Plaintiff's Right of Way *(k)*

1. The plaintiff's grove No.514 is situated to the east of the

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he must in the alternative, claim their value. For the measure of damages see notes on "Trespass to goods" *(ee)* post. In case the goods are of special value and the defendant threatens to destroy them, an injunction may also be claimed.

Limitation : Three years under Article 91.

Defence : The defendant may deny the plaintiff's title to the goods or his right to immediate possession of the goods, or the fact of detention. He may plead that he has a lien on the goods. Particulars of the "lien" should be given.

(j) An easement can be acquired by three methods (1) by express or implied grant; (2) by user as of right for the statutory period of 20 years under the Easement

defendant's grove No.513, in village and a public road runs to the west of the defendant's grove.

2. The Plaintiff was and is, entitled to a right of way from his grove No.514 over the defendant's grove No.513 to the said public road, and back from the public road over the said grove No.513 to grove No.514, for himself, his servants, cattle and carts all times of the year.

3. The plaintiff was, and is, entitled to the said right of way by enjoyment thereof for over 20 years before the obstruction of the defendant hereinafter alleged, as of right and without interruption (*or*, by grant thereof from Ramlal, deceased father of the defendant, the then owner of grove No.513, by a deed, dated June 3, 1959].

Act; or (3) by immemorial user based upon the fiction of a lost grant (*Velji Kachrabhai* v. *Bhupatrai*, A 1951 Saurastra 60). It can also be claimed on the basis of a custom. Right to draw water from well, from time immemorial, is customary right and hearsay evidence of immemorial user would be admissible. Such a right is not extinguished if 20 years have not expired from the date of disuse of right till the date of suit (*Maheshwari Prasad* v. *Munni Lal*, A 1981 All 438).

The combined effect of sections 15, 28 and 33 to 35 of Easements Act is that for all practical purposes the principles of an actionable disturbance of an easement are the same in India as in England. Interference with the right of easement may be graded into two degrees : (1) An interference which does not result in substantial damage within the definition of explanation 1 to section 33 and gives no cause of action altogether; (2) an interference which so materially affects the utility of the dominant tenant that injunction would be the appropriate remedy.

A person whose right of easement is disturbed has, in addition to his right of abatement of the disturbance a remedy in an action for damages, or injunction, mandatory or prohibitory or both, according to the circumstances of the case. A claim for damages or compensation is admissible in all cases of disturbance **provided that the disturbance has actually caused substantial damage** to the plaintiff (section 33, Easement Act). If the disturbance is so trivial that no substantial damage is caused to the plaintiff, he has no right of suit (*Gajadhar* v. *Kishorilal*, 13 ALJ 385). The meaning "substantial damage" has been explained in the three explanations appended to section 33. If the disturbance affects the evidence of the easement or diminishes the value of the dominant heritage, it causes "substantial damage". The requirement of **substantial damage should not be confused with "special damage"** and it is not necessary that special damage should be caused to the plaintiff, though if the same have been caused they can be recovered. If "substantial damage" is caused by the disturbance and no special damage have resulted, then the plaintiff can claim general damages which may be nominal or exemplary according to the circumstances of the case (*see* Mayne on Damages, 10th edition, p 437).

[*Or*, if a right of way by necessity is pleaded, paras 1, 2 and 3 should be as follows :

1. The parties were joint owners of the groves Nos.513 and 514 up till 1960, and the way for men, cattle and carts from the highway to the grove No.514 and back from the grove No.514 to the highway lay over to grove No.513 at all times of the year.

2. At a partition held in 1960, the plaintiff became the owner of grove No.514, and defendant of grove No.513.

A claim for injunction can be made in all cases in which a suit for compensation lies and also to prevent a threatened disturbance "when the act threatened or intended must necessarily, if performed, disturb the easement" (section 35). If, however, money compensation is an adequate relief, injunction cannot be granted.

In an action for invasion of the right of easement, therefore, the **plaintiff must allege the existence of the right, with necessary particulars and facts showing its obstruction or disturbance. If the claim is for injunction, "the substantial damage" arising from the disturbance or the apprehension of disturbance from the intended act of the defendant, and in case of a claim for damages, the damage resulting from the disturbance should also be clearly alleged.** As to the mode of pleading easement *see* Chapter VI. In case of obstruction of a public right special injury over and above that suffered by the public should be proved, and therefore, alleged by the plaintiff. Similar action can be brought in respect of right in the nature of easement. It has been held in Lahore that a right to bury the dead in the land of another is not an easement and cannot, therefore, be enforced (*Jiwan Singh* v. *Karamdin*, 103 IC 678 Lah).

The person in possession of the dominant heritage, whether as owner or as occupier can bring the suit, but if the disturbance is of a permanent character, the owner of the heritage can also sue even though, his tenant is in possession. Any one creating the disturbance is primarily liable in such a suit, but so long as the disturbance continues, the persons under whose direction it is created, the persons actually creating it and the persons who are responsible for its continuance are all equally liable, and all or any one of them can be made a defendant. But if a person other than the original creator of the disturbance is sought to be made liable, the suit should be preceded by a request to such person to remove the disturbance. In every case, the liability of each defendant will have to be clearly specified. One of the owners of a dominant tenement can bring a suit to establish the right of easement and for removal of obstruction and other owners need not be impleaded if they do not feel aggrieved (*Kedaruddin* v. *Samsur Mata*, 169 IC 771, A 1937 Cal 335). A customary right is not an easement. A customary right must be recognised by the community, mere user for 30 years is not enough (*Radha Krishna* v. *Tukaram*, A 1991 Bom 119; see also *Amar Singh* v. *Kehr Singh*, A 1995 HP 82).

Limitation : For compensation and injunction is three years (Article 113). In

3. There is no other way from the highway to grove No.514 except over grove No.513, hence the plaintiff claims a right of way for himself, his servants, cattle and carts from the highway to grove No.514 and back, over grove No.513.]

case of suits to restrain the disturbance by injunction, section 22, Limitation Act, will be a great help as the obstruction is a continuing wrong. If the easement is claimed on the ground of prescription, the plaintiff should prove user within two years of the suit (section 15, Easements Act; *Aktat* v. *Collector of Bareily*, 1933 ALJ 516, A 1933 All 623).

(k) The right of way, may be public or private. Private rights of way are vested in private individuals or owners of particular tenements, and such right arise from grant or necessity. Public right exist in favour of all the members of the public and their origin is dedication. A third kind of right, intermediate between the two, may arise by custom in favour of particular class or the public. That is called a customary right vide section 18 (*Damodar Jena* v. *Pahali Ojha*, 1977 (2) CWR 642). When a right of way is claimed by a particular section of public, they cannot claim it as an easement acquired by prescription or by necessity, but they can claim it either as a public way or as a right acquired by custom (*Rudraganda Basanagonda Harobelabadi* v. *Fakirappa Adiveppa Pujar*, (1981) 1 Karn LJ 355). When the right is alleged to have been acquired by prescription it must be proved to have been enjoyed as "of right" within the period prescribed by section 15 of the Easements Act (*Sajjad Ali* v. *Shabid Ali*, A 1950 All 316; *Mahadevamma* v *M.N.Setty*, A 1973 Mysore 254). Before a right of way can be acquired as an easement it is necessary to prove that (1) there has been an actual enjoyment of the right; (2) that the enjoyment has been open; (3) that it has been peaceful; (4) that it has been as of right; (5) that it has been as an easement; (6) that the easement was enjoyed without interruption and that it has been enjoyed for twenty years. Unless all these ingredients are proved, no right of easement can accrue to the owner of a dominant heritage. Long user of a right of way raises a presumption in favour of the person using the way that the enjoyment has been as of right and when there is no evidence to rebut this presumption, it must be held that the enjoyment has been as of right (*Phool Chand* v. *Murari Lal*, A 1951 M B 89; *Mistry Ali Mohd. Abdulla* v. *Khwaja Abdul Qadus*, A 1976 J & K 23; *C.Mohammed* v. *Ananthachari*, A 1988 Ker 298; *Suresh Chand* v. *Hindu Mal*, A 1991 HP 56).

Neither the Government nor the Municipality or any local authority has got any right to put up any obstruction over the public street so as to prevent it from having any access to the adjoining land. The owner of the land adjoining the public street has got a right of access at every point where his or her land adjoins public street (*K.V.K.Janardhanan* v. *State*, A 1995 Mad 179; *Godavari Bhai* v. *Cannanore Municipality*, A 1985 Ker 2). *Prima facie* the grant of a right of way is the grant of a right having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used, both those circumstances may

4. The defendant on, or about January 1, 1996, unlawfully obstructed the said way by digging a ditch 3 feet deep between his grove No.513 and the plaintiff's grove No.514 and has caused substantial damage to the plaintiff by affecting the evidence of the said easement of way.

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legitimately be called in aid in determining whether it is a right restricted to foot passengers only or a general right of way for animals, carriage and everything else (*Hastimal* v. *Bachhraj*, 1952 BLW 191). Thus a right of way does not necessarily include a right to take a marriage or funeral procession. If such a right is claimed, it must be specifically pleaded (*Ganga Sahai* v. *State*, 1964 ALJ 617). On right of public to use highway see case law discussed in *K.Sudarsan* v. *Commissioner, Corporation of Madras*, A 1984 Mad 29. If the right of way is claimed as easement by way of necessity, it has to be proved that both the tenements are owned by different persons but when a sub-lessee of shop belonging to government claims easement of way through land belonging to government there can be no right of easement in such a case (*The State of Gujarat* v. *Hiralal Motilal Lohar*, A 1980 Guj 146).

The plaintiff must show in the plaint the mode by which he claims to make out a right of way, e.g., by prescription, by grant, or by necessity, etc. It is not sufficient to use these words merely, **but facts must be alleged from which the particular kind of easement can be inferred.** The kind of way claimed should be specified, i.e., whether for pedestrian traffic or for cattle or carts. etc. The **qualification of the right**, *i.e.*, whether enjoyed at particular season or at all times, should also be alleged. **The termini of the way, if it is a private right, must also be indicated, but this is not necessary in the case of a public right.** Where there are no termini, *i.e.*, a point of arrival and a point of departure, such as a blind lane, there can be no right of way (*Pandu* v. *Laxman*, A 1937 Nag 322).

The infringement of the right must next be shown. In the case of a private right, obstruction alone is sufficient, but **in the case of a public right some special damage over and above that suffered by the rest of the public must be alleged, with particulars and details of the damage,** otherwise there will be no cause of action (*Shyamlal* v. *Man Math*, 51 IC 324 Cal; *Sivashanker* v. *Muthu Swamy*, 25 IC 603 Mad; *Surendra Kumar* v. *District Board, Nadia*, A 1942 Cal 360; *Ram Gulam* v. *Ram Khelawan*, A 1937 Pat 481; *Sitaram* v. *Puttolall*, A 1937 Oudh 456, 170 IC 495). The Madras and Lahore High Courts have, however, held that the English rule that no suit can be brought by a person who has not suffered special damage does not apply to India (*Mani Sami* v. *Kupusami*, A 1939 Mad 691; *Ghulam Rasul* v. *Ali Baksh*, A 1936 Lah 132, 161 IC 457; *Municipal Committee, Delhi* v. *Md. Ibrahim*, 152 IC 850, A 1935 Lah 196), and it has been held by the Patna High Court that a person in immediate neighbourhood and entitled to use a local public thoroughfare has a special cause of action irrespective of proof of special damage (*Phalad Maharaj* v. *Gauri Datt*, 171 IC 933, A 1937 Pat 620; *Dasrath* v. *Narain*, A 1941 Pat 249, 192 IC 760; *Dalgobinda* v. *Khatu*, A 1948 Pat 183). What is a special damage is

The plaintiff claims :

(1) Rs.2,200 as general damages.

(2) An order to the defendant to fill so much of the said ditch as would reserve to the plaintiff the right of way which he has been enjoying.

(3) A perpetual injunction to restrain the defendant from the repetition or continuance of the act complained of.

No. 181—Ditto, Statutory form

(Form No 25, Appendix A, C.P.C.)

(Particulars of the right claimed and the obstruction are not given and paragraph 2 is only an inference of law. This form is, therefore, defective).

1. The plaintiff is and at the time hereinafter mentioned was, possessed of [a house in the village of ______].

2. He was entitled to a right of way from the (house) over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants (with vehicles, *or* on foot) at all times of the year.

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a question of fact. The diminution of the width of public way so as to prevent plaintiff turning his cart as he used to do before, has been held to be a special damage (*Bhagwandas* v. *Town Magt., Budaun*, A 1929 All 767).

But village pathway is not a public right in the full sense but only a quasi-public right and a person can sue in respect of it as a member of the limited class whose special rights have been infringed, and not special damage is necessary to be proved (*Harish Chandra* v. *Harish Chandra*, A 1923 Cal 622 DB; 80 IC 195; *Suresh Chandra* v. *Jamini Kantata*, 96 IC 711; *Ramdahin* v. *Parmeshar*, A 1940 Pat 160; *Bibhuti Narayan Singh* v. *Guru Mahadev*, A 1940 Pat 449, 19 Pat 208; *Dalgobinda* v. *Khatu*, A 1984 Pat 183; *Faquir Chand* v. *Sooraj Singh*, A 1949 All 467; *Harendra Nath Chakrabarty* v. *Asim Sindhu Chakrabarty*, A 1981 Cal 325). In order to establish a village pathway it should be proved that it was used by people as inhabitants of the village and not as members of the public (*Harisadhan* v. *Radhika Pd.*, A 1938 Cal 202, 173 IC 252). Suit can also be instituted on behalf of all members of the class to which the right belongs under O.1, R.8, (*Bibhuti* v. *Guru*, A 1940 Pat 449). But where no suit can be instituted by an individual without proof of special damage he cannot institute it even under O.1, R. 8 on behalf of the public or other persons unless he can prove special damage to the latter (*Surendra Kumar* v. *Dist. Board, Nadia*, A 1942 Cal 360). In any case a suit in respect of a public highway can be brought under section 91 C.P.C. But if suit is based on infringement

3. On the ___ day of ______ 19___, defendant wrongfully obstructed the said way, so that the plaintiff could not pass (with vehicles, *or* on foot, *or* in any manner) along the way (and has ever since wrongfully obstructed the same).

4. (*State special damage, if any*).

No. 182—Suit for Obstruction to a Highway

1. The road leading from the Church to the Railway Station at Muzaffarnagar is a public highway.

2. The defendant heaped *Kankar* in the middle of the said road in front of the Civil Surgeon's house so as to obstruct the said highway.

3. The plaintiff on March 5, 1995 at about 8 p.m. while lawfully passing over the said highway fell over the *kankar* and sustained personal injuries and incurred loss and expense.

Particulars of Injuries and Damages

* * * *

The plaintiff claims Rs.1,600, with interest from date of suit to that of payment.

No. 183—Ditto, Statutory form
(Form No. 26, Appendix A, C.P.C.)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from ___ to ____ so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones (*or*, into the said trench) and broke his

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of right (of owner of adjoining property) of access to highway he can bring it and section 91 will not bar it (*Godavari* v. *Cannanore Municipality*, A 1985 Ker 2, on right of municipality in highway, see also, *M.A. Pal Mohd.* v. *R.K. Sadarangam*, A 1985 Mad 23).

Defence: The defendant may plead that the plaintiff's user was permissive or secret and cannot, therefore, give a prescriptive right. If the plaintiff has claimed prescriptive right of easement of way, it is good defence that the right was interrupted more than two years before the institution of the suit (*Syed Manzoor Husain* v. *Hakim Ali Ahmed*, A 1980 All 389). He may show that the plaintiff's way has not been substantially obstructed as he can still pass over land. There can be no right of wandering all over a large plot of land and if a small way is left, which is quite

arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

No. 184—Suit for Obstruction to the Right of Flow of Rain Water and Dirty Water *(l)*

1. On the west of the plaintiff's house in *mohalla* Goala Sarai, in the town of Aligarh, lies a vacant piece of land belonging to the defendant.

2. In the western wall of the said house there was a *mori* (*or*, an outlet for water) which discharged the water of the plaintiff's latrine on the ground floor, on to the said land of the defendant. On the roof of the plaintiff's house there were three *parnalas* or spouts through which the rain water from the roof of the plaintiff's house used to be discharged on the defendant's said land.

3. The plaintiff had been discharging the said latrine water and the rain water from his said house through the aforesaid *mori* and *parnalas* respectively on to the said land of the defendant for over 20 years before the defendant's obstruction hereinafter alleged, as of right and without interruption.

4. On or about June 15, 1995, the defendant has built a wall on the said land close to the western wall of the plaintiff's said house and has thus obstructed the flow of the said water of the plaintiff.

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sufficient for the plaintiff's purposes, there can be no cause of complaint (*Golcuk* v. *Tarinee*, 4 WR 49; *Doorga* v. *Kalley*, 7 C 145). If plaintiff has not perfected right of way by use for the period of 20 consecutive years within two years next before institution of suit, the suit to establish prescriptive right of way should be dismissed (*Bansh Narayan Misra* v. *Batuk Nath Sharma*, 1982 All LJ 111). There can be no easement of necessity when alternative way is available to the claimant of the right (*Ramesh Chandra Bhukhrabhai Patel* v. *Maneklal Maganlal Patel*, A 1978 Guj 62, *Sukhdei* v. *Kedearnath*, 33 All 467).

(l) A right of higher land to discharge rain water on lower land is a natural right. A proprietor of higher land is entitled to collect the water falling on his land and to drain it on to his neighbour's land on a lower level by making *moris* in his boundary wall (*Gibbons* v. *Lenfestey*, A 1915 PC 165; *Waniram* v. *Karam Singh*, 1993 MPLJ 347 MP). But the upper proprietor has no right to increase the burden on the neighbour's land by discharging the water with greater force and in a more accumulated form than it would have received if the water had been allowed to flow in a natural way (*Tej Kishan* v. *Akhlaq Husain*, A 1949 All 184). A right to discharge such water through an artificial contrivance such as a spout or artificially created

5. In consequence of the said act of the defendant, the water of the plaintiff's latrine could not flow out and became stagnant and has been a source of great discomfort to the plaintiff and injury to his health, and has thus caused substantial damage to the plaintiff.

The plaintiff claims:

(1) An order to the defendant directing him to remove his wall in such a way as not to obstruct the flow of the plaintiff's said water.

(2) A perpetual injunction to restrain the defendant from a repetition of any act calculated to obstruct the flow of the said water.

(3) Rs.1000 as general damages.

No.185—Suit for Obstruction to Light and Air *(m)*

1. The plaintiff is, and at all material times hereinafter mentioned was, the owner in possession of a dwelling house bounded as follows in Raja Ki Mandi in the town of Agra, having windows on the west side thereof:

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water course is one which can be acquired as an easement (*Tharur Panchayat* v. *Kunchavi*, A 1978 Ker 50). Whether the right of throwing filthy water on neighbour's land can also be acquired as an easement has been answered in the affirmative in *Ramasubbier* v. *Mohomed*, A 1937 Mad 823; *Tharur Panchayat* v. *Kunchayi*, 1977 KLT 742, A 1978 Ker 50, but in other cases it has been observed that law does not permit acquisition of a right to perpetuate a nuisance day in and day out on somebody else's land (*Swami Nath* v. *Sheo Ratan*, 1981 AWC 79; *Kailash Chand* v. *Gudi*, A 1990 HP 17; *Prabhu Narain Singh* v. *Ram Niranjan*, A 1983 All. 223; *Jag Narain* v. *Ram Dularey*, A 1979 All 71; *Bankey Lal* v. *Krishna Lal*, A 1967 All 43; *Bheru Lal* v. *Mohan Singh*, A 1966 Raj 123; *Gopal Krishna Sil* v. *Abdul Smad Chaudhari*, A 1921 Cal 569 DB; *Mangat Ram* v. *Sirajul-hasan*, A 1924 Lah 492). If an easement to flow or discharge such water is established, the plaintiff can claim not only to have the obstruction to such right removed but also damages resulting from the obstruction. It is no defence that the plaintiff can discharge the water more conveniently towards another direction, but it is a good defence to a suit for closing new spouts that they do not impose an additional burden on the servient heritage (*Sakharam* v. *Sakharam*, 20 NLJ 99).

(*m*) It must be remembered that the easement of receiving light and air by prescription differs from other easements in this important point that a person does not acquire an absolute right to the whole amount of air and light which he has been enjoying. He obtains a right to so much of it as will suffice for the ordinary purpose of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surrounding (*Peter Charles Paul* v. *William Robson*, 12

Boundaries of the House

* * * *

2. He has been enjoying the use of light and air to, and for the said house through the said windows, for a period of over 20 year before, and up to, the time of the obstruction hereinafter complained of, as of right and without interruption.

3. The defendant, on or about January 1, 1996, erected a high wall near the said windows and has thereby completely prevented and obstructed the light and air from entering into the said house by the said windows thus rendering the plaintiff's said house unfit for comfortable dwelling.

[*Or*, the defendant has, on or about January 1, 1996 erected a wall which has in a material degree diminished and obstructed the light and air from entering the said house by the said windows.

4. The plaintiff is a tailor by profession and used to carry on his business, as a tailor, in the said house. The said partial obstruction of light

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ALJ 1166, 42 C 46, 18 CWN 933, 1 LW 561, 1914 MWN 631, 16 BLR 803 PC; *Rajani* v. *Nirmal*, A 1946 Cal 438) and no interference is actionable unless it is of a substantial character (*Wali Mohammad* v. *Batuk*, 163 IC 843, A 1936 All 517; *Abdulla* v. *Municipal Corpn., Karachi*, A 1936 Sind 39, 179 IC 884; *Babu Shiv Pratap Singh* v. *Prem Narain Jaiswal*, 1978 All LJ 304; *Bhulwati Devi* v. *Munna Lal*, A 1982 All 20). He can claim no more air than is necessary and, under the Indian Easements Act, he can have no cause of action unless the diminution interferes with his physical comfort (section 33, Exp. III), and such interference must be alleged in the plaint. It is not necessary that the obstruction should render the house insanitary, but where the Easements Act does not apply, e.g. in Bengal, this would be necessary as under the English Law a cause of action is not complete without proof of the fact.

Similarly, mere diminution of light does not give a cause of action. It must be shown, and also alleged in the plaint, that either (1) the obstruction affects the evidence of the easement, or (2) it materially diminishes the value of the dominant heritage, or (3) it interferes materially with the physical comfort of the plaintiff, or (4) it prevents him from carrying on his accustomed business as beneficially as he had done previously (section 33). If the last mentioned ground is taken the plaint must show the business which the plaintiff was accustomed to do in the dominant heritage and how it is affected by the obstruction of light. In places where the Easements Act does not apply, the test is whether the obstruction amounts to a nuisance, and in such cases it should be alleged that the diminution of light has rendered the house unfit for comfortable habitation (*Delhi and London Bank* v. *Hem Lal Dutt*, 14 IC 39; *Hiralal* v. *Mohadra*, 57 IC 706 Cal). Easementary right to

prevents him from carrying on his business, as such tailor, in the said house, as beneficially as he had been previously doing and the said obstruction to air materially affects the physical comfort of the plaintiff].

4. (*Or* 5). The said obstruction of the light and air has materially diminished the value of the plaintiff's said house. Formerly the house was worth Rs.75,000 but now it is worth not more than Rs.50,000.

5. (*Or* 6). The plaintiff's has suffered damage by the said obstruction.

Particulars

	Rs.
Rent of another house which the plaintiff had to take for residence and business since the said obstruction, for 5 months at Rs.210 per month.	1050

vertical light and air is recognised but there is no question of a person having right of light or air coming to hi s property laterally (*Dr. K.Panduranga Nayak* v. *Jayashree*, A 1990 Kant 236).

In a suit for injunction restraining the defendant from obstructing light and air of a window of the plaintiff's house, the plaintiff cannot succeed on the mere presumption that by closing down of the disputed window, specific injury should be deemed to have been caused to him. Such a presumption cannot be raised in view of the language of section 33 and 35, Easements Act (*Jamna Das* v. *Gulraj*, A 1952 Raj 1). As to when a plaintiff can get damages, when injunction and when both, see *Mt. Panna* v. *Ram Saran*, A 1933 All 492, 1933 ALJ 1006, 145 IC 530; *Ellerman* v. *Pazundang*, A 1933 Rang 351. No such easement can be claimed through an aperture in a joint wall (*Narayan* v. *Shankar*, 174 IC 944, A 1938 Bom 215, 40 BLR 115). If the case is based on obstruction affecting the evidence of easement, the obstruction should be specially alleged. Damages can be awarded for such obstruction e.g., blocking of one of the windows, even if it does not cause any diminution of light and air and no actual damage (*Sofia Bidi* v. *Vasudev*, A 1940 Mad 952).

Defence : The defendant may plead that the interference to the plaintiff's right is not sufficient according to the above standard or, in a suit for mandatory injunction (but not in one for damages), that the suit has not been brought promptly and the plaintiff has been guilty of *laches* (*Sultan* v. *Rustamji*, 20 B 704; *Benode* v. *Sondaminery*, 16 C 252), and may raise any of the general pleas relating to easements. He may pleads that, in any event, the whole of the obstruction need not be removed, as plaintiff is not entitled to the whole light and air but only a small portion would be enough for him. Mere existence of other sources of light is no defence unless the plaintiff has acquired a prescriptive right to light from those sources (*Jadooie* v. *Kisum*, 105 IC 39 Pat; *Mohamed Zaman* v.*Malikumar*, 165 IC 219, A 1936 Lah 792).

The plaintiff claims :

(1) A mandatory injunction requiring the defendant to demolish so much portion of his wall as obstructs the said light and air of the plaintiff.

(2) Rs.1,050 damages.

(3) Future damages at Rs.210 per month up to the day the obstruction is removed.

(4) In the alternative, Rs.25,000 as damages, for depreciation in value of the house.

No. 186—Suit for Interference with a Right of Privacy *(n)*

1. The plaintiff is, and at all material times hereinafter mentioned was, the owner of the house bounded as follows in *mohalla* Maithan in the town of Agra, and has, since its construction, more than 50 years ago, been using it as a dwelling house for himself and his family members, including ladies.

2. The ladies of plaintiff's household observe complete *pardah* and do not appear before the public, and they have been enjoying this seclusion from outsiders, while residing in the said house.

3. The defendant has on or about February, 1 1996 ,built a room on the upper storey of his house to the east of the said house of the plaintiff, and in the western wall of the newly built room he has opened three

(n) There is no inherent right to privacy but such a right can be acquired by prescription, grant or local usage (*Kesho* v. *Mt. Muktakiran*, A 1931 Pat 212, 133 IC **enjoyed, and also that the defendant's act substantially interferes with such privacy** (*Gokul* v. *Radha*, 10 A 358; *Mt. Janki* v. *Bhagwan Din*, 94 IC 914, 29 OLJ 136) and without such allegations of the existence of the customary right and of his right to the advantage of it, the suit will fail (*Bhagwandas* v. *Zamarrud Hussain*, 1929 All LJ 1028, 51 A 986; *Bhulan* v. *Altaf*, 1946 AWR 272, A 1945 All 335) The Oudh Court has, however, held that the custom is so well established in these provinces that the courts are entitled to take judicial notice of it (*Baqridi* v. *Rahim Bux*, 93 IC 332, A 1946 Oudh 352). Some Allahabad rulings have also taken the same view as the Oudh court (*B.Nihal Chand* v. *Mst. Bhagwan Dei*, A 1935 All 1002 and *Mst. Daropadi Devi* v. *S.K. Dutt*, A 1957 All 48). The fact that the houses are separated by a public road does not prevent the existence of a right of privacy (*Sardar Husain* v. *Ahmad Husain*, 110 IC 693 Oudh). The Madhya Pradesh High Court has held that the custom has got to be strictly proved. Even if custom is proved an injunction cannot

windows overlooking the residential rooms, the courtyard and the kitchen of the *zanana* portion of the plaintiff's said house.

The plaintiff claims :

(1) That a mandatory injunction be issued to the defendant to close the said windows.

(2) That an injunction be issued to restrain the defendant from doing any act in invasion of the plaintiff's right of privacy attached to the said house.

No. 187—Suit for Diverting of Water-Course

(Form No. 27, Appendix A, C.P.C.)

1. The plaintiff is, and at the time hereinafter mentioned was possessed of a mill situated on a [stream] known as the ______ in the village ______, district of ______.

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be granted unless it is established that there has been a substantial infringement of the right of privacy (*Abirchand Gulab Chand Jain* v. *Monik Ramnarain Tailor*, 1978 MPLJ 204). The plaintiff has to prove that he has been enjoying the right of privacy. So where his premises are already overlooked from the roof of the defendant's house as well as other adjacent houses he cannot claim a right of privacy and cannot complain of further invasions (*Shiv Lal* v. *Ram Narain*, 3 IC 88 All; *Mst. Karimannissa* v. *Mira Baksh*, A 1929 All 809, 119 IC 834). But on the ground that looking out of a window does not attract the attention of the inmates of the plaintiff's premises to enable them to seclude themselves, while looking from the roof does, it has been held that even if a house is overlooked from other sides, the opening of additional apertures would nevertheless be an infringement of the right of privacy and may be restrained (*Kunj Behari* v. *Brij Behari*, A 1947 Oudh 139; *Abdul Rahman* v. *Bhagwandas*, 29 All 582). The right of privacy must be pleaded and proved. If the defendant opens any new window, the plaintiff is fully entitled to block the same by raising the height of his wall, and the defendant is not entitled to break or damage the said wall or any portion thereof so as to remove the obstruction to his new window (*Anguri* v. *Jiwan Dass*, A 1988 SC 2024). The right is not restricted to Indians alone, but it has been recognised even in favour of European ladies (*Abdur Rahman* v. *D. Emile*, 15 A 69); but not in favour of males (*Bhullan* v. *Altaf*, A 1945 All 335). Right of privacy may exist only in respect of inner courtyard, the custom should be in the circumstances reasonable and the court will see whether it has not fallen into disuse (*Diwan Singh* v. *Inderjeet*, A 1981 All 342). In *Busai* v. *Hasan Raza*, A 1963 All 340, it was held that in view of the changed social conditions the older decisions based on *purdah* system were no longer valid.

Such a suit can be brought either by the owner or by the lessee of a house. All that the plaintiff can claim is the protection of this right and if the same can be

2. By reason of such possession the plaintiff was entitled to the flow of the stream, for working the mill.

3. On the ___ day of ______ 19___, the defendant, by cutting the bank of stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than _____ sacks per day, whereas, before the said diversion of water, he was able to grind _____ sacks per day.

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 188—Suit for Obstructing a Right to Use Water for Irrigation

(Form No. 28, Appendix A, C.P.C.)

1. Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the ___ day of ______ 19___, the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

FALSE IMPRISONMENT *(o)*

No. 189—Suit for False Imprisonment

1. The defendant No.1 is an Executive Engineer employed in the

secured without total removal of the offending constructions, it is not necessary to order total removal (*Fazal Haq* v. *Fazal Haq*, 26 ALJ 49). The Court will always take into consideration the extent and degree of privacy to which the plaintiff is entitled under the circumstance of a particular case (*Sardar Husain* v. *Ahmad Husain*, 110 IC 693).

Defence : The defendant may show that the right of privacy has not been substantially enjoyed by the plaintiff as plaintiff's house is overlooked from several, other houses in the neighbourhood (*Shib Lal* v. *Ram Narayan*, 3 IC 88; *Mt. Karimunissa* v. *Mira Baksh*, 119 IC 834, A 1929 All 809), or that the interference is not substantial. It is no defence that the plaintiff can help himself by raising his own walls. But the right of privacy cannot be carried to an offensive length. It can also be pleaded that the custom has fallen into disuse.

(o) Restraint of the liberty of a person without lawful excuse is false

Irrigation Department, and on November 14, 1995 was encamping at Bagrasi in the district of Bulandshahr.

2. On November 14, 1995, the plaintiff was passing near the tent of the defendant No.1 when the said defendant No.1 arrested and detained the plaintiff for two hours and afterwards gave him into the custody of defendant No.2 who is a police Sub-Inspector at Siyana, on a false charge of having abused the son of defendant No.1.

3. The plaintiff offered to give his correct name and address to the defendant No.2, and to execute such bond to appear before a magistrate as the said defendant No.2 might direct but the said defendant No.2 refused to release the plaintiff, and took him in custody to Bulandshahr and after keeping him in wrongful confinement for 26 hours produced him before the Judicial Magistrate of Bulandshahr.

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imprisonment. It must be shown that the plaintiff was arrested or detained, either by force or by show of force or authority, without any lawful excuse or authority. The arrest is wrongful and actionable if it is made without authority of law, and without a warrant, or by an illegal warrant or by a legal warrant executed in an unlawful manner, and all that should be alleged in a suit for false **imprisonment are facts showing that imprisonment was unlawful. It is not necessary to prove that it was made maliciously.** The motive for the arrest need not therefore be alleged in the plaint (*Ram Pyarelal* v. *Om Prakash*, ILR (1977) 1 Del 549). False imprisonment is actionable without proof of special damage and it is not necessary for a person unlawfully detained to prove that he knew that he was being detained or was harmed by his detention (*Murray* v. *Ministry of Defence*, (1988) 2 All ER 521 HL).

Judicial Officers are exempt from liability for what they do in the discharge of their judicial duties, provided they, in good faith, believe they have jurisdiction to do that act (Act XVIII of 1850). For this purpose "Jurisdiction" means not the power to do or order the act imputed but generally his authority to act in the matter (*Anwar Hussain* v. *Ajoy Kumar*, A 1965 SC 1651). If he acted within his jurisdiction, even malice will not make him liable (*Girija Shanker* v. *Gopalji*, 30 B 241). The plaintiff should simply give the fact of his arrest or imprisonment and, if it was made by a public officer, facts showing that he had exceeded his authority. It is for the defendant to prove lawful justification (*Ram Pyare Lal* v. *Om Prakash*, ILR (1971) 1 Del 549).

The private person who moves a public officer to arrest or imprison a wrong person, is liable, if he has taken an active part in such arrest or if he obtains the warrant fraudulently and improperly. But if the defendant has placed all the facts before the officer having the discretionary power to order such arrest he is not responsible if the officer with full knowledge of all the facts, exercised his discretion and ordered the arrest (*Thakdi Haji* v. *Budrudin*, 29 M 208; *Balbhaddar* v. *Basdeo*,

The said Magistrate on November 16, 1995, discharged the plaintiff from custody, on the plaintiff executing a personal recognisance, to appear when called upon.

The plaintiff claims Rs.10,000 as general damages for disgrace, humiliation, physical discomfort and mental suffering.

29 A 44; *Graham* v. *Henry Gidney*, 60 C 955, A 1933 Cal 708). In such cases, if the plaintiff has been prosecuted unsuccessfully, a suit for malicious prosecution will lie. The distinction between these two kinds of suits should be carefully remembered; **if a man himself arrests or moves a ministerial or police officer to arrest another, he may be liable for false imprisonment**, and the plaintiff will be entitled to a decree without proof of malice or want of reasonable or probable cause. It will be for the defendant to prove facts justifying the arrest and the existence of reasonable and probable cause, if the same is a justification. But **if the defendant has made a charge before a Magistrate or a Judge, and the latter has ordered the arrest of the plaintiff, or has remanded him to custody, the defendant is not liable for false imprisonment**, but may be liable for malicious prosecution, in which case the plaintiff has to allege and prove not only his prosecution and the injury resulting from the same, but also that the defendant acted maliciously and without a reasonable or probable cause in prosecuting him (*Nagendra* v. *Basanta*, 57 C 5). The reason is obvious; imprisonment is a tort, unless justified; prosecution is not a tort, unless it was malicious and made without a reasonable or probable cause (*Austin* v. *Dowling*, LR 5 CP 534, 540; *Hicks* v. *Faulkner*, 8 QBD 167, 170). In order to succeed in a suit for damages for wrongful arrest and detention, it is not necessary for the plaintiff to prove malice and want of reasonable and probable cause on the part of the defendant in causing his wrongful arrest and detention (*Lalta* v. *Asharfi Lal*, A 1948 Oudh 135; *Bimal Prakash* v. *U.P.State*, 1969 ALJ 276).

If a man arrests another or causes a constable to arrest him and then unsuccessfully prosecutes him before a magistrate, that is a case both for false imprisonment and malicious prosecution and the element necessary for supporting the claim on each ground should be mentioned in the plaint. In such cases damages may be separately assessed and claimed for each act of tort (*Nurkhan* v. *Jiwandas*, 99 IC 638, A 1927 Lah 120). The principal heads of damages in a suit for false imprisonment would be the injury to liberty, that is, the loss of time considered from non pecuniary view point and the indignity, mental suffering, disgrace and humiliation with any attendant loss of social status (*Sailajanand Pande* v. *Suresh Chandra Gupta*, A 1969 Pat 194). Damages in a case of false imprisonment cannot be nominal but must be substantial. The damages may be aggravated if the defendants have acted in a high handed manner and caused more than usual amount of suffering and the defendants did not express any regret. The damages can be mitigated if the defendants act *bonafide* and express repentance for the wrong done by them at the earliest opportunity (*Ram Pyare Lal* v. *Om Prakash*, ILR (1977) 1 Delhi 549, 1977 Cr. LJ 1984 Del). Status is a relevant factor in assessing damages (*Nihal Singh* v.

No. 190—Suit for Moving a Police Officer to make Arrest

1. On October 14, 1995, the defendant made a false report of theft against the plaintiff at the Budaun *Kotwali* police station and requested the Sub-Inspector in charge of the said police station to arrest the plaintiff.

2. On the said report and the said request of the defendant, the said Sub-Inspector arrested the plaintiff on October 15, 1995, and kept him in the lock up for 24 hours, after which the said Sub-Inspector released the plaintiff.

The plaintiff claims Rs.5,000 as general damages.

Partap Singh, 1965 ALJ 805).

Limitation : One year from the time when the imprisonment ends vide Article 73. For malicious prosecution the limitation under Article 74 is one year from the date of acquittal or termination of the prosecution.

Defence : Facts justifying the act, e.g., that the defendant acted in defence of his property on which the plaintiff was trespassing or that he acted in discharge of his official duties or under order of a superior officer, may be pleaded. Arrest and imprisonment by public officer can be made only in certain specified circumstances, e.g., a police officer can arrest without a warrant in cases mentioned in sections 41, 42 and 151, Cr. P.C. and section 34, Police Act. If the defendant is a public officer, he must allege all facts showing that his act was within his legal powers, with such particulars as may be necessary. If the defendant seeks protection of the Judicial Officer's Protection Act, he must show-(1) that the imprisonment was ordered by him in discharge of his official duties, and (2) that the order was made within the limits of his jurisdiction, or, if not within those limits, that he, at the time, in good faith believed himself to have jurisdiction to make the order. The existence of a reasonable cause for the act complained of supplies the ground for the existence of good faith (*Rohini Kumar* v. *Niaz Mohammad*, A 1944 Cal 4).

A private person's powers of arrest in India are more defined and restricted than in England, and the general law on the subject is to be found in section 43, Cr. P.C. The only defence of a private person can therefore be either that the plaintiff was proclaimed offender, or that the plaintiff had committed a cognizable and non-bailable offence, in his presence (*Nazir* v. *Rex*, A 1951 All 3). If the offence was not committed in his presence, the arrest cannot be justified, even if the offence has really been committed and even if the defendant has reasonable cause for suspecting it. An issue of a reasonable and probable cause is, therefore, immaterial in such cases (*Gouri Prasad* v. *Chartered Bank*, A 1925 Cal 884, 52 C 615). If, however, a private person moves a police officer to arrest another person, and the police officer arrests the latter, not on his own responsibility and not after his own investigation and exercise of his own discretion, but on the motion of the private person alone, the latter must prove that he had reasonable ground for

No. 191—Suit for Arrest before Judgment *(p)*

1. The defendant instituted a suit No.141 of 1986 in the Court of the Munsif at Muzaffarnagar, against the plaintiff for recovery of Rs.2,000.

2. In connection with the said suit, the defendant obtained an order of arrest before judgment on January 15, 1986, from the said court, on the allegations that the plaintiff was going to leave India and had no property in India.

3. The aforesaid allegations were false, as the plaintiff had no intention to leave India and owned and still owns house worth Rs.1,50,000 at Meerut.

4. The defendant obtained the said order maliciously and without any reasonable or probable cause.

5. The plaintiff was arrested in pursuance of the said warrant, and was released, on furnishing security, after 12 hours.

6. The plaintiff was, by the said arrest, considerably disgraced and has suffered damage to his credit and reputation.

The plaintiff claims Rs.10,000 as damages.

FRAUD *(q)*

No. 192—Suit to Set Aside a Decree on the Ground of Fraud *(r)*

1. The defendant has obtained an exparte decree against the plaintiff

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suspecting that the person arrested had committed an act for which the police officer was entitled to arrest him and, in making this allegation, should give particulars of the reasonable and probable grounds. In the case of *Gauri Prasad* v. *Chartered Bank* supra, Page J., however, went further and held that even the existence of a reasonable and probable cause will be no justification when the offence was not committed in the defendant's presence because the arrest by a police officer in the presence of and at the investigation of the defendant should be regarded as arrest by the defendant himself which could not be made except under section 59, Cr. P.C. (now section 43). But in any case, if the police officer makes the arrest after making his own investigation, the mere fact that he did so on the report of the defendant would not make the defendant liable (*Balbhaddar* v. *Basdeo*, 29 A 44).

(*p*) See note *(e) ante* about attachment before judgment. The same applies *mutatis mutandis* to arrest before judgment.

(*q*) Fraud and misrepresentation are acts of tort which give a cause of action

from the Court of the Civil Judge of Monghyr (being decree No.557 of 1993), on February 5, 1994.

2. The said decree was obtained by the defendant by fraud. The following are the particular of the said fraud :

(i) The defendant made statement in the plaint that the plaintiff was a resident of village Talra, and got the summons issued against the plaintiff to village Talra. When the summons was returned with the report that the

provided they result in any damage to the plaintiff. If no damage is caused to the plaintiff, fraud or misrepresentation furnishes no cause of action. An actionable fraud of misrepresentation consists of the making of a wilfully false representation of a fact made with the intent that the plaintiff should act on it and of the plaintiff acting on it and suffering loss. A representation, if *bona fide*, is not actionable even if it was made negligently provided it was not made recklessly without caring whether it was true or false (*The United Motor Finance Co.* v. *Romar Dan & Co.*, A 1937 Mad 897). The object of a plaintiff in a suit on the ground of fraud is to be restored to the same position in which he was before the fraud was committed, or in which he would have been, had the fraud not been committed. This object may be achieved by a declaration of the invalidity of a transaction which is the result of fraud, by cancellation of a document, by rescission of a contract or by recovery of damages. **Fraud must be specifically alleged with full particulars** (*vide*. Chapter VI, Part I). **It should be clearly alleged in the plaint that the particular transaction was the consequence of the fraud, and that the defendant is either the perpetrator of the fraud, or an abettor in its perpetration or one who has accepted some benefit under the fraudulent transaction.**

(*r*) "Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by practising fraud on the court is a nullity and *non est* in the eyes of law. Such a judgment/decree— by the first Court or the highest Court—has to be treated as nullity by every Court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings (*S.P. Chengalvaraya Naidu* v. *Jagannath*, A 1994 SC 853). A court has jurisdiction to set aside a decree obtained by fraud and the defendant can bring a suit for the purpose, though if the fraud was committed on the court, the court can set aside the decree even under section 151, C.P.C. without a regular suit (*Sreemati Savitri* v. *Savi*, 6 Pat 108; *Akhil Kumar* v. *Board of Revenue*, 1995 ALJ 118). (See however, *Sadashiva* v. *Mahadeo*, 118 IC 61, A 1929 Nag 111; *Keshav* v. *Subha*, A 1939 Bom 490, where it has been held that a decree passed in terms of award or by consent cannot be set aside under section 151 on the ground of fraud).

The plaintiff must show how, when, where and in what way the fraud was committed. "The fraud must be actual positive fraud, a mediated and intentional contrivance to keep the parties and the court in ignorance of facts of the case and

plaintiff was not found at Talra, the defendant made an application, supported by an affidavit, alleging that the plaintiff was intentionally evading service, and praying for substituted service, and he obtained an order for service on the plaintiff by publication in "The Statesman," Calcutta.

The said statement of the defendant that the plaintiff was a resident of Talra and that he was evading service were false, were known by the

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obtaining the decree by that contrivance" (*Mohomed Hashim* v. *Iffat Ara*, 74 CLJ 261). Mere general allegation of fraud are not sufficient nor proof of constructive fraud or suspicion (*Laxmi Narain* v. *Mohd. Shafi*, A 1949 East Punjab 141). Fraud like any charge of a criminal offence must be established beyond reasonable doubt. Finding of fraud cannot be based on conjecture or suspicion (*Kishan Das Ram Kumar* v. *Shravan Kumar*, 1975 PLJ 556; *Savithramma* v. *H. Gurappa Reddy*, A 1996 Kant 99 Para 8). If fraud is practised on the court or the other party, decree cannot be set aside on the suit of a third person who was no party to it, on the ground that the decree holder had practised fraud upon the latter (*Bishamber* v. *Nilamber*, 125 IC 861, A 1930 Cal 263, 33 CWN 997). *Exparte* decrees, consent decrees and decrees obtained after contest are all liable to be attacked for fraud, the character of which will vary with the circumstance of each case (*Nanda Kumar* v. *Ram Jiban*, 41 C 990, 18 CWN 681, 19 CLJ 457, 23 IC 33). A consent decree may be set aside not on ground of fraud but even on grounds of undue influence, etc., on which a less formal agreement may be set aside (*Rama* v. *Manikkam*, A 1935 Mad 726; *Sital* v. *Parbhu*, 10 All 535). The plaintiff may show that he was prevented by the fraud practised by the defendant from appearing and contesting the claim, or that his consent to compromise was obtained by fraudulent misrepresentation. It is not sufficient merely to allege that the summons was not served on the plaintiff (*Sekharan* v. *Krishnan*, 28 Travancore LJ 184), but it must be alleged and proved that the defendant was responsible for suppressing the service or for having false return of service made (*Jawahir* v. *Neki Ram*, 13 ALJ 190; *Mahadeb* v. *Mahabir*, A 1923 Cal 569 DB; 76 IC 767; *Narana* v. *Kojiram*, 1939 MLR 113); or was, by any fraud, kept back from coming forward and defending the suit. The contrivance should be clearly alleged as particulars of fraud. If, however, the defendant was aware of the suit and could, if he chose, come and defend it, he cannot have the decree set aside on the allegation that the plaintiff practised fraud by making false allegation of title and producing false evidence (*Baikuntha Chandra* v. *Prahlad*, A 1926 Cal 426, 88 IC 52 DB; *Mohammed Yusif* v. *Nurjan*, 104 IC 805 Sind; *Kadirvelu* v. *Kappuswami*, 41 M 743, 34 MLJ 590, 23 MLT 372, 1918 MWN 514, 45 IC 774; *Badri Narain* v. *Parsoti*, 170 IC 146, A 1937 Pat 384; *Konda* v. *Palaniswami*, (1941) 2 MLJ 640). But the court can go into the question whether a claim was false in order to determine whether the plaintiff really suppressed the service of summons on the defendant to obtain a decree on a false claim (*Ram Chandra* v. *Prahlad*, 101 IC 708, 8 PLT 193; *Jagdeo Prasad* v. *Bhagwan Hajam*, 161 IC 474, A 1936 Pat 135; *Kunja Bihari* v. *Krishandhone*, A 1940 Cal 489).

defendant to be false and were made fraudulently to prevent the plaintiff from being informed of the suit, and the plaintiff was thus kept ignorant of the institution of the suit. The plaintiff is a resident of village Sambalhera and has always been living there.

One who seeks to impugn a decree passed after contest takes on himself a much heavier burden and it is not discharged by merely showing that the decision in the former suit was erroneous (*Nanda Kumar* v. *Ram Jiban*, 41 C 190, 23 IC 33). A decree cannot, therefore, be set aside merely because it was obtained on false and perjured evidence (*Kasiwar* v. *Amruddin*, 47 IC 14, 23 CWN 133; *Janki* v. *Lachmi*, 13 ALJ 753; *Kumar Swami* v. *Kamalchi*, 23 MLJ 187, 16 IC 843; *Sher Bahadur* v. *Md. Amin*, 116 IC 330, A 1929 Lah 569 DB), or that a false statement was made in the written statement by the defendant knowing it to be false, as the fraud must be extrinsic to the proceedings in the court (*Ramnathan* v. *Palaniappa*, 180 IC 286, A 1939 Mad 146). But where there has been a wilful suppression of evidence and the evidence withheld is of such a character that, if it had been produced, the probabilities are that the court would have come to a different conclusion, a suit will lie to set aside the decree. **But the plaintiff should in such a suit give full particulars of the evidence withheld and how it would have produced a different result to the litigation** (*Bhikaji* v. *Balvant*, 105 IC 296, 29 BLR 1046, A 1927 Bom 510 DB). If a plaintiff can show that the defendant prevented him by any contrivance from placing before the court in the former suit any material, relevant to the issue, or if any subsequent discovery of evidence shows that, there was any fraud, or that the court was misled in the former suit, the decree obtained even after contest can be set aside (*Abdul Karim* v. *Laiq Ram*, 173 IC 954, A 1937 Rang 534). Where a lady was kept in the dark about proceeding before an arbitrator and when steps were taken to have the award filed, her pleader without her knowledge, confessed judgment, it was held that fraud had been practised (*Umrao Begum* v. *Rahmat Ilahi*, 186 IC 77, A 1939 Lah 439). Merely giving wrong address for service which result in no service is not a fraud (*Tarunanga Nath* v. *Prem Narain*, A 1933 Cal 274, 143 IC 710, 60 C 98).

A decree cannot be set aside on the ground of mistake of fact or law (*Municipal Committee, Amritsar* v. *Harnam*, 9 Lah 35; *Allahbux* v. *Nusserwanji & Co.*, 164 IC 43, A 1936 Sind 99) or, on the ground that it was based on wrong principles (*Madivalapa* v. *Subappa*, A 1937 Bom 458). But a suit to set aside a decree obtained by fraud, practised by the plaintiff himself or both by the plaintiff and the defendant, is not maintainable (*Shripal Gonda* v. *Govind Gonda*, A 1941 Bom 77, 193 IC 795; *Godappa* v. *Balaji*, 196 IC 90, A 1941 Bom 274; *Md. Fazal Khan* v. *Abdul Rahim Khan*, 1950 NLJ 226).

A suit to set aside a decree on the ground of fraud may be instituted in any court in which a part of the fraud was committed, e.g., in a court which served the summons, when the fraud was committed in connection with the service, or where the decree is executed (*Jawahir* v. *Neki Ram*, 13 ALJ 190). There is no objection to

3. The plaintiff came to know of the fraud alleged in para. 2 above on March 10, 1995, when on receipt of a notice of execution he inspected the record of the original case.

The plaintiff claims that the said decree be set aside.

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an inferior court entertaining a suit for setting aside, on this ground, a decree passed by a superior courts (*Pilla* v. *Vedola*, 24 MLJ 254, 51 IC 536; *Chandi Prasad* v. *Govind*, 39 IC 791, 1 PLW 499).

When a defendant applied under O.9, R.13, for setting aside a decree because he was kept away from appearing on account of the fraud of the plaintiff, but did not deposit security as required by the Provincial Small Cause Courts Act, his application was dismissed, and it was held that he could bring a regular suit on the same grounds (*M.A. Maistry* v. *Abdul Azizz*, 104 IC 313, 5 R 471, 6 Bur LJ 148). But when a Small Cause Court had made an adjudication on merits, a regular suit was held barred (*Musthana* v. *Mohendra*, 76 IC 794, 1 R 500, A 1924 Rang 119).

Limitation : For such suit is three years from the date when fraud becomes known to the plaintiff (Article 59). The plaintiff should, therefore, mention the date of his knowledge in the plaint. If the defendant pleads limitation he must show plaintiff's knowledge anterior to that date (*Rahimbhoy* v. *Turner*, 17 B 341 PC).

Relief: claimed should be specifically for setting aside the decree. A declaration that the decree is not binding cannot be granted as the decree obtained by fraud is merely voidable and not void (as in the case of a decree passed without jurisdiction) and is perfectly binding until set aside (*Haji Munshi Fuzlu-Uddin* v. *Khetra Ghorai*, 30 CWN 59, A 1926 Cal 167 DB; *Pevandbai* v. *Thaoomal*, A 1926 Sindh 15, 88 IC 744; *Rajbans* v. *Askaran*, A 1930 Pat 227, 125 IC 113), nor can suit be maintained for declaration that proceedings in execution of a decree are null and void (*Amar Singh* v. *Chhajjumal*, 108 IC 55 Lah). Where the decree is against several persons including the plaintiff and is for a declaration that a certain *wakfnama* is invalid, the plaintiff might sue for a declaration that the decree is nullity so far as he is concerned and is not binding upon him. It has been held in *Rajib Pande* v. *Lakhan*, 27 C 11; *Bholanath* v. *Mt. Nagendra Bala*, 110 IC 571, A 1928 Cal 810 DB, and *Jamiraddin* v. *Khadejanesso*, 114 IC 407, A 1929 Cal 685; *Jatindranath Das* v. *Judaram*, 79 CWN 936; *Asharfi Lal* v. *Koili*, A 1995 SC 1440, that party against whom a decree is set up can show, without having to bring a fresh suit, that the decree was obtained by fraud. The aid of section 44, Evidence Act was taken in these cases.

The consequence of the setting aside of a decree on the ground of fraud depends on the finding in the suit for setting aside the decree. If the whole proceedings are set aside as fraudulent, that is the end of the matter and the earlier suit cannot be continued. If, on the other hand, the decree has been set aside on the ground of suppression of summons by means of fraud the first suit is revived and the plaintiff of that suit is entitled to have it tried and disposed of according to law (*Nizan Singh* v. *Kishuri Singh*, A 1931 Pat 204 FB; *Jagrup* v. *Ram Sabad*, A 1942

No. 193—Suit for Setting Aside a Transfer made to Defeat Creditors *(s)*

1. The plaintiff No.1 has decree No. 515 of 1994, passed by the Civil Judge at Varanasi, for Rs.2,908 against defendant No.1 and the plaintiff No.2 has debt of Rs.2,600 and interest owing to him under a bond of August 4, 1993, from the said defendant No.1.

[*If there are other creditors also, add*—several other persons whose names and addresses so far as known to the plaintiffs are given in the schedule attached herto (*or*, whose names are not known to the plaintiffs) (*or*, several other persons, the names and addresses of some of whom are mentioned in the schedule attached hereto and the name of others are unknown to the plaintiffs) have also debts owing to the them from the said defendant No.1].

2. The plaintiffs bring the suit on behalf of all the creditors of defendant No.1.

3. With the intention of defeating the aforesaid claims of the plaintiffs (*or*, the plaintiffs and the other creditors aforesaid) the defendant No.1 has fraudulently transferred the whole of his immovable property, detailed below, by a deed of gift dated May 18, 1995, in favour of his sister's son, defendant No.2

4. The plaintiffs came to know of the said gift on July 20, 1995, when a notice of mutation was published in the village.

Oudh 217; *Bisesar Pathak* v. *Phaguni Mahton*, A 1948 Pat 33).

Defence : in such cases usually is a denial of the alleged facts or of their sufficiency to amount to fraud. Since *res judicata* is outside the region of fraud it cannot be pleaded that the suit is barred by the principles of *res judicata* u/s 11 of C.P.C.

(s) Such a suit cannot be brought by the transferor himself after the fraudulent purpose has been carried out (*Mangal* v. *Bakhtawar*, 135 IC 244; *Kisan Ram* v. *Godawari*, A 1940 Pat 389, 189 IC 489; *Nagabhusan* v. *Seethama*, 18 Mys LJ 409; *Kalipada Mondal* v. *Kali Charan Mondal*, A 1949 Cal 204). Under section 53 Transfer of Property Act, such a suit can be instituted only on behalf of, or for the benefit of, all the creditors. Therefore, though one creditor may sue and though he is the sole and only creditor, yet he must do so for the benefit of all and should make this clear in his relief (*Deokali* v. *Ramdevi*, A 1941 Rang 76, 193 IC 286) **The plaintiffs must allege their claims, the defendant's transfer, and the fact that it was made fraudulently with an intent to defeat or delay the claims.** *It must also be clearly*

The plaintiffs' claim that the said transfer be declared null and void against the creditors of the said defendant No.1.

No. 194—Ditto, with Alternative Claim for a Declaration that the Transfer is Sham

1. The plaintiff got attached the house described below in execution of his decree No.515 of 1994 of the Civil Judge's Court, Varanasi, against defendant No.2.

(Description of the house)

* * * *

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alleged that the suit is brought on behalf of, and for the benefit of all the creditors, otherwise the suit will not be maintainable under section 53, Transfer of Property Act (*Faquir Bux* v. *Thakur Prasad*, A 1941 Oudh 457, 194 IC 588). If all creditors are not joined, permission must be obtained under O.1, R. 8, for bringing a representative suit. If no such permission is obtained, the suit will not be representative in spite of an allegation in the plaint to that effect and the decision will be binding only on the actual parties to the suit even if it is not dismissed on the ground of non-maintainability (*Mt. Banto* v. *Firm R.S. Lala Shiva Prasad*, A 1943 Lah 96) but if all the creditors are parties to the suit no permission to sue under O.1, R.8, is necessary (*Jaina* v. *Official Receiver*, A 1946 Mad 25). If a suit is filed by the plaintiff in the belief that he is the only creditor, even the Appellate Court can give him permission to sue in a representative capacity (*Mandavil* v. *Krishna*, A 1947 Mad 194, (1946) 2 MLJ 432, 1947 MWN 732).

It is not necessary that the creditor should be a judgment creditor, but any one who has a claim for which the transferor is legally liable can sue, e.g., a Hindu wife who has been deserted by her husband has a legal claim for maintenance and is a creditor (*Meenakshi* v. *Ammani*, 101 IC 610 Mad). Even a future creditor can sue on the allegation that the transfer was made on the eve of borrowing money from him in order to defraud him, though in that case the onus on him will be a heavy one (*Muhammad Ishaq* v. *Md. Yusuf*, 8 Lah 544). But an auction purchaser in execution of a decree of the creditor cannot sue except when he is the decree holder himself (*Ram Ratan* v. *Akhatii*, 181 IC 181, A 1939 Oudh 230; *Lalit Mohan* v. *Anil Kumar*, 43 CWN 1136; *Bai Hakimbu* v. *Dayabhi*, A 1939 Bom 508, 185 IC 655). Preferring one creditor to another is not an act of fraud and a transfer made with that object cannot be set aside (*Ma Pwa* v. *S.R.M.M.A. Chettiar*, 561 A 379, 7 R 624, 34 CWN 6, A 1929 PC 279; *Bai Hakimbu* v. *Dayabhai*, A 1939 Bom 508; *Bulaqi* v. *Jaswant*, 42 PLR 385; *Musahar Sahu* v. *Hakim Lal*, 14 ALJ 198 PC; *Mina Kumari* v. *Bijoz Singh*, 15 ALJ 382 PC; *Kishan Das Ram Kumar* v. *Shravan Kumar*, 1975 MPLJ 556). Where the sale consideration is inadequate, and the sale deed was executed only nominally for a collateral purpose and with a view to stave off creditors with the express understanding that the properties sold would be reconveyed to the vendors after

2. Defendant No.1, who is the wife of defendant No.2, claimed the said house under a sale-deed, dated May 15, 1992, executed by defendant No.2 and her claim has been allowed and the house released from attachment.

3. The said sale-deed is a sham and bogus transaction and does not convey any title to defendant No.1.

4. Alternatively, the said sale was made by defendant No.2, fraudulently with the intention to defeat or delay the claims of the plaintiff under the aforesaid decree.

The plaintiff claims a declaration that the said sale-deed is a sham and bogus transaction, or that it is null and void against the plaintiff, and therefore the said house is liable to attachment and sale in execution of the plaintiff's aforesaid decree.

No. 195—Suit for Procuring Property by Fraud

(Form No. 21, Appendix A, C.P.C.)

1. On the ___ day of _____ 19___ , the defendant for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent and worth ________ rupees over all his liabilities].

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the pressure of the creditors had subdued, it was held that the sale was vitiated. It was also held that vendee was not entitled to any equities in such cases (*Prasad* v. *Govindaswami Mudaliar*, A 1982 SC 84).

The facts proving the transaction to be fraudulent need not be detailed in the plaint, but must be reserved for the trial. If the transaction was a sham and colourable one and not intended to take effect as a transfer, a suit need not be brought under section 53 Transfer of Property Act, but the creditor may follow the property (*Bibi Sirab* v. *Mt. Golab Kuer*, 53 IC 892, A 1929 Pat 409; *Palaniandi* v. *Appavu*, 30 MLJ 565, 34 IC 778; *Prabhu* v. *Sarju*, A 1940 All 407, 190 IC 337). In fact in such cases a suit can not be brought under section 53 Transfer of Property Act (*G.B. Subrayalu* v. *A. Rao*, A 1945 Mad 281). He may bring an alternative suit for declaration that the transaction is a sham or for having it set aside under section 53 Transfer of Property Act. It was held in some cases that the frame of a suit seeking to set aside a transfer on the ground of being collusive and fictitious was defective (*Prabhu* v. *Sarju*, A 1940 All 407; *Mt. Rukaiya* v. *Radha Dishan*, A 1944 All 214). This seems to be too technical a view and in a subsequent case Kerala High Court rejected such an attack (*Onseph Skaria* v. *Cherian Joseph*, A 1965 Ker 288).

Limitation is 3 years under Article 113. The starting point of limitation is the date on which the plaintiff comes to know of the circumstances entitling him to

2. The plaintiff was thereby induced to sell [and deliver] to the defendant sundry goods of the value of ______ rupees.

3. The said representations were false [*state the particulars of falsehood*] and were then known by the defendant to be so.

4. The defendant has not paid for the goods (*or, if the goods were not delivered*, the plaintiff, in preparing and shipping the goods and procuring their restoration, expended ____ rupees).

[*Relief claimed*]

No. 196—Fraudulently Procuring Credit to be given to another Person

(*Form No. 22, Appendix A, C.P.C.*)

1. On the __ day of ______ 19__, the defendant represented to the plaintiff that *EF* was solvent and in good credit, and worth ____ rupees over all his liabilities [*or*, that *EF* then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit].

2. The plaintiff was thereby induced to sell to *EF* [rice] of the value ____ rupees [on ____ month's credit].

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff (*or*, to deceive and injure the plaintiff).

4. *EF* [did not pay for the said goods at the expiration of the credit aforesaid *or*,] has not paid for the said rice, and the plaintiff has wholly lost the same.

[*Relief claimed*]

No. 197—Suit against a Fraudulent Purchaser and his Transferee with Notice

(*Form No. 33, Appendix A, C.P.C.*)

1. On the ____ day of ______ 19___, the defendant *CD* for the

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have the transfer avoided. It is necessary to allege the date of knowledge of the plaintiff.

Defence : The defendant transferee may show that he has taken the property for consideration in good faith, or that he was also a creditor and has taken in lieu

purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth ____ rupees over all his liabilities].

2. The plaintiff was thereby induced to sell and deliver to *CD* [one hundred boxes of tea], the estimated value of which is ____ rupees.

3. The said representations were false, and were then known by *CD* to be so [*or*, at the time of making the said representations, *CD* was insolvent, and knew himself to be so].

4. *CD* afterwards transferred the said goods to the defendant *EF* without consideration [*or*, who had notice of the falsity of the representation].

The plaintiff claims :

(1) Delivery of the said goods, or ____ rupees, in case delivery cannot be had;

(2) ____ rupees compensation for the detention thereof.

[*For other precedents of fraud, see "Cancellation of Instrument" ante*].

INJUNCTION *(t)*

No. 198—Suit for Damages for Wrongfully Obtaining Temporary Injunction

1. On March 20, 1994, the defendant instituted a civil suit No.12 of 1994 in this court against the plaintiff for recovery of possession on certain land, on which the plaintiff was constructing a house.

2. On the same date, the defendant applied for and obtained a temporary injunction restraining the plaintiff from making any further construction until the disposal of the said civil suit. The said injunction was served upon the plaintiff on March 22, 1994.

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of his debts. If the creditor once accepts a gift, e.g., impleading the donee in his suit under section 128, Transfer of Property Act, he cannot afterwards impeach the gift under section 53 (*Sachitanand* v. *Radhapat*, 26 ALJ 524 DB).

(t) Forms of suits for "injunction" will be found under "Easements," "Nuisance" and "Injunction". See note *(e)* which applies *mutatis mutandis* to these cases also. The right of such suits is recognised in *Bhutnath* v. *Chandra Benode*, 16 IC 433, 16 CLJ 34; *Har Kumar* v. *Jagat Bandhu*, 100 IC 318, 53 C 1008, A 1927 Cal 247 DB; and *Rama Rao* v. *Somasundaram*, 51 M 642. It is not enough to

3. The defendant's said civil suit was dismissed on December 12, 1995.

4. The said temporary injunction was applied for maliciously and without any reasonable or probable cause.

5. The plaintiff has thereby suffered damage.

Particulars

(i) The plaintiff had erected walls of three rooms to the height of 8 feet before the injunction was served upon him, and they all fell down during the rains. The labour and time were therefore wasted and the bricks were also damaged. It would now cost Rs.12,000 to erect the walls to the same height, after utilizing serviceable bricks of the former wall.

(ii) The plaintiff was building the house for letting it on rent and the plaintiff has lost the rent of 9 months and 21 days at Rs.200 p.m amounting to Rs.1950.

The plaintiff claims Rs.13,940 with interest from date of suit to that of payment.

LEGAL REPRESENTATIVE *(u)*

No. 199— Suit by the Executor or Administrator of a Deceased Person

[*Before setting out the facts constituting the cause of action for the suit, add*]:

"1. The plaintiff is the executor of .... deceased."

or

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show that injunction was applied for on insufficient grounds, it must also be proved that there was no reasonable and probable cause for applying for it and that the defendant was actuated by malice (*Bhupendra* v. *Trinayani*, A 1944 Cal 289; also see *Ram Pratap* v. *Narain Singh*, A 1965 All 172). Abuse of process of law is the crucial element of this tort, and if that is established no further proof of malice is necessary (*Filmistan Ltd.* v. *Hansaben*, A 1986 Guj 35 DB).

Limitation for such a suit is three years from the date when the injunction ceases (Article 90).

(u) The English law maxim that a personal action dies with the person has been modified by *Philips* v. *Homfrey*, (1883) 24 Ch D 439, to this extent that a suit for damages for a wrongful act is allowed to be brought or continued against the estate of the deceased wrongdoer when the property or the proceeds or value of property

"2. The plaintiff is the son and legal heir of...........deceased, who died intestate, and has obtained letter of administration of the estate of the said ....from the court of ....in Miscellaneous/Test, case No.................of..............."

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belonging to another have been appropriated by the deceased person and added to his own estate or moneys. This has been recognised in India also. For example, a suit for damages for trespass on plaintiff's colliery lies against the legal representative of the trespasser (*Pannalal* v. *Adjai Coal Co.*, 101 IC 62, 31 CWN 82, A 1927 Mad 117). The maxin has further been modified in India by the provision of Act XII of 1855 (Legal Representatives Act), section 306, Indian Succession Act and section 89, Probate and Administration Act. Under the provisions of the Succession Act and the Probate and Administration Act, all demands whatsoever, and all rights to prosecute or defend any suit existing in favour of, or against, a person at the time of his death, survive to, or against, his executors or administrators, except causes of action for personal injuries not causing death and except cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory. The deceased plaintiff checked into and stayed at Hotel Oberoi Intercontinental. He visited the hotel swimming pool and while diving got head injury and was incapacitated. He died after 12 years. The maxim '*res ispa loquitur*' applied and compensation awarded. It was also held that the cause of action survived and the heirs of the deceased were entitled to recover the compensation (*Klaus Mittelbachert* v. *East India Hotels*, A 1997 Del 201).

The words "personal injuries" are not confined to physical injuries but wrongs such as defamation, malicious prosecution, etc., are also included (*Punjab Singh* v. *Ram Autor* 52 IC 348, 4 PLJ 676; *Rustomji* v. *Nurse*, 44 M 357; *Motilal* v. *Har Narayan*, 47 B 716). It should be noted that **under these Acts, cause of action does not survive to an ordinary heir or legal representative but only to an "executor" or "administrator"**. Even if the cause of action does not survive in any case, Act XII of 1855 will permit a suit to be brought by the legal representative of any person for a wrong committed in the latter's lifetime which has occasioned pecuniary loss to his estate, and similarly a suit can be brought under that Act against the legal representative of wrong-doer for any wrong for which the latter could have been sued. In the latter case, it is not necessary that the tort should have caused any pecuniary gain to the wrong-doer or loss to the other person. In both cases, the important condition is that the **wrong should have been committed within one year of the death** of the deceased person.

The result may be summarized as below :

If the person wronged dies —

(1) His legal representative cannot bring a suit in respect of a personal injury, except when it causes pecuniary loss to his estate (in which case a suit lies under Legal Representatives Act XII of 1855), or when it causes death (in which case a suit lies under Fatal Accidents Act XIII of 1855).

No. 200—Suit by any Other Legal Representatives under Act XII of 1855

[*After setting out the facts constituting the cause of action for the suit, add*] :

1. The said wrongful act of the defendant has caused the following pecuniary loss to the estate of the said............

(*Specify the injury*).

2. The said..........died on..........

3. The plaintiff is the brother and legal heir and representative of the said............

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(2) In respect of any other tort, his executor or administrator may sue within the ordinary period of limitation.

(3) Any other legal representative can sue only under Act XII of 1855, if the tort has caused pecuniary loss to the estate.

(4) A suit under Act XII of 1855, must be brought within one year of his death, and cannot be brought unless the tort was committed within one year of his death.

(5) If the suit by an ordinary heir does not come within Act XII of 1855, he should obtain letters of administration to be entitled to sue under the Probate and Administration Act or Succession Act.

If the wrong-doer dies —

(1) If the tort was a personal injury, a suit can be brought against his legal representative only under Act XII of 1855, i.e., within two years of his death and only when the tort was committed within one year of his death.

(2) If it was any other tort, a suit can be brought against his executor or administrator within the ordinary period of limitation.

(3) If the wrong-doer has appropriated the property or proceeds or value of property of another, the latter can recover damages from his estate in the hands of legal representative.

Full facts showing how the suit is maintainable should therefore be alleged in every suit for tort by or against a legal representative.

Substitution : Act XII, applies to suits *commenced* by or against a legal representative and does not permit a suit instituted during the lifetime of a person to be continued by or against his legal representative (*Ramchandra* v. *Rockmany*, 28 M 487; *Har Das* v. *Ram Das*, 13 B 677; *Krishna* v. *The Corporation of Calcutta*, 31 C 406). The continuance of such a suit depends on whether the cause of action survives or not according to Succession Act or Probate and Administration Act. Suit filed against a doctor for damages for negligently performing an operation cannot be continued against his legal representative as the doctor's death

No. 201—Suit against the Executor or Administrator of a Tort-feasor

[*After setting out the facts constituting the cause of action, add*] :

1. The defendant is the ....of the said........deceased.

No. 202—Suit against a Legal Representative under Act XII of 1855

[*After setting out the facts constituting the cause of action for the suit, add*] :

1. The said........died on............

2. The defendant is the ....of the said............deceased.

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extinguishes his liability in tort and the right to sue also gets extinguished (*C. Jayprakash* v. *State of A.P.*, A 1977 AP 20).

Suits under, Fatal Accidents Act XIII of 1855

If the death of a person is caused by wrongful act, a neglect or default of the defendant under such circumstances that, if the said act had only resulted in personal injury, short of death, the deceased could have brought a suit for damages, the executor, administrator or representative of the deceased can bring a suit for damages under the Fatal Accidents Act XIII of 1855. Such a suit can be instituted only for the benefit of the wife, husband, parents meaning father, mother, grandfather or grandmother and child meaning son, daughter, grandson, grand-daughter, stepson or stepdaughter, and if the deceased has left no such relations, no suit can be brought. The suit may be brought by all the heirs named above or by any one of them, or by the executor or administrator of the deceased. Only one such suit is permissible, but a claim for injury to the estate of the deceased in the same transaction may be added (section 2).

Particulars of the persons for whose benefit the suit is brought should be given in the plaint (section 3), **as also particulars of the wrongful act, neglect or default of the defendant, which caused the death, and also of the damages claimed.** However, for mere omission of the name of one beneficiary the suit cannot be dismissed at appellate stage (*Jeet Kumari* v. *Chittagong E. & E. Supply Co.*, A 1947 Cal 195, 51 CWN 419, 82 CLJ 68). Damages can be claimed under two heads: under section 1, damages proportionate to the loss resulting from death to the claimants, and under section 2 damages for pecuniary loss to the estate of the deceased resulting from the wrongful act which caused the death (*Jeet Kumari* v. *Chittagong E.&E. Supply Co.* A 1947 Cal 195, 51 CWN 419; *Shankarrao Prahladrao* v. *Babulal Fauzdar*, 1980 MPLJ 563). If the plaintiffs have received any compensation out of fine imposed by criminal court, the same should be taken into consideration in fixing the amount (*Nathuram* v. *Chand Kr.*, 106 IC 165 All).

No. 203—Suit Under Act XIII of 1855 (Fatal Accidents Act)

1. The plaintiff No.1 is the widow, and plaintiffs 2-4 are and were on December 21, 1995, the minor children of one Sukh Din deceased (*or*, the plaintiff is the widow of Sukh Din deceased and brings this suit for her own benefit and for the benefit of the minor children of the said Sukh Din, who died on December 21, 1995).

2. The said Sukh Din was killed, his cart was smashed and his two bullocks were killed, by injuries caused by the negligence of the defendant's servants on December 21, 1995 at the Hindoria level crossing near Damoh station where the public cart-road from ....to........crosses the defendant's line of railway.

3. The negligence consisted of the defendant's servants leaving the gates at the said level crossing open and thereby inviting the said Sukh Din to cross the line at a time when a special goods train was approaching from Damoh side. In consequence the said Sukh Din who was proceeding to cross the line with his cart and bullocks was run over by the said train and was instantaneously killed, and his bullocks were also killed and his cart was smashed.

For the prospective loss of income or other earnings, the court should have regard to various factors such as, what sum, if invested. would produce the amount of income which he would probably have spent on the plaintiffs, the accidents of life and other matters, and give the plaintiff what is considered under all the circumstances as a fair compensation for the loss. The possibility of the deceased's death, his age and earning capacities are factors all of which are to be taken into consideration in assessing the amount of damages (*Dhansingh* v. *Ganeshibai*, 101 IC 642 Lah). Sympathetic damages or solatium for loss of companionship, etc., are not relevant. What is to be considered is the loss of reasonably expected benefit (*Jeet Kumari* v. *Chittagong* v. *E.&E. Supply Co.*, A 1947 Cal 195). The principles on which the amount to be awarded as damages is to be assessed have been discussed in *Governor General in Council* v. *Bhanwari Devi*, A 1961 All 14; *State Mysore* v. *Gowri Vithal Deshbhadari*, A 1964 Mys 113; *Union of India* v. *V.S. Ghosh*, A 1973 Pat 129; *Manoharlal Shobharam Gupta* v. *M.P. Electricity Board*, 1975 MPLJ 744; *Shriram Hari Tambeg* v. *Diwakar Ramchander Kharbe*, A 1975 Bom 227; *Vasanty G. Kamath* v. *Kerala State Road Transport Corporation*, 1981 KLT 200; *Patel Hirabhai Changanlal* v. *Gujarat State Road Transport Corportiaon, Gita Mandir*, A 1981 Guj 226; *K.S.E.S.* v. *Kamalakshy Amma*, A 1987 Karn 253 DB). [See also notes and precedents on compensation claim application under Motor Vehicle Act under "Miscellaneous Applications" *post*].

4. The said Sukh Din was earning Rs.2,000 per month by plying his cart and was a healthy man of 32 years and was the sole support of the plaintiffs (*or*, of the plaintiff and her minor children), and the plaintiffs (*or*, the plaintiff and her minor children) have suffered damage by his death and by the death of his bullocks and damage to his cart. Out of the income of Rs.2,000 Sukh Din used to contribute more than Rs.1,500 per month to the maintenance of the plaintiffs [*or*, of the plaintiff and her minor children).

Particulars of Damage

	Rs.
Loss at Rs.1,500 per mensem for 28 years, the expected period of the life of the said Sukh Din ...	5,04,000
value of the two bullocks	14,000
Value of the cart	11,800

Particulars of the persons for whose benefit the suit is brought

1. Smt. Baribahu, widow, aged 30.

2. Ram, son, aged 10.

3. Km. Ganga, daughter, aged 7.

4. Km. Jamna, daughter, aged 3.

The plaintiffs (*or*, the plaintiff) claim(s) Rs.5,29,800 with interest from date of suit to that of payment.

LIBEL *(v)*

No. 204—Suit for Libel

1. The defendants Nos.1, 2 and 3 are editor, printer and publisher

Limitation : There is a special period of limitation governing suits under Act XII of 1855. A suit by the legal representative of the deceased should be brought within one year (Article 81) and a suit *against* him can be brought within two years, of the death of the deceased (Article 83). In all suits brought under this Act, therefore, the date of death should be clearly alleged. But a suit to which Act XII does not apply i.e., when the cause of action survives, it is governed by the ordinary rule of limitation (*Chundermonee* v. *Bantomonee*, 1 WR 251). Limitation for suit under Act XIII of 1855 is two years (Article 82).

Defence: Same as could be raised if the deceased had received personal injuries short of death and had brought a suit for damages.

(v) Libel consists of the publication by the defendant by means of printing,

respectively of the "Meerut Herald", an English weekly newspaper which has a large circulation in the Meerut division.

2. The plaintiff is employed as Executive Officer of the Bulandshahr Municipality in the Meerut division, and has many friends and relations, residing in the said division.

3. In the issue of the said paper of February 4, 1996, the defendants falsely and maliciously, printed and published of the plaintiff, and of him by way of his profession, the following words in an editorial article : "He has no educational qualification, and is totally unfit for the post of an Executive Officer of a big Municipality like Bulandshahr. He was formerly employed in the Municipal Board of Azamgarh and was dismissed by that Board for dishonest misappropriation of the Board's money"

4. By the said words the defendant meant, and was understood to mean, that the plaintiff was incompetent and useless as an Executive Officer and further that he was a dishonest person who had committed a criminal offence or criminal offences while in the service of the Municipal Board of Azamgarh.

5. By reason of the premises, the plaintiff has been greatly injured in his credit and reputation and has been brought into public odium and contempt and has suffered much pain and humiliation.

The plaintiff claims Rs. 10,000 as damages.

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writing, picture, signs etc., of any matter defamatory of the plaintiff (see also, Slander, *post*). **The following points must be alleged in the plaint :**

(1) The exact words which are said to be defamatory, or a description of the painting or signs claimed to be defamatory with their latent significance (*Purushottam Lal Sayal* v. *Prem Shankar*, A 1966 All 377).

(2) If the words are, with reference to the context, such as are capable of conveying a more serious imputation than they ordinarily carry, such imputation may be alleged. If the words are plain and not defamatory in themselves, but were used by the defendant in a particular sense and have a latent meaning which is defamatory such meaning of those words must be set out in the plaint. The explanation is technically called an "*innuendo*". But the words from which an "*innuendo*" is to be extracted must be fairly susceptible of the meaning sought to be given and where they are susceptible of serveral meanings, it is unreasonable to seize upon the bad meaning (*Hales* v. *Smiles*, 168 IC 853, A 1937 Rang 105; *Ramkant* v. *Devi lal Sharma*, 1969 MPLJ 805). The meaning attributed by the plaintiff should be one which can be conveyed to reasonable men and words which bear their ordinary meaning should be shown to have a libellous tendency. It is not sufficient

No. 205—Suit for Libel by Innuendo Published on an Occasion of Qualified Privilege

1. The defendant is the Tahsildar of Tahsil Nakur, Dist. Saharanpur, and the plaintiff is a farmer of village Renkra in Tahsil Nakur, who had taken a loan from the government for purchase of a tractor.

2. The collector called for a report from the defendant of all the persons who are habitual defaulters of dues recoverable as arrears of revenue in the defendant's said Tahsil.

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to show that they were understood by some persons in that sense (*Union Benefit Guarantee Co.* v. *ThakarLal*, 161 IC 769, A 1936 Bom 114).

(3) That the defamatory statement was in writing or in printing or was conveyed in the form of painting or caricature.

(4) That it referred to the plaintiff (*Manmohan* v. *Yash*, A 1964 SC 1161).

(5) That it was published [*with particulars of such publication, the names of persons by whom and when and how it was published (Brijlal* v. *Mahant Lal Das*, A 1940 Cal 393; *Nanmmal* v. *Ram Pd.*, A 1926 All 672, 96 IC 89; *Subbarayudu* v. *Ramakrishna Rao*, (1968) 2 Andh LT 101)]. In case of newspapers, it is not necessary to allege names of the persons who read the paper. Communication made in the ordinary course of business to a typist has been held not to amount to a publication (*Kishab Lal* v. *Pravat Chandra*, A 1938 Cal 667).

(6) If the occasion of publication was one of a qualified privilege, e.g., when it was published in an official report, malice of the defendant must be alleged to show that he cannot take advantage of the privilege.

(7) No special damage is necessary in such case, though if any has been suffered, it can be claimed. But when in the case of libel on a company, the words complained of refer only to the personal character of its officers and do not reflect on the company in the way of its property, the company cannot succeed unless it proves special damage to it (*Union Benefit Guarantee Co.* v. *Thakarlal*, 161 IC 769, A 1936 Bom 114).

In a libel action when the defendant raises plea of justification and mentions evidence by which he might substantiate his case, the court should not grant temporary injunction restraining further publication of the alleged libel (*Abdul Wahab Galadhari* v. *Indian Express Newspapers (Bom). Ltd.*, A 1994 Bom. 69), except where the words have been published in pursuance of a conspiracy having sole or dominant object of injuring plaintiff (*Gulf Oil Ltd.* v. *Page*, (1987) 3 All ER 14 (CA).

It is not necessary to allege falsity of the statement in the plaint. Similarly, malice is not an essential element to support a claim for libel (*Rahim Baksh* v. *Bachalal*, 51 A 509, 27 ALJ 303, 115 IC 458, A 1929 All 214 DB; *Union Benefit Guarantee Co.*, supra; *Indian express Newspaper Ltd.* v. *Jagmohan*, A 1985 Bom

3. The defendant, on September 4, 1995, submitted a written report to the Collector and therein falsely and maliciously wrote and published of the plaintiff the following words : "He is the best paymaster in my Tahsil and is a first class gentleman."

4. By the said words the defendant meant, and was understood to mean, that the plaintiff was worst defaulter in his Tahsil and a thorough rogue.

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229), unless the occasion of publication be one of qualified privilege. But, as it is not proper or safe to depart from established precedent, it is better to make these allegations also in every plaint for libel or slander.

Limitation : For such a suit is one year from the date of publication of the libel (Article 75). The date of publication should therefore be alleged.

Parties : In case where newspapers, editors, printers and publishers are all liable but if suit against one is dismissed, the other cannot be sued as the cause of action is indivisible (*Makhanlal* v. *Punchamlal*, A 1934 Nag 226, 152 IC 398).

Defence : If there is no justification it is always wise to offer an apology, as to plead justification in such cases is to alienate the sympathy of the Judge and to run the risk of a decree for heavy damages. But apology tendered and accepted in criminal court is no defence to a civil suit (*Govind Charyalu* v. *Seshagni*, A 1941 Mad 860). The apology should not appear to be a mere paper apology in a hesitating manner but an unreserved expression of sorrow (*L.D. Jaikwal* v. *State of U.P.*, A 1984 SC 1374, Contempt case). Where justification is pleaded, the defendant must make clear in the particulars of justification, the case which he is seeking to set up and must state clearly the meaning or meanings which he seeks to justify (*Morrel* v. *International Publishing Ltd.*, (1989) 3 All ER 733 (CA); *Lucas Box* v. *News Group Newspapers Ltd.*, (1986) I All ER 177 (CA). He may plead justification of any alternative meaning which those words are reasonably capable of bearing (*Prager* v. *Time Newspaper Ltd.*, (1988) I All ER 300 (CA). An unsuccessful plea of justification might deprive even a successful defendant of his costs (*Makhanlal* v. *Pancham*, A 1934 Nag 226). When plea of justification is entirely given up, evidence relating to justification cannot be reconsidered for the purpose of mitigation of damages (*Rustam* v. *Krishnaraj*, A 1970 Bom 424). The following are the justifications of a libel, any one of which may be a complete defence, though more than one of such pleas may be taken.

(1) *Truth, (Nellikka* v. *Deshabhimani Ltd.*, A 1986 Ker 41) But if the real truth has been exaggerated, the libel will not be justified (*Clarkson* v. *Lawson*, 6 Bing 266). If the charge made in the libel is specific, the defendant may simply plead its truth, but if it is one of general misconduct of the plaintiff, the defendant must, if he wants to justify it as true, give particulars of instances to prove the truth of the statement.

(2) *Fair and bona fide comment* on matters of public interest. If the imputation

5. By reason of the premises, the plaintiff has fallen considerably in the estimation of the District Officer and has suffered much in credit and reputation.

The plaintiff claim Rs. 5,000 as general damages.

is one of conduct amounting to a criminal offence, the defendant will have to prove it with the same conclusiveness as in a criminal prosecution, so that, if there is any doubt, the plaintiff will have the benefit of it (*Khair-ud-din* v. *Tara Singh*, 99 IC 300, 7 Lah 491). A defendant who relies on a plea of fair comment in libel proceedings is not required to show that the comment was an honest expression of his own views, but that the facts on which comment was based were true and that the comment was objectively fair in the sense that any man, however prejudice and obstinate, could honestly have held the view expressed (*Telniknoff* v. *Matusevcth*, (1991) 4 All ER 817 HL). A comment is not fair if it is not honest or relevant, or is not based on true facts and it must express an opinion and should not state a fact (*Union Benefit Guarantee Co.* v. *Thakarlal*, 161 IC 769, A 1936 Bom 114; *Raghunath* v. *Mukandilal*, 165 IC 892, A 1936 All 780; *Radheyshyam* v. *Eknath*, A 1985 Bom 285.) When fair comment is pleaded the defendant is required to spell out with sufficient precision to enable the plaintiff to know the case he had to meet what the comment was which the defendant claimed was fair comment and attracted the comment defence (*Control Risk Ltd.* v *New English Library Ltd.*, (1989) 3 All ER 577 (CA). For instance, that the statement of fact are true and those to opinion constitute fair comment. Such a "rolled up" plea is held to be a plea of fair comment only (*Union Benefit Guarantee Co.* v. *Thakarlal*, 161 IC 769, A 1936 Bom 114).

(3) *Absolute Privilege*, such as that of judicial proceedings including proceeding before any tribunal recognised by law such as a commission of inquiry (*Duraiswami* v. *Lakshman*, A 1933 All 537) or state proceeding or parliamentary proceedings, but not proceeding, before administrative tribunals (*Purushottam Lal* v. *Prem Shanker*, A 1966 All 377). A Judge or a Magistrate is absolutely privileged, even though he acts maliciously, provided he does not knowingly act beyond his jurisdiction. A *vakil* is also similarly privileged (*Jagat Mohan* v. *Kalipado*, 1 Pat 371, A 1922 Pat 104, 669 C 86; *Sullivan* v. *Norton*, 10 M 28); but it has been held in Bombay that advocates are not absolutely privileged and will be liable if malice is definitely proved by plaintiff (*Tulsidas* v. *Bilimoria*, 137 IC 275, A 1932 Bom 490, 34 BLR 910). Statements made by parties or witnesses on oath or in complaints and the statement of an accused person are all privileged (*C.H. Crowdy* v. *L. O'Reilly*, 17 CLJ 105, 18 IC 737; *Nannu Mal* v. *Ram Prasad*, A 1926 All 672 DB), so the statement made in first information report to the police (*Madhab Chandra* v. *Nirod*, A 1939 Cal 477, 43 CWN 775; *Sanjivi Reddi* v. *Koneri Reddy*, A 1926 Mad 521 DB; *V. Narayana Bhat* v. *S. Subbanna Bhat*, A 1975 Karn 162), but the statement must be relevant to the inquiry (*Babu Prasad* v. *Mudomal*, 11 ALJ 193; *Girwar Singh* v. *Siraman Singh*, 32 C 1060), and their relevancy should therefore be alleged in the defence.

MALICIOUS PROSECUTION *(w)*

No. 206—Suit for Malicious Prosecution.

1. On January 4, 1993, the defendant filed a complaint before the Sub-divisional Magistrate of Roorkee, charging the plaintiff with having enticed away the defendant's wife.

A police report under section 202, Cr. P.C. is absolutely privileged (*Veni Madho* v. *Wajid Ali*, 167 IC 433, A 1937 All 90; *K.Ramdas* v. *Samu Pillai*, (1969) 1 MLJ 338). Statements made during investigation are, however, not absolutely privileged (*Maroti Sadashiv* v. *Gadubai Narayanrao*, A 1959 Bom 433; *Haji Ahmad Hussain* v. *State*, 1960 ALJ 109; *Chotkan* v. *State*, 1960 ALJ 668). Allegations made in pleadings are absolutely privileged only if they are relevant to the case, action will lie if they are not pertinent or are made maliciously (*Dalpat* v. *Raja Amarpal*, 6 OLJ 26, 49 IC 58; *Dhiro* v. *Gobinda*, 65 IC 204; *Nathji Muleswar* v. *Lalbhai*, 14 B 97; *B. Ganeshadutt* v. *Mangni Ram*, 11 Rang LR 321 PC; *Hindustan Gilt & Co.* v. *Chilam Kurti*, A 1943 Mad 350; *Sumati Prasad* v. *Shiv Dutt*, 1946 ALJ 60). The defendant may plead that the memorandum alleged to be defamatory is privileged and not actionable because it is a communication by one officer of State to another officer relating to a matter of State (*Fayed* v. *Al Tajir*, (1987) 2 All ER 396 see also *Hasselblad* v. *Obinson*, (1985) I All ER 173 (CA).

(4) *Qualified Privilege* such as information for public good, including information or report of a crime, character of servants, statements necessary to protect one's own interest, or those provoked by the plaintiff and fair reports of judicial or parliamentary proceedings or of a public meeting. In all these cases there is no defence, if defendant is proved to have acted maliciously. If the defendant proves that he honestly believed that the plaintiff had committed the crime imputed to him, no action would lie (*Sajjad Hussain* v. *Mulchand*, A 1926 Oudh 18, 90 IC 951; *Rustom* v. *Krishna Raj*, A 1970 Bom 424). The Allahabad High Court insists on proof of reasonable and probable cause also (*Majju* v. *Lachman*, A 1924 All 535, 46 A 671, 22 ALJ 597 FB; see contra, A 1962 Pat 229). A slanderous statement made before a caste *panchayat* is not actionable in the absence of proof of actual malice (*Daulat Singh* v. *Prem Singh*, A 1938 All 447, 176 IC 797, 1938 ALJ 638).

It is no defence for the publisher of libel that he did not originate it but heard it from another or that it was a current rumour and the defendant *bona fide* believed it to be true (*Mohammad Nazir* v. *Emperor*, 26 ALJ 509; *Hales* v. *Smiles*, 168 IC 853, A 1937 Rang 105; *Raghunath* v. *Mukandi Lal*, A 1936 All 780, 165 IC 892).

Previous conviction for the same defamation is no bar to a civil suit for damages nor can damages be reduced for that reason (*Venkayya* v. *Suraya*, A 1940 Mad 879, 1940 MWN 892).

(w) Suit for malicious prosecution in Criminal Court lies but not for malicious institution of a Civil Suit (*Mohammad Amin* v. *Jogendra*, A 1947 PC 367; see *Ram Pratap* v. *Narain Singh*, A 1965 All 172; *Parkash Chand Seth* v. *Sant*

2. A warrant was, on the said complaint, issued for the arrest of the plaintiff, and the plaintiff was arrested and was released on bail after remaining in custody for twenty four hours. He was tried on the said charge and was acquitted on July 6, 1995.

3. The defendant had brought the said charge against the plaintiff maliciously and without a reasonable or probable cause.

4. By reason of the premises, the plaintiff has suffered much physical and mental pain, and has been lowered in the estimation of his friends, and was prevented from attending to his business, and incurred expense in defending himself from the said charge.

Singh, (1972) 74 PLR 714; and *Gonu Ganpati Shivale* v. *Balchand Jairaj*, 1980 Mah LJ 879; *C.B. Agarwal* v. *P. Krishna Kapoor*, A 1995 Delhi 154). In every suit for malicious prosecution following facts should be alleged :-

(1) that the defendant initiated the proceedings against the plaintiff;

(2) that the proceeding terminated in plaintiff's favour and the way in which they terminated;

(3) that the prosecution was malicious;

(4) that it was started without any reasonable or probable cause;

(5) general damages claimed, and particulars of any special damage claimed.

The burden of proving all these facts is on the plaintiff, who must prove all of them (except No.2) independently of the findings of the criminal court whose judgement can be used only for proving point No. 2 (*Shubrati* v. *Shamsuddin*, 110 IC 413, 16 ALJ 439, 50 A 713, A 1928 All 337 DB; *Jogendra Garabdu* v. *Lingaraj Patra*, A 1970 Orissa 91; *Govindji* v. *Damodran*, A 1970 Kerala 229; *Ferozuddin* v. *Mohammad Lone*, 1977 Kash LJ 350; *Gulabrao* v. *Madhav*, A 1984 Bom 323; *Sova Rani Dutta* v. *Debabrata Dutta*, A 1991 Cal 186; *K.T.V. Krishnan* v. *P.T. Govonden*, A 1989 Ker 83). In this respect this action differs from one for false imprisonment (*vide note (o) ante*).

At least one of the following three sorts of damage must be shown to support an action for malicious prosecution:

(1) damage to man's fame as where the matter, whereof he is accused, be scandalous;

(2) damage to his person as when he is put in danger to lose his life, limb or liberty; and

(3) damage to his property as where he is forced to spend money and necessary charges to acquit himself of the crime of which he was charged.

If there was neither of these three sorts of damages, no action would lie (*Jatindra Mohan* v. *Corporation of Calcutta*, A 1941 Cal 3; *C.M. Agarwala* v. *Halar Salt and Chemical Works*, A 1977 Cal 356).

The question of liability for prosecution in cases set up by the police on information given or report made by the defendant depends on the facts of each

Particulars of Special Damage

	Rs.
Fee paid to Mr. M. Banerji, Senior Advocate for defence	2,500
Fee paid to Mr. Ali Bux, Junior Advocate for defence	1,000
Travelling and diet expenses of defence witnesses on two dates, ...	1,250
Loss of business as a druggist for one day, ...	3,000
Total	8,050

case. If the defendant did no more than make a report and the plaintiff was prosecuted by the police after independent investigation in which the defendant has not taken any part, he is not liable (*Fayaz* v. *Sardar Khan*, 187 IC 789; *Raghubar Dayal* v. *Kalen*, A 1940 All 231, 188 IC 211; *Lakshmojirao T.V.* v. *Somavarapu Venkatappaiah*, A 1966 AP 292; *Ramesh Chandra Singh* v. *Jagannath Singh*, A 1975 Orissa 121), but if he took an active part, e.g., he named the witnesses before the police, asked the police to search the defendant's house, etc., he is liable, though he does not appear in court as a prosecutor (*Ganga Prasad* v. *Sardar Bhagat Singh* 30 A 525 PC; *Tannumala* v. *Muddumuru*, 8 MLJ 242; *Hari Charan* v. *Kailash*, 36 C 278; *Lakshmojirao T.V.* v. *Somavarapu Venkatappaiah*, A 1966 AP 292). But when the information by the defendant to the police was directed against the plaintiff, defendant was held liable even though the plaintiff was prosecuted after police investigation (*Ram Kishan* v. *Ram Narain*, A 1934 Pat 14; *Lambodar Sahu* v. *Laxmidhar Pani*, (1972) 1 CWR 870). Where the defendant lodged F.I.R against the plaintiff for theft and assault in pursuance of which the latter was arrested, handcuffed and produced before the court, it was held that the defendant set the machinery of criminal law into motion and the suit for damages was maintainable. (*Sova Rani Dutta* v. *Debabrata Dutta*, A 1991 Cal 186). A person instigating a false prosecution with necessary knowledge and intention is also liable though he remained behind the scene (*Issardas* v. *Assudamal*, A 1940 Sindh 90; *Ramesh Chandra Singh* v. *Jagannath Singh*, A 1975 Ori 121).

If a person places before a lawyer all the facts in his possession and acts in good faith on the opinion given to him by the lawyer, it is difficult to hold that he had no reasonable and probable cause for the step that he had taken (*Municipal Board, Agra* v. *Mangi Lal*, 1950 ALJ 754).

Proceedings under security sections are also prosecutions (*Niaz Khan* v. *Jai Ram*, 17 ALJ 776, 41 A 503, 50 IC 140). Action would not lie, if the complaint is dismissed under section 203, Criminal Procedure Code without the plaintiff having been summoned (*Golab* v. *Bhola*, 38 C 880; *Shaikh Meeran* v. *Ratna*, 37 M 181; *Subhag* v. *Nand Lal*, 8 Pat 285, 118 IC 133, A 1929 Pat 271; *Deolal* v. *Remington Rand Inc*, 199 IC 755, A 1940 Nag 225; *Vattappa* v. *Mathu Karuppan*, A 1941 Mad

The plaintiff claims :

(1) Rs. 10,000 as general damages for mental and bodily pain and loss of reputation.

(2) Rs. 8,050 special damages.

(3) Interest from date of suit to that of payment.

No. 207—Ditto, Statutory Form

(Form No. 31, Appendix A, C.P.C.)

1. On the ___ day of ______ 19___ , the defendant obtained a warrant of arrest from _____ (a Magistrate of the said city, *as the case*

538; *Ali Mohammad* v. *Zahir*, 53 All 771), but if the plaintiff was given notice and was present at inquiry under section 202, action will lie (*Mohammad Amin* v. *Jogendra*, A 1947 PC 367; *Kambhampati Venkata Satyanarayana* v. *Kambhapati Peda Subharao*, A 1969 AP 29; *Adikandas Sahu* v. *Kasi Ram*, 1972 (2) CWR 1242). Nominal damages were awarded where accused though not served, appeared but later the order for summons was modified (*Zaharuddin* v. *Budhi*, A 1933 Pat 292).

If defendant only made a report to the police, who took the plaintiff in custody, as defendant had suspected him, and afterwards released him for want of proof, defendant was held not liable (*Nagendra* v. *Basanta*, 57 C 5, A 1930 Cal 392; *Dattatriya* v. *Hari Keshav*, A 1949 Bom 100) Mere filing a complaint to police as a result of which plaintiff's house was searched but no judicial authority was set in motion, as the complaint was found to be false was held not amounting to malicious prosecution by the defendant (*Bolandanda Pemmayya* v. *Ayaradara Kushalappa*, A 1966 Mys 13). It has been held that the test of a prosecution is not whether the proceedings reached a stage where they could be termed a prosecution but whether damage resulted to the plaintiff (*Sanatan Sahu* v. *Kali Sahu*, A 1964 Ori 187).

It is necessary that law should be set in motion by making complaint to an authority exercising judicial powers. The disciplinary authority is not a judicial authority, though it discharges its functions in a quasi-judicial manner. A proceeding before it cannot be said to be a prosecution (*D.N. Bundopadhya* v. *Union of India*, A 1979 Raj 83).

If the prosecution was false to the knowledge of the defendants no further proof of want of reasonable and probable cause will be necessary (*Bansi* v. *Hukum Chand*, A 1930 All 216). 'Malice' in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want for reasonable or probable cause (*S.R. Venkataraman* v. *Union of India*, A 1979 SC 49, (1979) 2 SCC 491). Malice can also be inferred where the object of prosecution is to provide defence in a counter case (*Bansi* v. *Hukum Chand*, A 1930 All 216), or when a false complaint is wilfully lodged

may be) on a charge of ______ , and the plaintiff was arrested thereon, and imprisoned for ___ (days, *or* hours and gave bail in the sum of ___ rupees to obtain his release).

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the ____ day of ______ 19___ , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to

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(*Padmanabhan Gangadharan* v. *Mathevan Gangadharan*, A 1976 Ker 49). Any indirect or improper motive is malice in law (*Mahamud-ul-Hasan* v. *Md. Shibli*, A 1934 All 696, 151 IC 359; *Jogendra Garabadu* v. *Lingaraj Patra*, A 1970 Orissa 91). For burden of proof, its discharge and shifting of burden see the case of *Vijay Nath* v. *Damodar Das*, A 1971 All 109.

It is not for the plaintiff to prove or allege falsity of the charge (*Balbhaddar Singh* v. *Badri Sah*, 24 ALJ 453; *Basdeo* v. *Shyama*, 1936 ALJ 803, 164 IC 184, A 1936 All 582; *Shubrati* v. *Shamsuddin*, 26 ALJ 439, 110 IC 413, A 1928 All 337; *Issardas* v. *Assudamal*, A 1940 Sindh 90; *Sah Manji* v. *Sah Chaturbhuj*, A 1939 PC 225). Though it is not necessary to prove innocence as such, yet if the plaintiff wants to rely on his innocence as affording proof of other facts necessary for him to prove (e.g., want of reasonable and probable cause) he should prove innocence independently of the judgment of criminal court (*Khaja Hussenuddin* v. *Kisan*, 25 NLR 180, A 1929 Nag 260.) Proof of malice is not sufficient to prove want of reasonable and probable cause (*Madan Lal* v. *Lakshmi Narain*, 1938 PWN 783), but from proof of want of reasonable and probable cause and of indirect motive or recklessness in instituting the complaint, malice may be inferred (*Abubaker* v. *Manganlal*, A 1940 Mad 683, 1940 MWN 305). For distinction between malice and absence of reasonable and probable cause *see*, *Dev Atma Nand* v. *Shambhu Lal*, 1965 ALJ 317; and *Bharat Commerce and Industries Ltd.* v. *Surendra Nath*, A 1966 Cal 388.

Conviction by trial court subsequently set aside in appeal cannot afford evidence of reasonable and probable cause (*Mauji Ram* v. *Chaturbhuj*, 183 IC 196, A 1939 PC 225). The cases in which the accusations have been found to be false to the knowledge of the prosecutor stand on a different footing from those in which the accusations are based on information and belief. In those cases the prosecutor cannot be heard to say that there was no want of reasonable and probable cause (*Ucho Singh* v. *Nageshar Pd.*, A 1956 Pat 285). When accusation against the plaintiff was in respect of an offence which the defendant claimed to have seen him commit, and the plaintiff is acquitted by criminal court on merits, there shall be presumption that there was no reasonable or probable cause for the prosecution (*Pendekanti Subbarayudu* v. *B. Venkatanarasayya*, A 1968 AP 61; *E.Dakshinamurthy* v.

do business with him; *or*, in consequence of the said arrest, the plaintiff lost his situation as clerk to one EF; *or*, in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business and was injured in his credit and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

No. 208—Like Suit, when the Case was Sent up by the Police

1. On January 5, 1993, the defendant made a report at the Kotwali Police Station, Varanasi, charging the plaintiff with having entered defendant's house and having taken away the defendant's valuable goods and documents.

K. Venkataswami Chettiar, A 1972 Mad 241; *Girja Prasad Sharma* v. *Umeshankar Pillai*, A 1973 MP 79).

In assessing damages, the court will have to consider (1) the nature of offence the plaintiff was charged of (2) the inconvenience to which plaintiff was subjected, (3) monetary loss, and (4) the status and the position of the plaintiff. Damages awarded for loss of reputation are in the nature of solatium and are not given for punishing the defendant or for enriching the plaintiff (*C.M. Agarwala* v. *Halar Salt and Chemical Works*, A 1977 Cal 356). Some damages must be claimed for reputation and bodily and mental suffering, and special damages actually suffered, such as the cost of defence, loss of business, etc., must also be claimed. If cost was defrayed not by plaintiff but by another person, plaintiff cannot recover it. Special damages should be specifically proved, no damages can be allowed for the plaintiff's shop having remained closed without proof of consequent loss and on mere proof that plaintiff pays income-tax (*Gyasiram* v. *Kishore*, A 1930 All 165). Plaintiff can get damages for loss of service during the pendency of the criminal case (*Raghunath* v. *Motiram*, A 1933 Rang 299). For distinction between suits for malicious prosecution and false imprisonment see note under "False Imprisonment".

For the liability of the State for acts of its servants, see *Md. Murad* v. *State of U.P.*, A 1956 All 75; *State of U.P.* v. *Kasturi Lal Ralia Ram Jain*, A 1965 SC 1039; *State of Bihar* v. *N.P. Jain*, A 1963 Pat 290 and *State of Rajasthan* v. *Mst. Vidyawati*, A 1962 SC 833; *SAHELI a Women's Resources Centre* v. *Commr. of Police, Delhi*, A 1990 SC 513; *Rajmal* v. *State*, A 1996 Raj 80). See also notes under precedents of Motor Accident Claim application, *post*.

Magistrate negligently issued warrant of arrest and acquitted person was arrested. Damages were awarded against the Magistrate personally (*State of U.P.* v. *Tulsi Ram*, A 1971 All 162.

Limitation : One year from date of acquittal or termination of proceeding (Article 74). If the defendant applies for revision from the order of discharge, limitation

2. On January 8, 1993, the police arrested and sent up the plaintiff to the Judicial Magistrate for trial and the said Magistrate remanded the plaintiff to custody. The police submitted charge sheet on February 15, 1994 and the plaintiff was thereafter tried on the said charge. On February 20, 1995, the said Magistrate acquitted the plaintiff.

3. The real prosecutor of the plaintiff on the said charge was the defendant. The defendant misled the police by producing perjured witnesses before them during the investigation, and by falsely stating to the police that several articles belonging to the plaintiff and found at the time of search of the plaintiff's house belonged to the defendant. The defendant remained in court during the trial and assisted the public prosecutor by instructing him in opposing the plaintiff's application for bail and in the examination and cross-examination of the witnesses for the prosecution and the defence.

4 and 5 and prayer. *Same as 3 and 4 and prayer in precedent No. 206.*

No. 209—Suit for Malicious Prosecution and False Imprisonment

1. On October 20, 1994, the defendant wrongfully arrested the plaintiff at his house at Hardwar, kept him in *havalat* during the night and in the morning sent him up in handcuffs to the court of the Judicial Magistrate of Roorkee on a false charge of theft.

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will run from the dismissal of revision (*Madan Mohan* v. *Ram Sunder*, 125 IC 464, A 1930 All 326; *Bhagat Raj* v. *Garai*, 1937 AWR 1113, 1937 ALJ 1281; contra *Purshottam* v. *Ravji*, A 1922 Bom 209, 47 B 28, 67 IC 754, 24 BLR 507).

Forum : Suit must be instituted where plaintiff was prosecuted or where defendant resides; but it has been held that the cause of action partly arises also where the plaintiff receives summons of the criminal case (*Alexandra* v. *Indra*, A 1933 Cal 706).

Defence : is usually truth of the charge. But it must be understood that it is not always easy to prove truth though it may be easy to show that defendant had a reasonable and probable cause for instituting the prosecution. In such cases truth should not be pleaded, as an attempt to prove the truth may only result in heavier damages being awarded. Truth and existence of reasonable and probable cause may be pleaded in the alternative. If reasonable and probable cause is pleaded affirmatively particulars should be given. But if the plea is only a denial of the plaintiff's allegation of the absence of a reasonable and probable cause, no particulars will be necessary.

2. The plaintiff had to give bail and was released by order of the said Judicial Magistrate late in the evening of October 21, 1994.

3. The said Magistrate tried the plaintiff on the said charge of theft and acquitted him on November 5, 1995.

4 and 5. *As 3 and 4 in precedent No 206.*

The plaintiff claims :

(1) Rs.5,400 as general damages for false imprisonment.

(2) Rs.4,500 as general damages for malicious prosecution.

(3) Rs.4,496 as special damages.

(4) Interest from date of suit to that of payment.

NEGLIGENCE *(x)*

No. 210—Suit for Injuries Caused to the Plaintiff by Negligent or Rash Driving

1. On February 20, 1996, the plaintiff was driving his *tonga* along the Chandni Chowk Road, Delhi, when the defendant's coachman. while, acting in the course of his employment as such, so negligently drove the defendant's *landau* that they came into collision with the plaintiff's *tonga*.

Particulars of Negligence

The plaintiff was driving from the Fort side to the Fatehpuri side and when his *tonga* reached the Dariba Kalan junction, the defendant's *landau* came from Dariba Kalan, being driven at a very rapid pace on the wrong side of the road, and suddenly turned sharply round the corner towards the Fort and so came into collision with the plaintiff's *tonga*.

2. The said collision caused severe injuries to the plaintiff's person and his horse, and damage to his *tonga*.

(x) In every claim based on the negligence of the defendant or his servant or agent, **the plaintiff is bound to allege the following facts :**

(1) Facts showing that the defendant owned a duty to the plaintiff. as mere negligence, unless it amounts to a breach of any duty, will not afford a cause of action. The duty may be one arising out of contract, or one created by law, or one which all citizens owe to each other, e.g., that no person shall run down another, etc. The facts on which such duty is founded must be stated. If the duty arises out of contract, the contract must be pleaded, but if it is a legal or general duty which is presumed by law, it is not necessary to state its existence, and it would suffice to set

Particulars of Injuries

The plaintiff's left arm was broken and he received several bruises, was ill and suffering for two months and was unable to attend to his business as a medical practitioner. The front legs of the plaintiff's horse were broken for which it had to be in the veterinary hospital for three months, and has become permanently lame.

The off-shaft of the *tonga* was broken, as also the off-wheel, and the axle was bent.

Particulars of Damages Claimed

	Rs.
Fee to Dr. Sen for treatment of the plaintiff ...	500
Fee paid to Taj Din, Compounder	60
Chemist's bill	100
Loss of business as a medical practitioner for two months	1,000
Hospital Expenses for horse	90
Depreciation of value of the horse	200
Cost of repair to *tonga* paid to Messers Rodwell & Co., Delhi	100

The plaintiff claims Rs.500 as general damages, and Rs.2,050 as special damages, with interest from date of suit to that of payment.

No. 211—Suit for Injuries Caused to Plaintiff by Negligent or Rash Driving

(Form No. 30, Appendix A, C.P.C.)

1. The plaintiff is a shoemaker, carrying on business at ________ The defendant is a merchant of _______.

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out the facts and to state generally that the defendant acted negligently.

(2) Facts showing that the duty was not performed. Full particulars of the alleged negligence must be set out, but if negligence can be presumed from any act or conduct. the act or conduct must be set out, e.g., when the injurious agency is under defendant's management and if an accident happens which ordinarily does not happen if those who have the management use proper care, defendant's negligence will be presumed. In such cases an allegation of the fact of defendant's management and the accident are sufficient. The maxin *res ipso loguitur* is applicable

2. On the ___ day of ______ 19___ , the plaintiff was walking southward along Chowringhee, in the city of Calcutta, at about 3 O'clock in the afternoon. He was obliged to cross Middleton Street which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in pain, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profit.

No. 212—Injuries Caused by Negligence on a Railroad

(Form No. 29, Appendix A, C.P.C.)

1. On the ____ day of ______ 19___, the defendants were common carriers of passengers by railway between ______ and ______.

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at ______ (*or*, near the station of ______ , *or*, between the station of ______ and ______), a collision occurred on the said railway caused by the negligence and unskilfulness of the defendant's servants whereby the plaintiff was much injured (having his leg broken, his head cut, etc., and *state the special damages, if any*

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in such cases which means that the transaction speaks for itself.

(3) That the alleged negligence was the proximate cause of injury or damage to the plaintiff (*Governor-General of India in-Council* v. *Bibi Sahiman*, A 1949 Lah 388).

A suit would lie against government for torts committed by its servants in the course of their employment in a business or commercial undertaking owned by the state. But the state is not liable for tortious acts of its servants in the course of employment or in exercise of statutory functions delegated to them which may be referable to exercise of sovereign powers (*State of U.P.* v. *Kasturi Lal*, A 1965 SC 1039; *State of M.P.* v. *Chiranji Lal*, A 1981 MP 65).

as), and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as (a salesman).

[*Relief claimed*]

* * * *

(*Or, thus* : 2. On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendant's railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., *as in para* 3).

(*See also Railway Claims Tribunal Act 1987*).

No. 213—Injury Caused by Professional Negligence of Surveyor

1. Plaintiff wanted to acquire a house for his residence and came to know that house No........situated at............was to be sold by its owner Sri..........

2. The price demanded by the said owner for the said house was Rs.2,00,000 (Rupees two lacs).

3. Defendant is an architect, valuer and surveyor, and is registered with the Architects Council of India and is a valuer registered with the Wealth Tax authorities.

Normally a master is liable for negligence of his servant, if servant acts in the course of employment and principal is liable for negligence of the agent acting within the scope of his authority (*Sita Ram Motilal* v. *Gautam*, A 1966 SC 1697; *Annamalu* v. *Abithakuyambal*, A 1979 Mad 276). Where a teenage girl was electrocuted by hanging high tension wire, compensation was awarded (*Seemu* v. *Himachal Pradesh State Electricity Board*, A 1994 HP 139). Accident due to leakage to cooking gas due to fault of supplier's mechanic in fixing the cylinder, supplier was held liable and compensation awarded (*Bhagwat Sarup* v. *Himalaya Gas Co.*, A 1985 HP 41). It is the duty of the authority operating and maintaining supply of electricity to see that the overhead electric lines are perfectly in order and that there is no visible possibility and apprehension of wire being snapped and sparks being released from them resulting in electrocution and fire to the property. The maxim '*res ipsa loquitur*' applied to the case. The dependents of the deceased were also granted interim relief under the inherent powers of the court (*T. Gajayalakshmi Thayumanavar* v. *Secretary P.W.D., Government of Tamil Nadu*, A 1997 Mad 263 DB; *R.S.E.B.* v. *Jai Singh*, A 1997 Raj 141).

4. As plaintiff wanted to assure himself of the soundness of the said house and of the reasonableness of the price demanded by the owner before purchasing it, he commissioned the defendant to make a full structural survey of the house. A sum of Rs.2,500 was paid to the defendant by plaintiff as the agreed fee.

5. Defendant on May 5, 1995, reported to plaintiff that after structural survey he had found that the house was in a sound condition and that it was a reasonable buy at the said price.

6. Acting upon the expert professional advice of defendant as aforesaid, plaintiff purchased the house for the said price from its previous owner and thereafter moved into the house for residing therein.

7. Plaintiff thereafter discovered the following structural defects in the house to which defendant had failed to draw plaintiff's attention, namely:

(a) ....

(b) ....

(c) ....

(d) ....

8. Plaintiff got the said defects removed by getting necessary repairs carried out at a cost of Rs.40,000.

9. While the said repairs were being carried out plaintiff and members of his family were compelled to manage and reside in a single room as the other parts of the house had to be handed over to the contractor and his masons for carrying out those repairs. Plaintiff thus suffered vexation,

It should be noted that in view of sections 165 and 166 to 175 Motor Vehicles Act, claims for compensation in respect of accidents involving death or a bodily injury to persons arising out of the use of Motor Vehicles lie to the claim tribunals appointed under section 110 and the jurisdiction of civil courts with regard to such suit is barred. Similarly under the Railways Claims Tribunal Act, 1987 claims for compensation in respect of railway accidents lie to the tribunals appointed under section 13 (1) and the jurisdiction of civil courts with regard to such claims have been barred by section 15 of the Act. *See also* notes under Railways and Carriers, *ante*. Against the award of the Tribunal an appeal lies to the High Court. General damages may be presumed by the court, while special damages have got to be specified in petition and proved in the evidence (*Adam Khan Mohammad* v. *Ramesh Raja Naik*, 1978 ACJ 409, (1978) 2 Karn LJ 148). Even before the Tribunals it will be desirable to observe the rules of pleading. For motor accident claims, see precedents and notes under applications *post*.

namely, distress, discomfort and all the other natural consequences of living in a house in a defective condition, for a period of three months from July to September, 1995.

10. Plaintiff assesses the damage caused by such denial of use of the said building for a period of three months and by such vexation as Rs.10,000.

11. Had the said defects in the house been brought to his notice, plaintiff would not have agreed to pay more than Rs.1,50,000 which would be the proper market value, at the time of purchase, of the house subject to those defects.

12. It was an implied term of the contract between plaintiff and defendant that defendant would exercise the degree of care to be expected of a reasonable competent surveyor. Defendant was in breach of contract by failing to exercise the said degree of care, for if it had been exercised the defects would have come to the notice of defendant.

13. Defendant who owed a duty of care towards the plaintiff was also guilty of professional negligence.

14. Plaintiff has suffered damages as a result of defendant's breach of contract and of negligence :

Particulars of Damages

(i) Difference in price which plaintiff would have paid for the house if the defendant's report had been carefully made from that which he in fact paid owing to defendant's negligence; in the

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Professional Negligence: A person engaged in a profession, such as a legal or medical practitioner, architect, surveyor, valuer, accountant or analyst, including a body of persons (a body running a hospital, a firm, a company, etc.) engaged in supplying such professional services owes a duty of care towards his client or patient. Even the best professional may not always be successful despite his skill and care and he would not be liable for such failure. Even a best surgeon cannot guarantee the success of all operations. In some operations the average success rate is very low and the surgeon may warn the patient and his relatives of the slim chances of success, and yet the latter may insist on his taking the risk because of the realisation that the alternative to it is sure imminent death. They cannot then charge the surgeon with professional negligence on the ground that he should not have performed such a risky operation or that he was unsuccessful.

alternative Rs. 40,000, cost of repair incurred by plaintiff which he would not have to incur if the report had been carefully made

(ii) Damages for vexation and for loss of use of accommodation during the period of repairs.

Total 60,000

Plaintiff claims Rs.60,000 as damages besides interest from date of suit to that of payment.

No. 214—Injury Caused by Professional Negligence of Doctor

1. Plaintiff's mother Smt. Rashmi was in the family way and during the period of her pregnancy, right upto delivery on April 4, 1996 and thereafter was under the medical care of defendant who is a gynecologist and obstetrician of repute and runs..................Nursing Home at .... The delivery took place at the said nursing home and the plaintiff was the child born on the occasion.

2. The pregnancy of plaintiff's mother had been difficult and she had been in labour for over twenty-four hours from the afternoon of April 3, 1996.

A professional expert is, however, not immune if he fails to take reasonable care, he will be liable in tort for damages or an injury caused by his negligence (For a detailed statement of law on civil liability of doctors, see Halsbury's Laws of England, 4th Ed. Vol. 30, paras 34 to 40 and 3rd Ed. Vol. 38, para 1251). The House of Lords has held in *Whitehouse v. Jordan*, (1981) 1 WLR 246, (1981) 1 All ER 267 (on the facts of which case, precedent No. 214 is based) that while some errors of 'clinical judgment' may be completely consistent with the due exercise of professional skill, other acts or omissions in the course of exercising clinical judgment may be so glaringly below proper standards as to make a finding of negligence inevitable (On facts, negligence was negatived).

In a recent case before the Court of Appeal in England, a deformed child was born and it was contended in a suit on behalf of that child and her mother that due to an infection of German measles received by the mother the doctor ought to have advised abortion. Due to his negligence the child and mother suffered in that the child was born with a congenital deformity. It was held (*Mekay v. Essex Area Health Authority*, (1982) 2 All ER 777) that the duty owned to an unborn child was a duty not to injure it and the duty owned to the mother was to advise her of the infection and its potential and serious effects and on the desirability of an abortion in those circumstances. The claim to that extent was held maintainable. But the

3. Defendant on the evening of April 4, 1996 decided to perform a "trial of forceps delivery", a delicate procedure performed with a view to establishing whether delivery *per vaginam* rather than by caesarian section was possible.

4. Defendant pulled on the baby six times with forceps but when there was no movement on the fifth and sixth pulls she decided to abandon that procedure in favour of a caesarian section.

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claim of the child that the foetus had a legal right to die in such circumstances and that she suffered the injury of having been wrongfully given birth was held not tenable, for such a claim for 'wrongful life' would be contrary to public policy as a violation of the sanctity of human life. In the celebrated "thalidomide" cases, on the other hand, it was *assumed* that action for injury caused to child in womb lies (*Distillers Co* v. *Thompson*, 1971 All ER 694, 1971 AC 458); hence the question of maintainability of a claim for wrongful life is still an open question so far as Indian Courts are concerned. For injury caused by doctor's negligence, see also *Chatterton* v. *Gerson*, (1981) 1 All ER 257 QB; *Ram Bihari Lal* v. *Dr. J.N.Shrivastava*, A 1985 MP 150.

The medical practitioners cannot claim immunity on the ground that they are governed by the Indian Medical Council Act, and are subject to the disciplinary control of Medical Council of India and/or State Medical Councils. They do not enjoy any immunity and they can be sued in contract or tort on the ground that they have failed to exercise reasonable skill and care (*Indian Medical Association* v. *V.P. Shantha*, (1995) 6 SCC 651). For the duties of a medical practitioner towards patient and standard of proficiency required from a medical practitioner see *Laxman* v. *Trimbak*, A 1969 SC 128; *Parmanand Katara* v. *Union of India*, A 1989 SC 2039; *P.N.Rao* v. *G. Jayaprakasu*, A 1990 AP 207; *Achutrao Haribhan Khodwa* v. *State of Maharashta*, (1996) 2 SCC 634 (case-law discussed).

In cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable (*Achutrao Haribhau Khodwa* v. *State of Maharashtra*, (1996)2 SCC 634). Where a doctor is found negligent but no loss or injury has resulted therefrom, no claim for damages lies, as damage is a necessary element of the cause of action in tort (*Sidhraj Dhadda* v. *State*, A 1994 Raj 68).

On negligence of share brokers resulting in economic loss, see *Stafford* v. *Cont. Commodity Services Ltd.*, (1981) 1 All ER 691, QBD.

On negligence of surveyors see *Perry* v. *Sidney Phillips & Sons*, (1982) 1 All ER 1005, on appeal (1982) 3 All ER 705 (Where plaintiff purchased a house on faith of the report of the surveyor who had certified it to be in a good condition whereas it was found to be in a very bad shape. Damages awarded on account of difference on date of breach in the price which plaintiff would have given if the report had been carefully made from that which he in fact gave owing to negligence of surveryor

5. Shortly after her birth the baby (plaintiff) was found to be suffering from severe brain damage as per particulars given below:

Particulars of the Injury

* * *

6. The said brain damage was sustained in the course of the trial of forceps delivery due to the negligence of defendant as per particulars given below:

Particulars of the Negligence

(a) Defendant's decision to perform a "trial of forceps delivery" was much too belated. Postponement of the decision from the morning till the evening of April 4, 1996 and failure thereafter to proceed with Caesarian section straightway was glaringly below proper standards of professional care and skill.

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and also on basis of expense in repairing the house and also damages for (a) the inconvenience and discomfort which the plaintiff would suffer for the period of repairs and (b) the distress and discomfort already suffered by him which was caused by the defective condition of the house). (See also *Dodd Properties* v. *Canterbury C.C.*, (1980) 1 WLR 433; *Brandeis Goldshmidt & Co. Ltd.* v. *Western Transport Ltd.*, (1981) QB 864; *Philips* v. *Ward*, (1956) 1 WLR 471; *Ford* v. *White & Co.*, (1964) 1 WLR 885 on measure of damages). Where a surveyor gives his report not to the plaintiff but to a building society from which the plaintiff purchases or obtains a mortgage of the house on the faith of that report, then too the plaintiff can recover damages from him even in the absence of any contract or fiduciary relationship; it has been held that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, since the law implies a duty of care when a party seeking information from a party possessed of special skill trusts him to exercise due care and the latter knew or ought to have known that reliance was being placed on his skill and judgment (*Yianni* v. *Evans & Sons*, (1981) 3 WLR 843, following the rule laid down by House of Lords in *Hedley Byrne & Co.* v. *Heller*, 1964 AC 465).

Limitation : Suits for compensation for defendant's negligence will be governed by Article 113 (three years). In a suit on tort based on professional negligence of engineer, limitation starts from when damage is first actually caused to the building and not from when it is first discovered (*Pirelli General Cable Works Ltd.* v. *Oscar Faber*, (1983) 2 WLR 6 HL).

Defence : The defendant might show contributory negligence of the plaintiff himself, or that the damage and injury caused was the result of a pure accident, or of a wrongful act or negligence of third party for whose acts he is not responsible. He may deny that there was any damage to the plaintiff. In case of tort of a servant, the defendant master may plead that act was not done in the course of employment

(b) In performing "trial of forceps delivery", defendant pulled the baby too long and too hard with the forceps so that the foetal (plaintiff's) head had become wedged or stuck, thereby leading to asphyxia. The head had to be unwedged or unstuck with the use of force. Thus there was lack of normal professional care, both in getting it wedged and in having to unwedge it.

7. Plaintiff's parents thereafter got the plaintiff treated for the said injury and incurred a sum of Rs.______ as expenditure on the treatment.

Particulars of the Expenditure

* * *

8. The treatment was only partially successful and plaintiff has been disabled for life to the extent of sixty percent due to the said injury.

Particulars of the Disability

* * *

9. Plaintiff is entitled to compensation as follows :

(a) Medical expenses	Rs. ....
(b) Physical and mental suffering ..	Rs. ....
(c) Economic loss (loss of earning capacity)	Rs. ....
Total	Rs. ....

Plaintiff claims Rs..........as damages besides interest from date of suit to that of payment.

NUISANCE *(y)*

No. 215—Suit for Carrying on a Noxious Trade

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of the house to the west of defendant's open plot of land in *Mohalla* Chhipi, in the town of Aligarh.

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nor on defendant's behalf, nor for his benefit.

If plaintiff is partly to be blamed for accident he is entitled to damages in proportion to blame of defendant (*Vidya Devi* v. *M.P. State Transport Corporation*, 1974 MPLJ 573; *Commissioners* v. *Owners of S.S. Volute*, 1922 IC 129).

(y) There are two kinds of nuisance : (1) Public, and (2) Private. Public nuisance is an act affecting the public at large, and no individual can bring a suit in respect of it, unless he suffers any special injury over and above that suffered by the rest of

2. Since January 1, 1985, the defendant has started a tannery on his said plot of land and has thereby wrongfully caused to spread from the pieces of skin, which he keeps on the said open plot of land for drying, such offensive smell all over the plaintiff's house that it has become both insanitary and uninhabitable.

3. The plaintiff has, in consequence, abandoned his residence of the said house, and has taken another house on a rent of Rs.230 per month, and no one is ready and willing to take the plaintiff's said house on rent on account of the said nuisance. The plaintiff has therefore suffered damage.

Particulars

Loss of rent, at Rs.230 for 4 months.............Rs.920.

The plaintiff claims :

(1) A prohibitory injunction to restrain the defendant from spreading the offensive smell over the plaintiff's house.

(2) Rs.920 as damages.

(3) Future damages at Rs.230 per month up to date the defendant obeys the said prohibitory order.

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the public, and unless that injury is substantial and the direct cause of the nuisance. [See full discussion of this in note (k)]. A suit in respect of such nuisance, either for declaration or injunction may, however, be instituted under section 91 C.P.C. by the Advocate General or any two or more persons with the permission of the court and in that case no special injury has to be shown. Such power may with the previous sanction of the State Government be, outside Presidency towns, exercised by collectors or any other officer as the State Government may appoint in this behalf (section 93).

A suit by one party who wants to use a highway in a particular manner against another who obstructs him in such use is not a suit relating to a public nuisance and such a suit for declaration or injunction can be brought without proof of special damage (*Surendra* v. *District Board, Nadia*, A 1942 Cal 360; *Pailappan* v. *Sebastian*, 1988 (1) KLT 701: *Godavari* v. *Cannanore Municipality*, A 1985 Ker 2). A neighbour can also sue for injunction to restrain construction of a building in breach of municipal bye-laws or other like regulation (*Onkar Nath* v. *Ram Nath*, A 1985 Del 293, relying on *K.Ramadas Shenoy* v. *Town Municipal Council*, A 1974 SC 2177). The pollution of "Public Waterway" constitutes public nuisance (*Rajadhiraj Industries Pvt Ltd.* v. *Nauhelal Beghel*, (1988) 2 Cur CC 69 (MP).

Private nuisance is act affecting a particular individual or individuals. If the individuals affected are limited in number, the nuisance is not public, whatever may be the number (*Ramghulam* v. *Ram Khelawan*, 167 IC 798, A 1937 Pat 481). It is also

No. 216—Suit for Carrying on a Noxious Manufacture

(Form No. 24, Appendix A, C.P.C.)

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called ____________ situate in ________.

2. Ever since the __ day of ________ 19__, the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the said lands.

3. Thereby the trees, hedge, herbage, and crops of the plaintiff growing on the said lands were damaged and deteriorated in value, and the cattle and livestock of the plaintiff on the said lands became unhealthy and some of them were poisoned and died.

4. The plaintiff was unable to graze the said lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep, and farming stock therefrom, and has been prevented from having so beneficial and healthy use and occupation of the said lands as he otherwise would have had.

No. 217—Suit for Discharging Water on Plaintiff's Land

1. The plaintiff owns a piece of land bounded as follow, in *mohalla* Khattrain, in the city of Meerut, and to the west of the said land is a house belonging to the defendant.

Boundaries of the Plaintiff's Land

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of two kinds : (1) producing personal discomfort, e.g., noise, bad smell, etc., (2) causing [illegible] injury to property, e.g., [illegible] foul water on anothers property, emitting smoke, destroying plants and trees, etc. Injury to personal comfort does not always amount to a nuisance, but the question generally depends on attendant circumstance. What may be a nuisance at one place, e.g., in the country, may have to be tolerated in another place, e.g., a busy town. But such consideration would not apply when there is a sensible injury to property resulting from the nuisance. It is also necessary that the act complained of should be an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant and dainty modes and habits of living but according to

2. In the first week of December, 1983, the defendant (i) opened a *mori* or drain in the eastern wall of his house through which he discharges the water of his latrine, (ii) constructed three water spouts in the said wall through which he discharges the rainwater of his roof on the plaintiff's said land, and (iii) has opened a door in the said wall through which he passes over the plaintiff's said land. All these wrongful acts of the defendant are calculated to injure the plaintiff's property.

The plaintiff claims an injunction to restrain the defendant from discharging water through the *mori* and the three spouts on the plaintiff's said land, and from passing over the said land.

No. 218—Representative Suit in Respect of a Public Nuisance

1. In the first week of September, 1984, the defendant constructed a *chabutra* in front of his residential house on a public street known as Maliwara Bazar in Delhi.

2. The said construction has narrowed the said street at that particular point and has obstructed the passage of the public in carriages and tongas along the said street.

3. The defendant, though requested by the plaintiffs by a registered letter dated October 10, 1984, to remove the said *chabutra*, has failed and neglected to do so and, unless restrained from doing so, intends to maintain the said obstruction.

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plain, sober and simple notions obtaining among the people (*Thakurdas Meghraj* v. *Bhawanji*, 167 IC 145, A 1937 Sind 8). For principles to determine if nuisance is actionable see *Ram Lal* v. *Mustafabad Oil & Cotton Ginning Factory*, A 1968 Punj 399. It is not merely on the ground of nuisance that restrictions can be imposed on the construction of buildings, and it has been held that an injunction to restrain the use of a building as mosque can be granted on proof that it would lead to communal disturbances (*Khaji Dodda* v. *Nanippa*, A 1937 Mad 348, 185 IC 554).

On discharge of chimney smoke towards plaintiffs house, see *B. Venkatappa* v. *B. Lovis*, (1984) 2 An WR 297; towards plaintiffs grove and trees (*Subhash Narayan* v. *Ram Narain*, A 1994 All 120; *Hansraja* v. *2nd Additional District Judge Gorakhpur*, 1981 All LJ 183; *Gabga Bricks Udhyog* v. *Jai Bhagwan Swarup*, A 1982 All 333); on discharge of roof water, see *Panna* v. *Ram Saran*, 1933 ALJ 1006; on construction of non-flush system latrine, see *Abdul Hakim* v. *Ahmed*, A 1985 MP 88, 1984 MPLJ 578; on use of a neighbouring flat as lodging house, see *Hardayal* v. *Nirmala Devi*, A 1984 Del 350.

4. The plaintiff has obtained the leave of the court to bring this suit on behalf of all member of the public passing as aforesaid along the said street.

The plaintiff claims :

(1) A declaration that the said street is a public street and the defendant is not entitled to obstruct the passage of the public along the same.

(2) An order to the defendant to remove the said *Chabutra.*

(3) An injunction to restrain the defendant from obstructing the passing of the public along the said road.

(*NB.*—No claim for damages can be added to this suit under section 91 C.P.C. If the plaintiffs have sustained any special and extraordinary damage by the nuisance, they bring a separate suit).

The injury caused by the nuisance must be real and substantial and mere temporary inconvenience from noise or dust caused by lawful exercise of a man's profession, and without negligence, is not actionable. The actual occupier alone (e.g., a tenant) can bring a suit for nuisance of a temporary character, but if the injury is of a permanent character the landlord should bring the suit. A suit for nuisance must be brought against the person actually committing it, but if it is committed by a servant or agent for the master, the latter should be sued. An owner who lets or sells property with a nuisance on it may be sued for the nuisance.

The nuisance and injury to the plaintiff should be alleged. If there are special circumstances which make the act, a nuisance, though ordinarily it would not be so, they must be alleged. **In case of public nuisance the special injury to the plaintiff must be alleged with sufficient details and particulars.** If no particulars are given, general allegations will not do (*Raj Chandra* v. *Mohin Chandra*, 91 IC 728, A 1926 Cal 549 DB), but the Patna High Court took a more lenient view and held that this omission is not fatal (*Khurshed Hussain* v. *Secretary of State*, 169 IC 66, A 1937 Pat 302). There are clearly two modes of escape from the special restrictions of section 91: (i) by proof of special damage and (ii) by proof of the invasion of the special rights of a limited class which will give an independent right of action (*Bibhuti Narayan* v. *Mahadev Asram*, A 1940 Pat 449; *Gajadhar Prasad Ganga Prasad Shukul* v. *Rishal Kumar Mohan Lal*, A 1949 Nag 319).

A suit for removal of an obstruction on a village pathway is not covered by section 91, C.P.C. as the path could by no means be described a public highway (*Dalgovinda Mahatha* v. *Khatu Mahatha*, A 1948 Pat 183), but one in respect of which a customary right recognised by section 18 Easement Act, is claimable.

The plaintiff may claim damages or injunction. Damages will be allowed in all cases of nuisance to property where the injury is present and substantial, and in case of physical discomfort only when the act amounts to a nuisance. Injunction

No. 219—Ditto

(Form No. 37 Appendix A,C.P.C)

1. The defendant has wrongly heaped up earth and stones on a public road, known as ______ street, at _______, so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained the leave of the court for the institution of this suit.

The plaintiff claims :

(1) A declaration that the defendant is not entitled to obstruct the passage of the public along the said public road.

(2) An injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 220—Suit by an Individual in respect of Public Nuisance

1. The plaintiff is a medical practitioner, and his medical hall is situate on the public road called the Mor Ganj Road in the town of Saharanpur.

2. The defendant is a grain merchant and has for the last six months been occupying the shop which adjoins the plaintiff's said medical hall on the north and opens on the said public road.

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will be granted when the injury is continuous or defendant threatens to repeat the nuisance, or there is a probability that further nuisance will arise. Injunction will not be granted except in extreme cases, when the nuisance is temporary and occasional. A mandatory injunction will not be granted if a prohibitory injunction will serve the purpose, e.g., in case of a latrine there should not be a prayer for its demolition, but for an injunction to restrain the defendant from using it as a latrine (*Rama Rao* v. *Martha Sequeira*, 42 M 796, 37 MLJ 234, 52 IC 921). In the case of latrine which is a private nuisance, defendant can be ordered to build the latrine upon latest scientific patterns, e.g., by putting up a spring door (*Krishna Chandra* v. *Gopal Chand*, 39 PLR 664) and can be restrained in regard to its capacity being overtaxed (*Dattartraya* v. *Gopisa*, 101 IC 810 Nag). So in case of defendant's opening a door on plaintiff's land but in defendant's own wall, the suit should not be for closing the door, but for an injunction to restrain the defendant from passing over the plaintiff's land. But where something is to be done on the property of the defendant to remove the nuisance, e.g., cutting a tree or demolishing a wall, a mandatory injunction can be claimed.

3. Ever since his occupation of the said shop, the defendant has been every day from 6 a.m. to 1 or 2 p.m., wrongfully exposing heaps of various kinds of grain on the said public road in front of the plaintiff's medical hall, as a result of which the plaintiff and his patients are put to great inconvenience when coming to, and going from, the said medical hall, by not being able to bring their carriages and cars right up to the medical hall door and having to leave the same in middle of the road and to walk over the grain scattered by the defendant in front of the said medical hall.

4. the defendant does not discontinue the said nuisance and threatens to continue and repeat it unless restrained by injunction.

The plaintiff claims :

(1) Rs.2,500 as damages.

(2) A perpetual injunction restraining the defendant from keeping or scattering grain on the said public road in front of the plaintiff's medical hall.

No. 221—Suit for Polluting the Water under the Plaintiff's Land

(Form No. 23, Appendix A, C.P.C.)

1. The plaintiff is, and at all the time hereinafter mentioned was, possessed of certain land called ______ and situate in ______, and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water, which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the ___ day of ______ 19___, the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water flowed into the well.

Limitation : See note on Limitation in cases of wrongs to Easement, *ante.*

Defence : The defendant may plead that the alleged act does not amount to a nuisance, or that the injury to the plaintiff from the same is not direct or substantial. He may plead that he has acquired, by prescription, a right to continue the alleged nuisance. When pleading this, he will have to give all the particulars necessary for such a claim. If he has altered the mode of enjoyment of the alleged easement causing addition to be burden on the servient heritage, he may plead any of the

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

No. 222—Suit for Injunction Restraining Nuisance

(Form No. 36, Appendix A, C.P.C.)

1. Plaintiff is, and at all the times hereinafter mentioned was absolute owner of [the house No.______ street, Calcutta].

2. The defendant is, and at all the said times was the absolute owner of [a plot of ground in the same street].

3. On the __ day of ______ 19__, the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present times has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

4. In consequence, the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.

The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

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three grounds mentioned in section 43, Easements Act, on which he can claim that the easement still survives. Change in the position of windows is change in the easement of light and air and cannot be permitted (*Bai Hariganga* v. *Tricamlal*, 26 B 374). Change in position of *parnalas* (or water spouts) may amounts to an addition of the burden by increasing the force of the water and will extinguish the old easement.

It is a good defence to an action for an act which is a nuisance that it was directed or authorised to be done by law, unless the statutory powers were used negligently or in bad faith (*East Freemantit* v. *Annois*, 1902 AC 213; *Nirmal Chandra* v. *Municipal Com. of Patna*, 40 CWN 1353, A 1936 Cal 707). But, if that act authorised or directed by law is not a nuisance itself but it becomes a nuisance if done negligently and the defendant has done it negligently, the law would be no defence (*Crane* v. *South Suburban Gas Co.*, (1916) 1 KB 33). No length of time can justify a public nuisance.

In case of a private nuisance affecting the personal comfort of a person. length of time would be no defence, if the plaintiff had no power to stop the nuisance (*Sturges* v. *Bridgman*, 11 Ch D 852). Laches or acquiescence may sometimes be a good defence, particularly in a suit for an injunction, for instance, to a suit for removal of a balcony overhanging the land jointly owned by the parties. It is no defence that the plaintiff himself came to the nuisance, or that the act of causing

No. 223—Suit for Injunction against Digging Plaintiff's Land (z)

1. The plaintiff is the owner of fields Nos.572, 573 and 574 in village Kailashpur, tahsil Jagadhari, district Ambala, the total area of which is 5 *hectares*.

2. On May 1, 1985, the defendant began wrongfully to dig, and is still digging, earth from the said plot for the purposes of his brick-kiln close by. He threatens and intends to continue and repeat the act, unless restrained from so doing.

3. The said fields could not, in consequence, be let to anybody for cultivation and the plaintiff has suffered damage.

Particulars

	Rs.
Expense to be incurred in re-filling the pits ...	3,000
Loss of one year's profit	2,500

The plaintiff claims:

(1) Rs.5,500 as damages.

(2) An injunction to restrain the defendant from digging any earth from the said fields.

WRONGFUL SALE *(aa)*

No. 224—Suit for Damages for Wrongful Sale of Plaintiff's Goods

1. In execution of his decree No.509 of 1984, passed by this court

nuisance is beneficial to the public (*Shelfer* v. *City of London E.L. Co.*, 1 Ch 287), or that the place where the nuisance is created is the only place suitable for the purpose (*St. Helen's Smelting Co.* v. *Tffing*, 11 LC 642), or that the defendant is merely making a reasonable use of his property (*Reinhardt* v. *Mevasti*, 42 Ch D 658), or that reasonable care and skill are taken to prevent the nuisance (*Rapier* v. *London Tramways Co.*, 2 Ch D 588).

(z) In such cases, it will be a mistake to ask for mandatory injunction to fill up the pits. No such order can be granted in case of a nuisance which the defendant commits on the plaintiff's property. The plaintiff can remove it and recover cost of doing so as damages.

(aa) See note *(d)* about suits for damages for wrongful attachment. If the plaintiff cannot obtain release of the goods and they are wrongfully sold, his

against one Shamlal, the defendant attached, on July 10, 1984, and wrongfully sold, on September 20, 1984, the following goods of the plaintiff:

(1) Four cows worth Rs.1,500; (2) Two she-buffaloes worth Rs.1,600; (3) One mare worth Rs.2,000; and (4) Wheat worth Rs.4,000

2. The plaintiff has suffered damages thereby.

Particulars of Damages

	Rs.
Value of the property at the date of attachment as per details given above.	9,100

The plaintiff claims Rs.9,100, with interest from the date of suit to that of payment.

SEDUCTION *(bb)*

No. 225—Suit for Seduction of Wife

1. Smt. Ramo was on, November 15, 1986, and still is, the wife of the plaintiff, and the defendant on all material dates well knew this fact.

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remedy is to sue for damages for the wrongful sale. The damage is usually the value of the goods. The price fetched at the auction sale is not necessarily the measure of damages, as that may be very low, but the plaintiff can claim what the property was actually worth as also any other damages which he might have suffered by its seizure but, as the money is claimed as damages, he cannot get any interest on it from the date of seizure.

Limitation is only one year under Article 80 and that is reckoned from the date of attachment.

(bb) A father can maintain a suit for damages for the seduction of his daughter. The basis of such a suit is the plaintiff's loss of service of the daughter. If the daughter was living with the father, and the father had a right to exact service from her, that is sufficient, and actual service rendered by her need not be alleged. Similarly, a suit may be brought by a husband against anyone who entices away his wife, for loss of her affection, companionship and aid. The motives with which the defendant took away the wife or persuaded her to leave the protection of her husband are immaterial and need not be alleged in the plaint, unless they are such as will aggravate the amount of damages. Even a father who persuades his daughter to leave her husband is liable for damages (*Md. Ibrahim* v. *Gulam Ahmad*, 1 BHC 236). **The plaint should only show that the woman is the plaintiff's wife, that the defendant enticed her away, and that he, at the time, knew that she was the plaintiff's wife** (*Sobha Ram* v. *Tika Ram*, A 1936 All 454). Even if the defendant does not entice her away, but she leaves the husband's house of her own accord,

2. On November 15, 1986, the defendant wrongfully enticed and procured Smt. Ramo unlawfully against the will of the plaintiff, to depart and remain absent from the house and society of the plaintiff.

(*Or*, on the said day, the said Smt. Ramo, without any provocation or other cause and without the consent of the plaintiff and against his will, and without his knowledge, left the house of the plaintiff).

3. The defendant wrongfully and against the will of the plaintiff, on the said day, received and has ever since harboured and detained the said Smt. Ramo at his house and refused to deliver her to the plaintiff.

4. The plaintiff has thereby lost the society and services of his said wife.

The plaintiff claims Rs.1,000, as general damages, with interest from the date of suit to that of payment.

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and the defendant harbours her knowing that she has left her husband without any just cause, he is liable for damages. But if she leaves her husband on account of his cruelty or misconduct, and the defendant gives her protection from motives of humanity, he is not liable (*Philip* v. *Squire*, 1 Peake 114). A suit for damages for adultery may similarly be brought, as adultery is an actionable wrong against the marital right of the husband. In England the jurisdiction to grant damages for adultery has since 1857 been given to Divorce Courts. In India also under the Divorce Act, 1869 damages can be claimed by an application under section 34 and not by a regular suit if the plaintiff is a Christian. Regular suit is necessary if he is a non-Christian.

The damages in all such cases are more or less arbitrary, as there is no criterion for actually measuring the loss suffered by the plaintiff. But the amount should ordinarily be exemplary (*Irvin* v. *K. Dearwan*, 11 East 23), and the disgrace and dishonour suffered by the plaintiff, his feelings and social position of the parties must all be taken into consideration.

Limitation : One year from the time when loss of service by seduction occurs (Article 77) in case of daughter and servant and 3 years in case of wife (Article 113) (*Sobha Ram* v. *Tika Ram*, A 1936 All 454, case under the limitation Act of 1908).

Defence : In cases of seduction, there is very little defence except denial of the seduction, or of the plaintiff's marriage or continuance of marriage with the woman seduced. The defendant may plead that the woman had left the plaintiff's protection of her own accord owing to the cruelty or misconduct of the plaintiff, and the defendant had only given her protection from motives of humanity. But otherwise the consent of the woman to seduction or adultery is no defence.

SLANDER *(cc)*

No. 226—Suit for Slander

1. On February 8, 1996, the defendant falsely and maliciously spoke and published of the plaintiff, and of him by way of his profession as a medical man, to Sri Ram Prasad of Meerut, Sri Biharilal of Hapur, Sri Ram Narain of Ghaziabad and several other patients of the plaintiff (whose names are unknown to the plaintiff), the following words: "Dr. Ghosh may be a capable physician but his moral character is bad and he is not a fit person to be introduced into respectable families".

If any special injury is alleged, it may be alleged as follows :

2. The plaintiff was, in consequence, much injured in his reputation, and three patients named above, and several other patients whose names are unknown to the plaintiff, have ceased to call the plaintiff for consultation and treatment, and the plaintiff has thus suffered loss in his professional business as a medical practitioner, as well as injury to his general character.

The plaintiff claims Rs.2,000 as damages, with interest from date of suit to that of payment.

(cc) See also libel *ante*. Slander is an oral defamation and all facts necessary to be alleged in a suit for libel must be alleged in a suit for slander except that the defamation was in writing. Any special damage suffered must be alleged as that would, in any case, affect the amount of damages. In England, slander is not actionable without proof of special damage except when it imputes a criminal offence, a contagious disease, or unchastity or when any imputation injuriously affecting the plaintiff in office, profession, trade or business is made. But the restriction is not recognised in India, and any defamatory statement which is calculated to cause pain to the person defamed is actionable provided it is not a mere hasty expression spoken in anger to which no hearer would attribute any set purpose to defame (*Kashi Ram* v. *Bhabu Ram*, 17 BHC 17; *Parvath* v. *Mannar*, 8 M 175; *Sangar Ram* v. *Babu Ram*, 1 ALJ 102; *Gayadin* v. *Mahabir*, 95 IC 90, 3 OWN 443, A 1926 Oudh 363 DB; *Mst Ramdhara* v. *Mst. Phulwatibai*, 1969 MPLJ 483). It is sufficient if the words used, excited against the plaintiff feeling of contempt and ridicule (*Suraj Narain* v. *Sita Ram*, 183 IC 236, A 1939 All 461). But if no substantial injury is caused to the plaintiff, the damages that he can get will only be nominal. The Calcutta High Court has, however, held that mere use of abuse and insulting language is not actionable without any special damage (*Girishchandra* v. *Jatadhari*, 26 C 653) e.g., calling a man outcaste (*Girdharilal* v. *Punjab Singh*, 146 IC 1078, A 1933 Lah 727).

No. 227—Like Suit, Another Form

1. The plaintiff is a road contractor and the defendant is a member of the Buildings and Roads Sub-committee of the Corporation of Allahabad.

2. The plaintiff was engaged by the said Corporation of Allahabad as a contractor to make certain roads within the limits of the said Corporation.

3. On March 4, 1996, at a meeting of the said Corporation the defendant falsely and maliciously spoke and published of the plaintiff, and of him in the way of his business as a road contractor, the following words:

"Ram Chandra, contractor, has broken his contract in many important particulars, and, from the somewhat cursory way in which I have examined his work, I can say it has been very badly done and he should not be paid a single paise without his work being thoroughly examined by the Corporation Engineer".

4. The said words were spoken to the following members of the said Corporation.

... ... (names)

5. The defendant meant, and was understood to mean thereby, that the plaintiff was dishonest and fraudulent person who claimed money to

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It must be remembered that every insulting statement will not be actionable. unless it was defamatory also (*Christensen* v. *Caster*, 41 IC 696 Low. Bur.). Also words of abuse used in the heat of a quarrel are not actionable as the person using them cannot be said to defame that person whom he abuses (*Srigineedi* v. *Tirumili*. 52 MLJ 87, 1927 MWN 83, 100 IC 90).

Limitation : One year from the date when the words are spoken or, where slander is not actionable without proof of any special damage, when such damage results (Article 76).

Defence : Same as in case of libel, except that where special damages are necessary to sustain the action, according to Allahabad High Court view the same may be denied, or may be alleged to be not the direct result of the slander. Privilege may be claimed in respect of statements by judges, counsel, parties and witnesses in the course of judicial proceedings (*K.Daniel* v. *Hyamavathi*, A 1985 Ker 233: case law discussed). Statements made to police by complainant do not form part of judicial proceedings and only qualified and not absolute privilege can be claimed for them (*Govind* v. *Pandharinath*, A 1985 Bom 224; contra : *Lachhman* v. *Pyarchand*, A 1959 Raj 169).

which he was not entitled and that the plaintiff was not fit to be trusted or employed to carry out any public work.

6. In consequence, the plaintiff was injured in his credit and reputation in his professional business as contractor, and the Zila Parishad of Allahabad and that of Mirzapur, which had formerly been employing the plaintiff as such, ceased to do so.

The plaintiff claims Rs.5,000 as general damages, with interest from date of suit to that of payment.

TRADE MARK *(dd)*

No. 228—Suit for Infringement of a Trade Mark

1. The plaintiffs have for the last 25 years manufactured and sold under the names of "Sanatogen" and "Formamint" certain chemical compounds for use in medicine and pharmacy, and within a short time the said compounds sold under the names of Sanatogen and Formamint acquired a very high reputation throughout India and the sales thereof

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(dd) See also copyright *(h) ante* for combining causes of action of copyright and trade mark. Under the Trade and Merchandise Marks Act (Act XLIII of 1958) owners of trade marks have to get them registered, because under section 27 of the Act no person is entitled to institute any proceedings to prevent or to recover damages for the infringement of an unregistered trade mark. The registration confers on the registered proprietor of the trade mark certain rights including the exclusive right to use the trade mark in relation to the goods in respect of which the trade mark is registered. **The plaintiff must prove that he is a registered proprietor of the trade mark.** Infringement has further to be shown. Infringement has been defined in section 29 as use in the course of trade of a mark which is identical with or deceptively similar to the trade mark in relation to any goods in respect of which the trade mark is registered and in such manner as render the use of the mark likely to be taken as use of the trade mark (*Sony* v. *Shamrao*, A 1985 Bom 327). Under section 27(2) of the Act an action for passing off against registered user of trade mark is maintainable at the instance of a prior user of the same, similar or identical mark. Since such a remedy is available against the registered user of a trade mark an interim injunction restraining him to use the mark can also be granted to make the remedy effective (*N.R.Dongra* v. *Whirlpool Corporation*, A 1995 Delhi 300 DB). Where the trade mark of the plaintiff is not registered, onus lies on him to prove not only similarity but also that the defendant is deceitfully passing off his goods as that of the plaintiff or there is bound to be confusion in the minds of the customers and a risk of damage (*Chhattar Extraction Ltd.* v. *Kochar Oil Mills Ltd.*, A 1996 Delhi 143).

were large and profitable and the names of Sanatogen and Formamint had come to mean chemical compounds of the plaintiff's manufacture.

2. At the end of October, 1995, the defendants inducted into the market several consignments of some substance under the names of Sanatogen and Formamint and have since then been selling the same at a much lower rate than the plaintiff's goods.

3. The general make up, marking, and appearance of the defendants' packages, apart from the use of the names of Sanatogen and Formamint, have been made to resemble closely the plaintiffs' package in order to pass off the defendant's goods as the plaintiffs' goods.

Particulars of packages of plaintiffs' goods

* * * *

Particulars of packages of defendants' goods

* * * *

4. The object of the defendant in inducting into the market and selling the said goods is to deceive the public and lead them to believe that in purchasing the inferior compounds offered for sale they were buying the genuine articles of the plaintiffs' manufacture.

5. Since the induction of the defendants' goods into the market the sale of the plaintiffs' goods has fallen considerably and the plaintiffs have suffered damage.

The Supreme Court has considered the various provisions of the Act, and explained the expressions "Aggrieved Person" "A Distinctive Trade Mark" and "Infringement and Commencement of Proceedings" and made certain important observations in the case of *National Bell Co.* v. *Metal Goods Mfg. Co.*, A 1971 SC 898. Fraudulent intention is not necessary (*Bundi Portland Co.* v. *Abdul Hussein*, A 1936 Bom 418). The mere fact that if looked at properly the defendant's trade mark was not the same as the plaintiff's is immaterial if the whole get-up of the one was like that of the other (*Juggimal* v. *Swadeshi Mills*, 56 IA 182, 27 ALJ 1, 33 CWN 242, 31 BLR 285, 114 IC 30, A 1929 PC 11; *Ibrahim* v. *Abdulla*, 65 MLJ 617). The test of comparison by placing the two marks side by side is not a sound one but what has to be seen is the element of similarity which may cause deception (*Thomas Bear Co.* v. *Prayag Narain*, A 1940 PC 86, 187 IC 658; *J&P Coats Ltd., Scotland* v. *Gurcharan Singh*, A 1969 Punj 290; *Prem Nath Mayor* v. *The Registrar of Trade Marks*, A 1972 Cal 261; *Parle Products* v. *J.P. &Co.*, A 1972 SC 1359). It is not necessary to prove actual deception (*National Carbon & Co.* v. *Sei Sen & Co.*, A 1938 Rang 99, 176 IC 597; *Firm Bhagwandas Rangilal* v. *Watkins Mayor &Co.*,

The plaintiffs claim :

(1) An injunction restraining the defendants from passing off, or attempting to pass off, and from enabling others to pass off, chemical compounds not of the plaintiff's manufacture as the goods of the plaintiff's manufacture by use of the names Sanatogen or Formamint, or by use of packages of similar make and appearance as those used by the plaintiffs for their goods.

A 1947 Lah 289), but the court should be satisfied that an unscrupulous retailer could be able to foist the defendant's goods upon an ignorant purchaser who trusts to his memory and has no opportunity of comparison (*Steel Bros.* v. *Ahmad Ibrahim*, 99 IC 723, 4 R 401; *Swadeshi Match Co.* v. *Adamjee*, 99 IC 227, 4 R 381; *Herbert Whitworth Ltd.* v. *Jamnadas*, 110 IC 312, A 1928 Bom 227, 30 BLR 514, 52 B 228 DB; *Abdul Kareem* v. *Abdul Kareem*, A 1931 Mad 461, 1931 MWN 311, 132 IC 650). Mere possibility of deception is, however, not sufficeint; there must be a reasonable probability (*Barlow* v. *Gobind Ram*, 24 C 364; *Nem Chand* v. *Wallace*, 34 C 495; *A.J. Von Wulfing* v. *Jiwan Das & Co.*, A 1926 Bom 200, 28 BLR 243, 93 IC 857).

The test is not whether the ignorant, thoughtless or incautious purchaser is likely to be misled but court has to consider an average purchaser buying with ordinary caution (*The National Sewing Thread Co.* v. *James Chadwick & Bros.*, A 1948 Mad 481, (1948) 1 MLJ 303, 1948 MWN 276; *Hari Prasad Lal Chand* v. *Nannoo Khan Hussain Bux*, A 1968 MP 234; *P.L. Anwar Basha* v. *M.Natrajan*, A 1980 Mad 56; *Arabind Laboratories* v. *Annamalai Chettiar*, (1981) 1 MLJ 75). Therefore mere phonetic similarity cannot be considered such as between "Cocogem" and "Kotogem" (*Modi Mills* v. *Tata Oil Mills*, A 1943 Lah 196; see however, *Bata India Ltd.* v. *Pyarelal & Co.*, A 1985 All 242; *B.K.Engg. Co.* v. *U B.H.I.Enterprises*, A 1985 Del 210). Absence of a specific instance of confusion or deception, though not conclusive is a material consideration and a strong case must be made out to justify the conclusion that confusion will result (*Imperial Tobacco Co.* v. *Mullaji*, 168 IC 573, A 1937 Nag 158), but the Bombay High Court has held that where there is a deliberate imitation of trade mark the onus shifts on to the imitator to prove that he is not liable (*Gujarat Ginning Co.* v. *Swadeshi Mills*, 181 IC 17, A 1939 Bom 11[illegible]); in [illegible] trade mark there is no monopoly and so a manufacturer of cigarettes under a mark of a particular device cannot object to the use to the identical mark on hats or soaps as the use cannot cause any deception (*Francis Day* v. *T.C.F. Corporation*, A 1940 PC 55).

If claim is based on the ground of fraud, fraudulent intention should also be expressly pleaded (*Adam jee* v. *Swadeshi Match Factory & Co.*, 110 IC 305, A 1928 Rang 210, 6 R 221 DB). The plaintiff can claim damages suffered by him and, if none has been suffered, nominal damages (*Thomas* v. *Prayag*, 4 AWR 1028; *Ram Kumar* v. *R. J. Wood*, A 1941 Lah 262, 195 IC 831; *Firm Kooverji* v. *Firm Adam Haji*, A 1944 Sindh 21) as he can bring a suit without waiting for the purchase of defendant's good as his (*The National Sewing Thread Co.* v. *James Chadwick & Bros.*, A 1948

(2) That an account be taken from the defendants of the profit they have made by sale of their said goods from the date of their induction into the market.

(3) Payment as damages of the amount of profits so found to have been made by the defendants.

No. 229—Suit for Passing off Goods as Plaintiffs' Goods

1. The plaintiffs have for more than 20 years manufactured and sold hair oil under the name of "Gulshan Hair Oil". The said oil is of a very superior quality and is well known to the public generally and is asked for

Mad 481), or he may ask for account of profits made by the defendant and recovery of that amount, in addition to injunction. But if the infringement is innocent, no account can be ordered unless the infringement continues after notice of owner's right, though injunction can be granted (*Calico Printers Association* v. *Ahmad A. Bros.*, 182 IC 577, A 1939 Bom 198). For method of assessment of damages, see *Hormus* v. *Ardeshar*, 6 IC 571; *Sallay* v. *S B.Neogi & Co.*, 10 R 85, 137 IC 202, A 1932 Rang 56; *Kamlapat* v. *Bhukabai*, 188 IC 462). Exemplary or penal damages cannot be awarded (*Upper Sindh Cigarette Manufacturing Co.* v. *Peninsulur Tobacco Co.*, A 1941 Lah 293, 196 IC 19). Where the plaintiff's mark is itself fraudulent he is not entitled to sue (*Daulat Ram* v. *Veramal*, A 1938 Lah 803). A suit for declaration that plaintiff did not infringe defendant's trade mark does not lie (*Mohammad Abdul Kadar* v. *Finlay*. 6 R 291, A 1928 Rang 256, 111 IC 136; see also, *Madura Coats Ltd.* v. *Chetan Dev*, A 1985 P & H 43-on section 120 of the Act).

Where a particular name has become associated with goods manufactured or sold by the plaintiff, he is entitled to the protection of its name against persons who use that name on goods which are so similar to that of the plaintiff that the purchaser might infer a common origin (*Dhan Lakhmi Weaving Works* v. *Mahomed Abdul Aziz*, (1941) 2 MLJ 435; *Victory Transport Co.* v. *The District Judge, Ghaziabad*, A 1981 All 421).

If an ignorant or unwary purchaser is likely to be misled by the name or description or appearance of the infringing article mark or name, that would be a sufficient ground of action and would justify the issue of an injunction (*Mangalore Ganesh Beedi Works* v. *Free India Works*, A 1951 Mys 29; *S.P.S. Selvaraj* v. *Edward Nadar*, (1977) 2 MLJ 441). The question of resemblance between two trade marks and the likelihood of deception are to be considered by reference not only to the whole mark but also to the distinguishing or essential feature, if any, of a trade mark (*James Chadwick & Bros. Ltd.* v. *National Sewing Thread Co. Ltd.*, A 1951 Bom 147). When the colour, scheme and design which the defendant has been using is identical with the colour, scheme and design which the plaintiff has registered as his trade mark, it is a case of infringement of trade mark (*Corn Products*

by the public under that name. No other hair oil is designed or known by the said name.

2. The defendant is a perfumer carrying on business at Chowk, Allahabad.

3. The defendant has wrongfully sold and passed [*or*, is selling and passing off] hair oil not of the plaintiff's manufacture as and for the plaintiff hair oil. He sells and passes off his oil under the name of "Gulbahar Hair Oil" and this misleads the public into the belief that it is the plaintiffs' hair oil and thereby causes injury both to the public and to the plaintiff.

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v. *Shangrilla Food Products*, A 1960 SC 142 ["Glucovita" and "Gluvita"]; *K.R. Chinna Krishna Chettiar* v. *Sri Ambal & Co.*, A 1970 SC 146 ["Ambal" and "Andal"]).

There is a real distinction between an infringement action and a passing off action. The main question in a passing off case is whether goods have been passed off as those of another. In substance it is an action for deceipt. Action for infringement is statutory remedy conferred on the registered proprietor for the indication of his exclusive right to the use of the trade mark in relation to those goods. The essential features of both actions might coincide where the passing off is merely by use of colourable imitation of the trademark. But while mere imitation of registered trade mark is sufficient for an action for infringement it may be a good defence in an action for passing off that not withstanding appropriation of certain essential features of the registered trade mark the goods are sufficiently distinguished from those of the plaintiff (*Pandit Durgadutt* v. *Navratna Pharmaceutical Laboratories*, A 1965 SC 980; *M. Damodara Pai* v. *C.K. Manilal*, 1972 Ker LJ 19; *Khem Raj Shri Krishna Das* v. *Garg & Co.*, A 1975 Delhi 130; *Moideen* v. *Vasu*, 1980 KLT 325).

The considerations relevant in a passing off action are somewhat different than on an application made by registration of a mark under the Trade-Marks Act and that being so the decision of court in a passing off action cannot be considered as relevant on the question that the Registrar has to decide under the provisions of section 8 (*The National Sewing Thread Co. Ltd.* v. *James Chadwick & Bros. Ltd.*, A 1953 SC 357, 1953 SCJ 509). All proceedings in connection with the registration of trade marks are to be taken before the Registrar of Trade Marks. The powers and duties of the Registrar in that connection and the procedure to be followed are laid down in the Act.

Under section 105 of the Act, suits for infringement of a registered trade mark or relating to any right in such mark and passing off actions are to be instituted in the District Court having jurisdiction. In such suits the reliefs that can be claimed include injunction and at the option of the plaintiff either damages or an account of the profits together with or without any order for the delivery of the infringing labels and marks for destruction or erasure. In suits relating to infringements, damages other than nominal damages or an account of profits cannot be allowed

4. Particulars of such wrongful sale and passing off are as follows: *(give particulars).*

5. The hair oil sold by the defendant is of inferior quality and the sale of it as plaintiff's hair oil has already caused and will cause a great loss of reputation and consequent damage to the plaintiffs.

6. The defendant intends to sell as "Gulbahar Hair Oil", oil not in fact the plaintiffs' manufacture and to pass off as hair oil manufactured by the plaintiffs which is not in fact manufactured by the plaintiffs.

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where (a) in a suit for infringement of a trade mark, the infringement complained of is in relation to a certification Trade Mark, or (b) where in a suit for infringement the defendant satisfies the court (i) that at the time he commenced to use the trade mark complained of he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was on the register or that the plaintiff was a registered user using by way of permitted use and (ii) that when he became aware of the existence and nature and the plaintiff's right in the trade mark, he forthwith ceased to use the trade mark in relation to goods in respect of which it was registered.

In a passing off action there are broadly two tests which have to be applied for determining whether plaintiff is entitled to injunction. The first is whether the words used in the trade name of plaintiff have come to acquire a distinctive or secondary meaning in connection with plaintiff's business so that the use of that trade name adopted by another was likely to deceive the public. The second is whether there is a reasonable probability that the use of the name adopted by the defendants was likely to mislead the customers of plaintiff by reason of similarity of the trade names (*Victory Transport Co. Pvt. Ltd.* v. *The District Judge, Ghaziabad*, A 1981 All 421).

It should be noted that a passing off action lies even in respect of trade marks which are not registered (*Durga Dutt Sharma* v. *Navaratna Pharmaceutical Laboratories*, A 1962 Ker 156). An infringement action lies only in respect of registered trade marks.

Proceedings for infringement can be started not only by the proprietor of the trade mark but also in case of his refusal by the registered user of the trade mark. In such cases the proprietor must be made a defendant proforma. In suits for infringement, where the registration or the validity of the plaintiff's trade mark is questioned the issue has to be decided not in the suit itself but by an application for rectification of the register made in the High Court. The High Court and the Registrar have concurrent jurisdiction for entertaining applications for removal of a trade mark from the register, imposition of limitations on the ground of non-user, defensive registration of trade marks and rectification and correction of the register of trade marks but the Registrar can refer such applications to the High Court at any stage of the proceedings. On grant of temporary injunction, see *Manoj Plastic* v. *Bhola Plastic*, A 1984 Del 441; *Tobu Enterprises* v. *Joginder Metal Works*, A 1985 Del 244.

The plaintiffs claim (i) an injunction restraining the defendant by himself or by his agents from selling or offering for sale as "Gulbahar Hair Oil" not of the plaintiffs' manufacture, (ii) Rs. 20,000 as damages or in the alternative an account of profits and payment of the amount shown to be due to the plaintiffs on the taking of such account.

Appeals against an order or decision of the Registrar lies to the High Court and appeals.

Defence: The defendant may question the registration of the trade mark or its validity, the plaintiff's right of suit and contend that the action complained of falls under section 30 and does not amount to an infringement. He may also plead determination of the right in the said mark, but particulars as to how the right had determined must be given, e.g., that it was not renewed after seven years or that it was abandoned. He can also pray for stay of the suit pending rectification, under section 111 of the Act (*Elofix Industries* v. *Steel Bird Industries*, A 1985 Del 258). Acquiescence is one of the defences available under section 30(1)(b) of the Act. If the plaintiff stood by knowingly and let the defendants build up an important trade until it had become necessary to crush it, then the plaintiffs would be stopped by their acquiescence. If the acquiescence in the infringement amounts to consent, it will be a complete defence. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant. (*Power Cantrol Appliances* v. *Sumeet Machines Pvt. Ltd.*, (1994) 2 SCC 448).

Dissimilarity of rival marks is not a complete defence, if the resemblance is sufficient to mislead an incautious purchaser (*Steel Bros.* v. *Ahmad Ibrahim*, 99 IC 723, 4 R 410). It is no defence that the defendant made special effort to guard against deception (*Lotus Ltd.* v. *Mt. Nassaba*, A 1934 Cal 600, 151 IC 5, 38 CWN 265; *Khem Raj Shri Krishnadas* v. *Garg & Co.*, A 1975 Delhi 130). Mere delay is no defence to injunction (*Abdul Karim* v. *Abdul Karim*, A 1931 Mad 461, 132 IC 650, 1931 MWN 311; *Devidas* v. *Alathur*, 1940 MWN 1157, (1940) 2 MLJ 793). In a passing off action the defendant can escape from liability by showing that his goods distinctly indicate that they do not originate from plaintiff, although they are similar to plaintiff's goods (*Khem Raj Shri Krishnadas* v. *Garg & Co.*, A 1975 Delhi 130).

Delay in making the application for rectifications of the register under Chap. VII of the Trade Marks Act is not *per se* a valid ground for defence (*Abinash Chandra* v. *Madhusudan*, 6 DLR Cal 138).

Limitation is three years under Article 88 (formerly Article 40) (*C.G. Varcados* v. *D.C. Mc. Leod*, 51 IC 434). This is continuing wrong and section 22 may be of help.

TRESPASS TO GOODS *(ee)*

No. 230—Suit for injury to Animal

1. On June 4, 1995, the defendant shot and killed a horse belonging to the plaintiff while the said horse was grazing in the plaintiff's field in village Rampur, pargana and tahsil Rupar, district Ambala.

2. The said horse was worth Rs.1,600 and the plaintiff has suffered damage to that extent.

The plaintiff claims Rs.1,600 as damages with interest from date of suit to that of payment.

No. 231—Suit for Damages for Cutting and Taking Away Trees

1. The plaintiff was the owner of 10 *Babul*, 5 *Nim* and 10 *Shisham* trees as detailed below.

2. On July 10 and 11, 1995, the defendant cut down without the plaintiff's consent, the said trees, and appropriated the wood thereof (*or, on* July 10, 1995 defendant No.1 wrongfully sold the said trees to defendant No.2 for Rs.75,000 and the latter has cut down the said trees).

3. The trees were worth Rs.75,000.

The plaintiff claims Rs.75,000 as damages, with interest from the date of suit to that of payment.

Details of Trees

* * * *

(ee) In this category are included suits for injury to goods or animals, e.g., theft, misappropriation, mischief, or breach of trust in respect of goods. **The plaintiff must allege that he was in actual** possesion of the goods (and in that case, he need not show title so long as the defendant cannot claim a better title than his own), or that **he had legal right to immediate possession. Next the act of the defendant amounting to trespass must be alleged with necessary particulars** but without unnecessary details.

It is not necessary that the person in possession must be owner of the property, he may be a hirer or a bailee or pawnee or a carrier. He can even bring a suit against the owner for wrongfully taking away the goods, and recover damages in respect of his limited interest but in such case, when **the suit is against the owner, the plaintiff must allege, not only his possession, but the limited right under which he was in possession.** In some cases persons having a right of possession though

No. 232—Suit for Cutting Away Plaintiff's Crops

1. The plaintiff was owner, and in possession of the sugarcane crop growing on plots Nos. 102, 103 and 104 in village Rupa, pargana and tahsil Sadabad, district Mathura.

2. On November 15, 1995, the defendant, wrongfully and without the plaintiff's consent, cut away and appropriated the said crop from the said plots.

3. The plaintiff has thereby suffered damage.

Particulars of Damages

	Rs.
Estimated out turn of the said crops	9,000
Less expenses by defendant	2,000
Net Loss	7,000

The plaintiff claims Rs. 7,000 with interest from date of suit to that of payment.

No. 233—Suit for Movables Appropriated by the Defendant

1. One Rahim Baksh was, at the time of his death, owner of the movable property entered in the Schedule appended to the plaint and to be treated as part hereof.

2. The said Rahim Baksh died on November 4.1980. He left no widow, sister, parents, or grand-parents or any issue except the plaintiff. The plaintiff is his only son. The defendant was the kept mistress of the said Rahim Baksh.

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not in possession can also sue, such as a bailor (*Kanhya Lal* v. *Badri Lal*, A 1965 Raj 121).

The plaintiff can, against a wrong doer, claim as damage, the value of the property if the same has been lost, plus such other damages as he might have suffered from being deprived of it. If the property is only partially injured, he must claim damages for such injury, describing the injury. The damage must be calculated according to the value of the property on the date of the wrong and not on any subsequent date (*Rogers* v. *John King & Co.*, A 1926 Cal 564, 53 C 239). If the property is still in possession of the defendant and can be recovered from him, the plaintiff may bring a suit for its recovery, and for damage suffered by its temporary loss. But specific movable property cannot be recovered unless the case falls under

3. At the time of the death of the said Rahim Baksh, the defendant took into her possession the said property and has retained it since and deprived the plaintiff of its use.

4. The plaintiff has thereby suffered damage.

Particulars

	Rs.
Value of the property as given in the said Schedule.	10.000
Loss of Profit which the plaintiff would have made by the use of 12 cows and 2 she-buffaloes for 1 month at Rs. 50 per day	1.500

The plaintiff claims :

(*a*) Return of the said property by the defendant, and Rs.1.500 as damages.

(*b*) In the alternative, Rs.11,500 as damages.

Schedule of Property

* * * * *

No. 234—Suit for Damages caused by Theft

1. On October 20, 1995, the defendant broke into and entered the plaintiff's shop and seized and wrongfully carried away therefrom, a Singer Sewing Machine, and two Bajaj electric iron belonging to the plaintiff.

2. By reason of the said wrongful act of the defendant, the plaintiff has been, and is, deprived of the use of the said articles, and prevented

section 7 or section 8 of the Specific Relief Act, 1963, and in all other cases only damages can be recovered. But even when the suit is for specific movables, the plaintiff must claim in the plaint a specified sum in the alternative, in case the property cannot be found. In that case if the court passes a decree for money in the alternative, the decree can be executed as if it were a money decree, but the procedure of O. 21, R. 31 should be followed (*Balmukunda* v. *B.N.Ry.* 103 IC 740, 31 CWN 850).

Limitation : The limitation is usually three years under Article 68 or 91 but the time from which it runs is different under each Article. If the plaintiff has lost the goods or the same have been taken away from him by theft, dishonest misappropriation or conversion, time for a suit for recovery of the specific goods or for compensation for wrongfully detaining the same would run from the date when

from carrying on his business as a tailor and deprived of the profits he would have otherwise made.

Particulars of Damage

	Rs.
Value of the Singer Sewing Machine	2300
Value of the two irons	300
Loss of business for 20 days at Rs. 30 per day ...	600

The plaintiff claims :

(1) Recovery of the said sewing and ironing machines or Rs. 2,600 on account of their value.

(2) Rs. 600 as damages.

TRESPASS ON LANDS *(ff)*

No. 235—Suit for Possession against a Trespasser

1. The plaintiff was, on November 5, 1995, and still is, owner of the house bounded as follows and situate in *mohalla* Alamnager, Lucknow, and had been in possession of it up to the said date :

Boundaries of the House

* * * *

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the plaintiff learns in whose possession the property is. Time for a similar suit in respect of any other property, and for one injuring goods runs from the date when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful.

Defence : In such cases, the defendant may plead self-defence, e.g., in shooting a dog attacking the defendant or his rabbits, or an inevitable accident, e.g., in the shooting off of a gun. He may plead some lawful excuse, e.g., a right to distrain the crop, etc., or may plead legal authority under a warrant or process or a right to cut trees under some custom. He can deny the plaintiff's title to property and plead a paramount title in himself, but, if the plaintiff was in possession, the defendant cannot plead title in a third person. If the defendant has lawfully obtained possession of the property of the plaintiff and is sued for refusing to deliver it back, he may plead that he has a lien on it for his charges, e.g., a tailor having a lien for his wages.

(ff) Trespass may be committed either by wrongfully entering upon the land of the plaintiff, or, having entered upon it lawfully, but, remaining on it without the plaintiff's consent and against his will, or by doing any act affecting the sole

2. On the said date, the defendant wrongfully broke open the lock and entered into possession, and has since then been retaining possession, of the said house, without the plaintiff's consent.

3. The letting value of the said house is Rs.2,000 per month.

4. By reason of the trespass, the plaintiff has suffered damage.

The plaintiff claims :

(1) Possession of the said house.

(2) Loss already suffered between November 5, 1995 and November 10, 1995 (*the date of the suit*) at Rs.2,000 a month, Rs.400.

(3) Continuing damages at the aforesaid rate of Rs.200 per month until delivery of possession to the plaintiff.

No. 236—Suit for Possession under Section 6 Specific Relief Act

1. The plaintiff was, up to November 21, 1995, in possession of the property detailed below.

Description of immovable property

* * *

2. On November 21, 1995, the defendant dispossessed the plaintiff of the said property, without the plaintiff's consent and otherwise than in due course of law.

The plaintiff claims recovery of possession of the said property.

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possession of the plaintiff, e.g., by storing bricks on the land or by driving pegs in the plaintiff's wall or by opening niches or almirahs in it, or by constructing a balcony overhanging the plaintiff's land. If a person having a limited right of entry exceeds the right, he is a trespasser. A person who is in possession under a void lease is also a trespasser and can be ejected as such (*Bank of Upper India* v. *Harnath*, 93 IC 852). Where government has acted in a purported exercise of statutory power, such suit would not lie unless its act is not only *ultra vires* but also otherwise than in good faith (*Latino Andre Henriques* v. *Union Government*, A 1968 Goa 132; *State of Bihar* v. *Bishnu Chand*, (1985) 1 SCC 449). A person who unlawfully interferes with the exercise of property right of others, commits trespass and is liable for damages without proof of malice or want of reasonable or probable cause unless the act of interference is under judicial sanction, when malice and want of reasonable and probable cause will have to be proved (*Ram Narayan* v. *Bholanath Das*, 81 CWN 518). If the only trespass consists in the doing of an act injuriously

No. 237—For Possession on the Grounds of Possessory Title

1. The plaintiff is a resident of village Namkoli, pargana Barla, district Aligarh, and had, up to the date hereinafter mentioned, been in possession of plot No. 272 in the *abadi* of the said village by keeping his cattle and fodder on it for over 50 years.

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affecting the property, a suit for damages would be sufficient. In such cases, the practice of praying for a mandatory injunction to compel the defendant to right the wrong he has committed, e.g., to fill up the niches or to remove the pegs, etc., is not always right (*Ewin v. L. Po.*, 104 IC 139, 5 R 404). If the plaintiff can himself remedy the wrong, he may only claim cost of doing so as his damages, in addition to any other damages. If, however, the plaintiff cannot do so because the doing of it involves the plaintiff's going on the defendant's land, a suit for a mandatory injunction is proper. For instance, if the defendant whose house is behind that of the plaintiff makes any niches on his side of the wall belonging to the plaintiff, the plaintiff must claim a mandatory injunction against the defendant to close the niches. Similar relief may be claimed in respect of constructions made by the defendant on joint land. The fact that a question of title may have to be incidentally gone into in determining the plaintiff's right to injunction is no objection to the maintainability of such a suit (*Veerappa v. Arunachalam*, 160 IC 993, A 1936 Mad 200). It is well-settled that where a person is in settled possession of the property, even on the assumption that he has no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse of law (*Krishna Ram Mahale (Dead) v. Shobha Venkat Rao*, A 1989 SC 2097, 1989 BCR (3) 364; *Lallu Yeshwant Singh v. Rao Jagdish Singh*, A 1968 SC 620).

Possessory Title : As against a person who has taken possession of the plaintiff's land, or who, having obtained possession under a right, does not leave it on the determination of the right, the only suit will be for possession and mesne profits. In such cases money compensation is not adequate (*Babu v. Mohd. Yamin*, 1995 (1) ARC 373 All; *Dip Narain v. Jagmohan*, 87 IC 15, A 1925 All 576). The fact that the trespasser has erected buildings on the land will not necessitate a suit for a mandatory injunction against the defendant to pull down the building. The suit will be one for possession, though the defendant may be allowed to take away his materials (*Narayan v. Lakshmanrao*, 25 IC 286).

The suit on the basis of possession may be brought either within six months of dispossession under section 6, Specific Relief Act, or within 12 years as regular suit. Where the person dispossessed has title to the property, he has the option to bring a suit either under Sec.6 of the Specific Relief Act or under the general law, based on title (*Chandrabhan Prasad v. Mohanlal*, A 1987 Cal 323). The former suit is based essentially on plaintiff's previous possession and subsequent dispossession and the question of title of either party does not arise. Plaintiff must be restored the possession, whether he has or has not any right to remain in

2. On December 4, 1959, the defendant, wrongfully and without the plaintiff's consent, dispossessed the plaintiff and has entered into possession of the said land, and is still in possession.

The plaintiff claims to recover possession of the said land.

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possession and whether the defendant has or has not a right to eject him. Such suits can be instituted on half the ordinary court-fee, and are very useful when the position is such that the plaintiff cannot succeed in a title suit, and, if he is restored to possession, the defendant can eject him by a title suit. The suit filed against those who are in actual possession for recovery of the immovable property under Sec. 6 of the Specific Relief Act can be effectively decided even in the absence of the agents who have dispossessed plaintiff and transmitted the possession to the defendants (*Dibgar Arvindkumar Keshavlal* v. *Shri Modh Ghamel Guyati Samraj*, A 1995 Guj 148, 1995 (1) Guj R 864 (Guj). In a suit under section 6 of the Specific Relief Act for the recovery of possession, questions relating to right, title and interest of a party are not to be decided, the court has to decide only whether the plaintiff was in possession of the property and has been dispossessed otherwise than in due course of law within six months prior to the date of filing of the suit (*Md. Nurul Islam* v. *Md. Julup Raja*, 1995 ALHC 2164 Gauh). Where in a suit for declaration of title, the alternative relief of possession is not claimed, the suit is not barred by the proviso to section 34 of the Specific Relief Act (*Kalyan Singh* v. *Vakil Singh*, A 1990 MP 295). No appeal lies against a decree passed in a suit under section 6 of the Specific Relief Act (*Hawabai* v. *Abdul Sattar*, 1995 ALHC 3062 Bom).

The only points that are necessary to be alleged in such a suit are, (1) that plaintiff was in possession, (2) that he has been dispossessed by the defendant within six months of the suit, (3) that he has been dispossessed without the plaintiff's consent and otherwise than in due course of law (*Kalulal* v. *Mannalal*, A 1976 Raj 108). A landlord who has put a tenant in actual possession cannot bring a suit under section 9 of the Specific Relief Act 1877 (now section 6 of the Act of 1963) against a person dispossessing the tenant (*Sita Ram* v. *Ramlal*, 18 A 440; *Veeraswami* v. *Venkatachala*, 92 IC 20, 50 MLJ 102, A 1926 Mad 18; *Goma* v. *Narsinghrao*, 20 B 260). The Calcutta and Madhya Pradesh High Courts have, however, taken a different view (*Nrittolal Mitter* v. *Rajendra Narain*, 22 Cal 562; *Nandlal Pd.* v. *Raghunath*, 1963 MPLJ Notes 87). But a mortgagee in possession through a tenant can (*Rathanasabapathi* v. *Ramaswami*, 33 M 452, 20 MLJ 301). At any event, a landlord can bring a suit with tenant as co-plaintiff (*Bhojraj* v. *Shesrao*, A 1949 Nag 126), or *pro forma* defendant (*Ratan Lal* v. *Amar Sing*, 53 B 773, A 1929 Bom 467, 31 BLR 1042 DB). A suit under section 6 can be brought even by a person who was in joint possession with another, but has been dispossessed by the latter (*Ajiman* v. *Raisat*, 19 CWN 1117, 28 IC 520), and in such a case a decree for joint possession can be passed (*Ballabh Das* v. *Gurdas*, A 1940 All 225, 189 IC 92). Even a tenant by sufferance has juridical possession and if dispossessed by

No. 238—Suit by One Co-Sharer against Another

1. The plaintiff and defendant are joint owners of plot No. 102 in the *abadi* of village Rampur, pargana Malihabad, district Lucknow, which has, up to the date hereinafter mentioned, been used by the parties as a threshing ground.

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landlord without recourse to court, he can sue for possession under section 6 (*Migilipuvvu* v. *Malamapaty Narsingha Rao*, (1982) 2 An WR 1). Deprivation of symbolic possession may also justify a suit under section 6 (*Kumar Kalyan Prasad* v. *Kulanand*, A 1985 Pat. 374: case law discussed). Such a suit cannot, however, be brought against the government. A decree in a suit under section 6 is final and not open to appeal nor normally to revision (*Sobhabati* v. *Lakshmichand*, A 1984 Ori 171), the remedy of the defeated party being by a regular title suit.

A person who is put in possession by a Magistrate under section 145 Cr. P.C. cannot be sued under section 6 (*Azimuddin* v. *Alauddin*, 43 IC 193, 22 CWN 931). A suit for *mesne profits* cannot be joined with a suit under section 6 (*Thavasi* v. *Arumagam*, 28 IC 1; *Tilak Chandra* v. *Fatik Chandra*, 25 C 803; *Nazir Ahmad* v. *Abid Ali*, 8 ALJ 910, 11 IC 387; *Adul Kadi* v. *Uthumansa*, 102 IC 661), nor can an order for removal of structures be claimed in such suit (*Sona* v. *Prakash*, A 1940 Cal 464). A suit under Sec. 6 of the Specific Relief Act by a licensee against the licensor is maintainable and a receiver can be appointed (*Meghji Jetha* v. *Kalyanji Nanji*, (1988) BCR 263 Bom).

A regular suit may be based on plaintiff's title in which case his previous possession is immaterial except for the purpose of limitation or it may be based on previous possession. Even if a suit is based on title court may give decree on the ground of previous possession (*Karuppanan* v. *Sundara Raja*, A 1940 Mad 71). A suit under section 6 is maintainable in the Civil Court even in respect of agricultural land as such a suit does not lie in the revenue court (*Maya Ram* v. *Gopal*, 1961 RLW 636; *Yar Mohd.* v. *Laxmidas*, A 1959 All 1).

A plaintiff can succeed merely on the basis of his previous possession, even though he has no valid title, against a person who has no title better than his (*Krishnarao* v. *Vasudeo*, 8 B 371; *Ma Pwa Zon* v. *Ma Pon*, 102 IC 696, 5 R 154; *Shiv Saran Rai* v. *Sukhdeo Rai*, A 1937 Pat 418, 171 IC 371; *Sohan Lal* v. *Sheikh Mohammad Hussian*, A 1930 Oudh 374; *Gajraj Puri* v. *Raja Ram*, 1937 AWR 1140, 1937 ALJ 1189; *Ramanlal* v. *Bhaiya*, A 1937 Nag 281; *Panchvati Ram Chandra* v. *Sambhama Devi*, 1971 AWR 135). A possessory title is good against the whole world except the real owner. *Nair Services Society Ltd.* v. *K.C. Alexander*, A 1968 SC 1165; *Damyanthi* v. *Theyyan*, 1979 KLT 85 where the rationale underlying the principle has been fully explained). Where a person is in settled possession of the property, he cannot be forcibly evicted even by the true owner except by due course to law (*Krishna Ram Mahale (Dead)* v. *Mrs. Shoba Venkata Rao*, A 1989 SC 2097; 1989 (3) Bom Cr 364 (SC); *C. Bhaskar* v. *State of Karnataka*, 1995 All. H.C. 3228 (Kant) (DB).

2. On January 2, 1996, the defendant commenced to build a house on the said plot, without the plaintiff's consent, and has constructed walls to the height of two feet. Notwithstanding a duly registered notice sent to him by the plaintiff by post requiring him to cease building and to remove the said constructions, the defendant is continuing to erect the same and

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The possessory title can be transferred even after dispossession of the transferor (*Jan Mohd.* v. *Habib*, A 1943 Oudh 330). The widow whose possession in lieu of dower was lost would succeed even against heirs in a suit u/s 6. Suit on possessory title can be filed even after failure in a suit u/s 6 (*Bambali Kuppum* v. *Padamnabba*, A 1945 Mad 245; *Nair Service Society* v. *K.C. Alexander*, A 1968 SC 1165). Plaintiff can recover possession from a trespasser on the basis of possessory title even though section 6 of Specific Relief Act may not be applicable (*Atra Devi* v. *Ram Sarup*, A 1972 Patna 186).

The plaint should therefore clearly show the right on which it is based. Next to the title of the plaintiff. should be alleged the dispossession by the defendant, or plaintiff's discontinuance of possession if the suit is on that ground. If it is on the ground of plaintiff's paramount title, the fact that the defendant is in possession should be alleged. Where there is no allegation of plaintiff's dispossession by the defendant, a suit under section 6 of Specific Relief Act, does not lie (*Nagar Palika, Jind* v. *Jagat Singh*, 1995 SC 1377).

The suit for possession may be brought by anyone who is affected by the wrong, but a person to whom a licence to build upon land has been granted can not bring a suit against one already in wrongful possession (*Manbahal* v. *Ram Ghulam*, 103 IC 43 All). But a licensee who is in possession and has some interest in land, e.g., has put cattle trough, etc., on it can sue for possession, if dispossessed (*Pannalal* v. *Anant*, A 1946 All 284; *Mahadev* v. *Palakdhari*, A 1960 All 743).

Limitation : Under the Act of 1963, all suits for possession have been divided in two categories, *viz*., suits based on title and suits not based on title. For all suits for possession based on title Article 65 applies in which the limitation is 12 year, and starts from the date when the possession of the defendant becomes adverse to the plaintiff. If the suit is not based on title but is based on previous possession and dispossession it will be governed by Article 64, and the Limitation of 12 years will start from the date of dispossession. Suit based on what is known as possessory title is really a suit based on previous possession and not on title and will, therefore, be governed by Article 64.

Joint Owners : One of the several co-sharer in a property can eject a trespasser (*Sri Thakurji* v. *Hiralal*, 20 ALJ 609, 44 A 634; *Syed Ahmed* v. *The Magnesite Syndicate Ltd.*, 39 M 501, 29 IC 60, 28 MLJ 598; *Govind* v. *Kasmirao*, 102 IC 195; *Moti Lal* v. *Basantlal*, A 1956 All 175; *Chiranjilal* v. *Khatoon Bi*, A 1995 MP 238; *Gouri Shankar Misra* v. *Kali Prasad Guru*, (1970) 1 CWR 325), but the decree obtained would be on behalf of all co-sharers and for the benefit of all (*Qader Rashid* v. *Khaliq*, 1972 Kash LJ 59) even if such a trespasser is in possession

thereby threatens and intends, unless restrained from so doing, to complete the said house.

3. The said constructions will interfere with the plaintiff's rightful enjoyment of the said land as threshing ground.

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under a lease from one of the joint co-sharers. In such cases, the other co-sharers are generally made defendants and a decree should be claimed by the plaintiff for himself and on behalf of his co-owners (*Sheodial* v. *Parbati*, 22 IC 841, 12 ALJ 23; *Ahmed Hussain* v. *Uma Devi Shukla*, A 1975 All 254). The right of other co-sharers is only to get the land partitioned (*Gajadhar* v. *Bhikari*, 18 CWN 1011, 27 IC 228; *Bhavani* v. *Rajagopal*, 70 CLJ 199). When the majority of co-sharers have allowed a third person to build on joint land, others cannot have the building demolished (*Amar Singh* v. *Jamal*, 8 LLJ 313, 94 IC 995 Lah).

Suit instituted by some of the co-owners for eviction of a trespasser is maintainable even without impleading all the co-owners (*Shivaji* v. *Hiralal*, 1985 MPLJ 10; *Chiranjilal* v. *Khatoon Bibi*, A 1995 MP 238).

One co-owner cannot appropriate any part of the joint land to his own exclusive use by building upon it, nor can he build on a joint party wall (*Ikramulla* v. *Muhammad Yunis*, 30 IC 33, 13 ALJ 473). The plaintiff may, in such cases, sue for injunction to restrain the defendant from doing such act, or for removal of such act of trespass, if already completed, but such a suit must be brought with promptitude, otherwise unexplained delay may be taken as acquiescence. Unless the partition is effected no co-owner can lay claim to the plot exclusively. The co-owners have equal rights and they can prevent the user of the joint property by some of the co-owners only unless there is a partition or family settlement permitting those co-owners to have exclusive possession on a particular property (*Narsingh Narain Misra* v. *Chairman/District Magistrate Basti*, 1994 ALJ 971 All; see also *Prabhoo* v. *Doodh Nath*, A 1958 All 178).

Demolition being discretionary relief the court must adjudge the balance of convenience (*Chhedilal* v.*Chhoteyilal*, A 1951 All 196 FB); hence a co-owner, cannot have a building erected by another co-owner, demolished without proof of special injury to himself (*Annanda* v. *Parbati*, 3 CLJ 198; *Sachendra Nath Sarkar* v. *Binapani Basu*, 80 CWN 289). A construction even a temporary one, if found to be a step towards an exclusive use of the land, can in a suitable case be demolished, but not one (*like a cattle trough*) which is not of such a character (*Shankar Lal* v. *Pati Ram*, 168 IC 650, A 1937 All 293). **The plaint should allege joint title in the property, and facts showing an invasion of such joint right, and further, according to Calcutta view, injury to the plaintiff.** If there has actually been an injury, it should, in any case be alleged, as after all injunction being a discretionary relief, the injury will be an additional ground for granting it. If the co-owner who erects a building has been in exclusive possession of the land, the building will be maintained if it is in keeping with the purpose for which he has been exclusively using the land, but not otherwise, e.g., one using land as a cattle trough cannot build a sitting room

The plaintiff claims:

(1) An order to the defendant to demolish the constructions made by him.

(2) Joint possession on the land occupied by the construction.

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on it (*Sheo Harakh* v. *Jai Govind*, 104 IC 414 All).

Co-owners are legally competent to make any arrangement for the enjoyment of the common property including an agreement that one will pay compensation to the other or that one of them will enter into possession as a lessee (*Thomas* v. *Radha Kumar Debi*, 1975 KLT 475). If co-owners are, by mutual consent or by private arrangement, in possession of separate portions of the joint property, anyone dispossessed by the other can sue for the latter's ejectment (*Kuldip* v. *Jagnandan*, A 1923 All 363 DB; *Jaganath* v. *Badri*, 34 A 113, 9 ALJ 48, 11 IC 768; *Durga* v. *Khunkur*, 27 CLJ 441, 45 IC 705; *Hardeo* v. *Chandka*, 52 IC 7, 6 OLJ 278). If one co-owner is in peaceful possession without any ouster or exclusion of others, he is under no obligation to render accounts or to pay compensation even if he is in possession of more than his share of land (*Chandra* v. *Bishesar*, 32 CWN 291; *Mst. Vidya Bai* v. *Narayandas*, 1971 MPLJ 925).

The rights and labilities of co-sharers *inter se* and what amounts to ouster has been dealt with at some length in *Sant Ram Nagina Ram* v. *Daya Ram*, A 1961 Punj 528; *Sinnaraj Pillai* v. *Ramayee Ammal*, A 1969 Mad 96 and *Mst. Vidya Bai* v. *Narayandas*, 1971 MPLJ 925.

In such cases he must plead in the plaint either an express arrangement or facts from which mutual consent could be implied e.g., long exclusive possession without hindrance (*Jalaluddin* v. *Rampal*, 4 OWN 871, 2 Luck 740). However long the possession of a co-owner of joint land may be, it cannot confer on him any right adverse to the other co-owners unless it is a case of ouster (*Maharajadhi Raja of Burdwan* v. *Subod Chand Bose*, A 1971 SC 376; *Shambhu Prasad Singh* v. *Mst. Phool Kumari*, A 1971 SC 1337).

Parties : One of the several co-owners can sue to eject a trespasser; but all persons in joint possession as trespassers must be joined as defendants (vide Chap XI). A servant or wife or relative of the trespasser cannot be sued without impleading the latter as even a wrongful possession implies more than physical possession of a person (*Shivalinga* v. *Kumodinei*, A 1930 All 224).

Defence : A defendant may justify a temporary trespass on the plaintiff's land by (1) an easement acquired by him, (2) a licence or permission of the plaintiff himself or of any person who had authority to give it, (3) self-defence or defence of goods or animals, (4) acts of necessity, e.g., to abate a nuisance or to put out fire, (5) authority of law, e.g., execution of legal process. In a suit on the ground of dispossession, the defendant may plead that the dispossession took place more than 12 years before the suit or that he has a better title than the plaintiff. In every case of possession on the ground of title, the defendant may allege that he has become owner by adverse possession for over 12 years, but there can be no title by

(3) A permanent injunction to restrain the defendant from making any construction on the said land without the consent of the plaintiff.

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possession even for over 12 years unless the possession is shown to have been adverse. As against government title by prescription can be completed by 30 years' possession (Article 112). As against local authorities e.g., Municipal Board and District Board 30 years' adverse possession is needed to mature the title by prescription (Article 111). The construction of a temporary shed on waste land which is not of immediate use to the owner is not adverse possession (*Shah Nawaj v. Ghulam Shah*, 40 PLR 91, A 1938 Lah 324, 176 IC 930), nor can the mere use of such land by a neighbour in various ways which are convenient to him (*Kaladhari v. Jabachh*, 181 IC 275, A 1939 Pat 399). Adverse possession need not be to the knowledge of the owner (*Kuppuswami v. Kuppaswami*, A 1941 Mad 866; *Raghubar v. Balli*, A 1941 Nag 311; *Saroj v. Kumar*, 45 CWN 126).

If the defendant was a co-sharer with the plaintiff he cannot succeed on the plea of adverse possession merely on the proof of long possession but must show definite exclusion or ouster of the plaintiff as in law generally possession of one co-owner is possession of all (*Krishan v. Krishanoo*, A 1985 HP 103; *P. Lakshmi Reddi v. L. Lakshmi*, A 1957 SC 314; *Vishnu v. Mahadeo*, 43 BLR 971; *Khem Chand v. Data Ram*, 1941 Sindh 50, 194 IC 137; *Muhammad Amiruddin v. Mahammud Abdul*, A 1941 Nag 343. *Jwala v. Jagdish*, A 1941 Lah 144, 195 IC 244; *Kuldip Mahaton v. Bhulan Mahaton*, (1995) 2 SCC 431). Unless other co-parceners have been ousted, mere possession of one co-parcener is not adverse possession (*Sadasivam v. Doraisamy*, A 1996 SC 1724). Where possession could be referred to lawful title, it will not be considered to be adverse (*Annasaheb Bapusaheb Patil v. Balwant Bapusaheb Patil*, A 1995 SC 895, 1995 ACJ 19 (SC), 1995 (2) SCC 544; *R. Chandevarappa v. State of Karnataka*, (1995) 6 SCC 309).

The plea of adverse possession must be raised in clear words. It is immaterial that the date of commencement of adverse possession is not stated (*Sathruppa Naicker v. Ramasamy*, A 1996 Mad 290). A person whose possession is permissive cannot claim title on the basis of adverse possession (*Dr. Bhargava & Co. v. Shyam Sunder Seth*, A 1995 SC 377, 1995 (1) ARC 402 SC; *Thakur Krishna Singh v. Arvind Kumar*, A 1995 SC 73, (1994) 6 SCC 591). In every case, particulars of the defence set up should be given. A trespasser erecting costly building cannot claim a right to retain possession or to compel the plaintiff to receive compensation for the land (*Ganga Din v. Jagat*, 12 ALJ 1026).

In a suit against a co-owner the defendant may plead aquiescence of the plaintiff, or that the alleged trespass is only an enjoyment of the property by the defendant and not an infringement of the plaintiff's right, or that the land on which the alleged trespass is said to have been committed has been in long exclusive possession of the defendant by consent of the plaintiff. He can claim compensation for reconstructing the joint property, if he did it without protest from the plaintiff and not with a view to embarrass him at the time of partition or at an inordinate expense (*Radhey Shiam v. Mahammad Nasir*, 168 IC 472, A 1937 Oudh 394).

No. 239—Suit for Joint Possession *(gg)*

1. Khuda Baksh, the father of the parties, was owner of the property detailed at the foot of the plaint.

2. The said Khuda Baksh died in 1995, leaving the plaintiff, his daughter, and the defendant, his son, as his only heirs.

3. On the death of the said Khuda Baksh, the defendant took exclusive possession of the said property and has been in possession ever since.

The plaintiff claims joint possession of the said property to the extent of her legal one-third share.

No. 240—Suit against Alienee of a Joint Co-Sharer *(hh)*

1. The plaintiff and defendant Nos.3 to 8 are joint owners of the land specified at the foot of the plaint.

(gg) A person who is entitled to possession of a property jointly with the defendant is entitled to a decree for joint possession, unless it can be held on considerations of equity and good conscience that he has lost that right (*Srish Chandra* v. *Mathura*, 102 IC 148). O.21, R.35 (2) lays down how a decree for joint possession can be executed and, it is not necessary to put the plaintiff in actual possession under the decree. If a co-sharer in separate possession of *abadi* land, builds a house thereon or transfers it to a third person, the other co-sharers can sue for joint possession (*Mohammad Sher Khan* v. *Bharat Indu*, 25 ALJ 983, 106 IC 656). The other co-sharers need not be joint (*Kuchibhotla* v. *Kuchibhotla*, 95 IC 856, A 1926 Mad 809). But when one co-sharer was in exclusive possession of joint land without any objection by other co-sharers without denying their title and he let to a third party an area smaller than what he would get on partition, the High Court refused to give joint possession of the land to other co-sharers (*Bibi Aimana* v. *Sarurannessa*, 32 CWN 449). One co-sharer cannot obtain exclusive possession of joint undivided property from another co-sharer. He can at the most have joint possession with the other co-sharer or a declaration of his specific share (*Hubai Mitter* v. *Hajibhai Abubai*, A 1950 Oudh 40).

The plaint should allege the plaintiff's title to the property and the defendant's possession of it. The date from which the defendant's possession is said to have become adverse must also be given, if such is the case.

If a decree for joint possession is not executed and joint possession (which may be symbolical) has not been obtained, the decree-holder cannot subsequently bring a suit for partition (*Sahjan* v. *Asanulla*, 101 IC 622, 31 CWN 406, A 1927 Cal 411, 54 C 554 DB).

(hh) The possession of the alienee in such cases becomes adverse to the other co-sharers as soon as he enters into possession and Article 144 of the old

2. The said land was in possession of one Ramjas as tenant of the plaintiff and defendant Nos.3 to 8 upto November 30, 1984 after which he relinquished it.

3. Defendant No.5 let the said land to defendants Nos.1 and 2 for 10 years and defendant Nos.1 and 2 took possession on January 15, 1985.

(*Or* 2. The said land is part of the joint *abadi* of village _____, and has been lying vacant.

3. Defendant No.5 sold the said land by a sale-deed dated July 20, 1986 to defendant Nos.1 and 2 who have erected a *kohlu* on it).

The plaintiff claims :

(1) Ejectment of defendant Nos.1 and 2 from the said land.

(2) Joint possession with defendant Nos.3 to 8.

III—PLAINTS IN OTHER SUITS

No. 241—Administration Suit *(a)*

(By a Creditor)

1. George Kellner, late of Allahabad, was, at the time of his death,

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Limitation Act was applied to such cases (*Ibrahim* v. *Ali Md.*, 116 IC 819). However, in some cases it has been held that possession of an alienee from a co-owner is adverse to other co-owners only when there is an ouster of other co-owners (*Ghulam Nabi* v. *Umar Bakht*, A 1941 Lah 307; *Mathure Sahu* v. *Sridhar Panda*, (1980) 49 CLT 539). Where a person purchases property held in common by several tenants in common from one of such tenants in disregard of the title of other co-tenants, possession of the latter becomes adverse to the purchaser from the date of his purchase (*Nizamuddin* v. *Mangal Sen*, A 1949 All 699). Transfer of specific plot by a co-sharer confers title in the property on the alienee to the extent of the share of that co-sharer alone (*Pal Singh* v. *Deputy Director of Consolidation U.P.*, 1970 AWR 895). Transfer of specific land by co-sharer in exclusive possession would remain subject to the right of other co-sharers on partition (*Tek Singh* v. *Juswan Singh*, A 1972 P &H 208). Possession of a stranger after purchasing the whole property from a co-owner is *prima facie* adverse, and if he satisfies that his possession was overt without any attempt at concealment and it was adequate in continuity, publicity and extent, he has to be given benefit of such possession as against other co-owners of his alienor (*Rajak Sarif* v. *Haji Syed Munsaraf Ali Chisti Bukhari*, (1972) 2 CWR 1608).

(a) Such a suit may be filed either by any creditor of the estate or by a legatee or heir of the deceased; but if the creditor is a decree holder his decree must be

and his estate still is, indebted to the plaintiff for the sum of Rs.4,000 and interest, due under a simple money bond executed by him in favour of the plaintiff on December 20, 1992.

2. The said George Kellner died intestate on March 24, 1994.

3. The defendant has obtained Letters of Administration of his estate, and has possessed himself of all the movable and immovable property of the deceased, but has not paid the plaintiff his debt.

The plaintiff claims that an account may be taken of the movable and immovable property of George Kellner deceased, and that the same may be administered under the decree of the court.

No. 242—Suit for Administration by Creditor on behalf of himself and all other Creditor's

(Form No. 41 Appendix A, C.P.C.)

1. *EF*, late of ____, was, at the time of his death, and his estate still is, indebted to the plaintiff in the sum of ______.

[*here insert nature of debt and security, if any*].

2. *EF*, died on or about the ___ day of ______ 19___. By his last will, dated the ____ day of ______ 19___, he appointed *CD*, his executor (*or*, devised his estate in trust, etc., *or*, died intestate, *as the case may be*).

3. The will was proved by *CD* [or, Letters of Administration were granted, etc.)

4. The defendant has possessed himself of the movable [and immovable, *or* the proceeds of the immovable] property of *EF* and has not paid the plaintiff his debt.

The plaintiff claims that an account may be taken of the movable [and immovable] property of *EF*, deceased, and that the same may be administered under the decree of the court.

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capable of execution and therefore a suit is not maintainable if the decree is barred by time or cannot be executed without leave of the Court of Wards which has not been obtained (*Lachmi Narayan* v. *Md. Mehdi*, 21 PLT 947). In an administration suit whether by an heir or a creditor it is necessary to claim that the estate of the deceased may be collected from wherever it is, that the debts due by the deceased may be ascertained, that the parties entitled to a share in the estate after payment of the debts, be ascertained with their respective shares and that eventually

No. 243—Suit for Administration by Specific Legatee

(Form No. 42, Appendix A, C.P.C.)

(Alter Form No.41 thus)

[Omit paragraph 1 and commence paragraph 2] EF, late of ___, died on or about the __ day of ______ 19__. By his last will, dated the __ day of ____ 19__, he appointed CD his executor, and bequeathed to the plaintiff [here state the specific legacy].

For paragraph 4, substitute-

The defendant is in possession of the movable property of *EF* and, amongst other things, of the said [*here name the subject of the specific bequest*].

Substitute following relief—

The plaintiff claims that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*], or that etc.

No. 244—Suit for Administration by Pecuniary Legatee

(Form No. 43, Appendix A, C.P.C.)

[Alter Form No.41 thus]

[*Omit paragraph 1 and substitute for paragraph 2*] *EF*, late of _____, died on or about the ____ day of ______ 19___. By his last will, dated the ___ day of ______ 19___, he appointed *CD* his executor and bequeathed to the plaintiff a legacy of ____ rupees.

In paragraph 4, substitute "legacy" for "debt".

Another form

EF, the above-named plaintiff, states as follows :

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whatever remains out of the estate after payment of the debts due by the deceased might be distributed among the heirs or persons entitled thereto proportionately (*Sebastias Antontia* v. *Rudolf Minguel Texeira*, A 1962 Bom 4; *Nazarali Kazamali* v. *Fazlam Bibi*, A 1975 Guj 81). All the creditors are not necessary parties (*Mt. Shahzadi* v. *Mt. Rahmat*, A 1937 Lah 761), though they are proper parties. If any creditor does not come in and prove his debt, an arrangement made under the decree of the court for rateable distribution of the assets amongst other creditors cannot be disturbed (*Kisandas* v. *Jivat Lal*, A 1936 Bom 423). But such suit cannot

1. *AB* of *K* died on the ___ day of ________. By his will, dated the ___ day of ________, he appointed the defendant and *MN* [who died in the testator's lifetime] his executors, and bequeathed his property, whether movable or immovable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his death, and in default of his having a son who should attain twenty-one or a daughter who should attain that age or marry, upon trust as to his immovable property for the person who would be the testator's heir-at-law, and as to his movable property for the person who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the __ day of ______ 19___. The plaintiff has not been married.

3. The testator was at his death, entitled to movable and immovable property; the defendant entered into the receipt of the rents of the immovable property and got in the movable property; he has sold some part of the immovable property.

The plaintiff claims :

(1) To have the movable and immovable property of AB administered in this court, and for that purpose to have all proper directions given and accounts taken.

(2) Such further or other relief as the nature of the case may require.

No. 245—Administration Suit by an Heir

1. The plaintiff's husband, Abdulla Khan, a Sunni Musalman, died in September 1994, leaving behind him, as his sole heirs, the plaintiff, his widow, defendant No.1, his father, defendant No.2 his mother, defendant

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be brought in respect of the assets of a deceased Hindu who died joint with his son and leaving no separate property (*Meenakshi* v. *Ramaswami Chettiar*, 184 IC 183, A 1939 Mad 552), nor by a Hindu reversioner against a widow (*Bai Vidvagauri* v. *Chaturdas*, A 1940 Bom 411). The procedure of the court in such suits is determined by O.20, R.13. Usually a receiver is appointed in whom the whole property of the deceased vests, and no creditor can, after that, take any proceeding against such estate (*Durgadutt* v. *Bholaram*, 102 IC 413, 29 BLR 409). If any creditor takes any proceeding for execution of his decree, the court has power to restrain him from doing so (*Nicholson Town Bank Ltd.* v. *Vardarajubi Naidu*, 1938 MWN 1127, 48

Nos.3 to 6, his children by the plaintiff, defendant No.7 and one Abdul Kadir now deceased, his sons by Mt. Kamia, his first wife who had pre-deceased him. He left no nearer relative.

2. The said Abdul Kadir, one of the sons of Abdulla Khan by his pre-deceased wife Mt. Kamia, also died in June 1995, and defendant No.8, his widow, and defendant Nos.9 to 17 his sons and daughters are his only heirs, there being no nearer relatives.

3. The said Abdulla Khan was at the time of his death a partner in the firm Abdulla Khan and Ahmad Karim carrying on a leather export business at Kanpur and the plaintiff believes that his share in the assets of the said firm was about a lakh of rupees.

4. The said Abdulla Khan also left some house and immovable property mentioned in Schedule A attached to the plaint which should be deemed to be part hereof. He also left considerable cash and movable property, the exact extent of which the plaintiff does not know. Such property so far as is known to the plaintiff is shown in Schedule B attached to the plaint which should be deemed to be part hereof.

5. At the time of the plaintiff's marriage with the said Abdulla Khan on April 20, 1962, it was verbally agreed between the plaintiff's father and guardian, Iftikhar Hussain, acting for the plaintiff, and the said Abdulla Khan that the plaintiff's deferred dower should be Rs.20,000. The whole of the said dower debt has remained unpaid.

6. By a verbal agreement between the said Abdulla Khan and his sons Abdul Kadir and defendant No.7 on November 20, 1992, the said Abdul Kadir and defendant No.7 relinquished their rights of inheritance in the estate of the said Abdulla Khan in consideration of the latter giving them the immovable property detailed in Schedule C attached to the plaint which should be deemed to be part hereof.

LW 849). The court can direct any party to hand over to the receiver any assets in its possession, but a disputed debt is not such an assets and an order for its payment to the receiver cannot be passed (*Ahmad Din* v. *Mohammad Taqi*, 163 IC 363, A 1936 Lah 365). The receiver can of course bring a suit for recovery of such debt. Court-fee is payable as in a suit for accounts. In order to avoid multiplicity of suits, the court has power to implead in such suit a person who alleges himself to be the heir of the deceased (*Maung Tin* v. *Maung Po*, 103 IC 22). When receiver effects a sale in an administration suit, it is not governed by the provisions of O.21.

The plaintiff claims :

(1) That an account may be taken of the movable and immovable properties and the assets left by the said Abdulla Khan and that the same be administered under the decree of the court.

(2) That the plaintiff's dower debt of Rs.20,000 be paid to her out of the said assets.

(3) That the remaining estate and assets of the said Abdulla Khan be divided amongst the plaintiff and defendant Nos. 1 to 6 according to their legal shares.

(4) Alternatively, if the court finds that the relinquishment, alleged in para 6 hereof, is not binding on defendant Nos.7 to 17 they should be directed to restore to the estate, the benefits they have received under the said relinquishment and then the estate may be divided amongst all the heirs of Abdulla Khan according to their legal shares.

No. 246—Suit by a Specific Legatee against an Executor for His Legacy

1. By his last will, dated January 4, 1994 one Ram Sukh of village Nagore, district Etah, appointed the defendant to be his executor and bequeathed to the plaintiff a legacy of Rs.4,000 out of his estate.

The court has full power to rectify any illegality or to set aside a sale, if fraud has been perpetrated, under inherent powers recognised by section 151 of the C.P.C. (*Fatima Sultana Begum* v. *E. Sawanprasad*, A 1977 AP 15). A formal decree for administration should be passed before that estate is actually administered (*Grimault Co.* v. *Premji*, 125 IC 910, 32 BLR 414), but the court is not bound to make an order for administration if the questions between the parties can be properly determined without such order (*Kisandas* v. *Jivat Lal*, A 1936 Bom 423). A suit for partition and administration may be joined if a residuary legatee wants his share out of unascertained residue (*Jiban Krishna* v. *Jitendranath*, A 1949 FC 64).

If a Hindu widow is a party to an administration suit, she can, on application, obtain an order for her future maintenance, but no order for arrears of maintenance can be passed in such a suit (*Maha Sabha* v. *Anna Sohan*, 104 IC 119, 6 Bur LJ 105).

In such a suit a court is not debarred from deciding question of title to property wholly situate outside its jurisdiction (*Amir Bi* v. *Abdul Rahim*, 110 IC 276, A 1928 Mad 760, 55 MLJ 266), or from giving to the plaintiff a larger amount than claimed in the plaint (*Onchan Thwin* v. *Khoo Zun Nee*, A 1938 Rang 254, 177 IC 501). In a suit by an heir, the court may be asked to partition the residue of the estate amongst the heirs (*ibid*). Such a suit can be filed about estate of a deceased undivided

2. The said Ram Sukh died on January 10, 1994.

3. The defendant proved the said will on April 20, 1994 and has since been in possession of the estate of the said Ram Sukh as such executor.

4. The defendant has, since the date of his possession, been realising large sums of money and has always been in a position to pay the plaintiff's legacy but has neglected to pay the same.

The plaintiff prays that the defendant be ordered to pay to him Rs.4,000 and interest at 6 per cent per annum from April 20, 1994, or that an account may be taken of the property of the said Ram Sukh and that the same may be administered under the decree of the court.

Note: If suit is against administrator, necessary changes may be made in paragraphs 1 and 3.

HINDU LAW

No. 247—Suit for Setting aside an Adoption *(b)*

1. The plaintiff is the only child, being a married daughter, of Jamna Prasad deceased.

2. The said Jamna Prasad died possessed of considerable immovable property specified in the schedule at the foot of the plaint in 1958, and his widow Smt. Ramo, defendant, entered into possession on his death.

Hindu father (*Meenakshi* v. *Ramaswami Chettiar*, 1937 MWN 757, A 1937 Mad 785, 173 IC 671). But where the sole purpose is to determine who is the rightful heir an administration suit cannot be filed by one rival heir against another (*Chand Narain* v. *Ghasiram*, A 1940 Lah 179, 189 IC 894).

Limitation: Article 120 (now 113) applies but when the suit is in effect for a legacy Article 123 was held to apply (*Salebhai* v. *Bai Safiabibi*, 36 B 111; *Rajamannor* v. *Venkat*, 25 M 361) but now Article 106 will apply. Suit by a Mohammedan heir against his co-heirs was held to be governed by Article 144 as regards immovable property and by Article 120 as regards movables (*Mohhomedally* v. *Safiabibi*, A 1940 PC 215) but now the former will be governed by Article 65 and the latter by Article 113.

(b) The Hindu Adoption and Maintenance Act (78 of 1956) has made material changes in the Hindu Law of adoption. Prominent among these are:

(1) A daughter can also be adopted. (On pre-Act law regarding daughter or daughter's son, see *Mariammal* v. *Govindammal*, A 1985 Mad 5).

(2) Before making the adoption the adoptive father must obtain the consent

3. The defendant Badri Prasad has wrongfully got his name entered in the municipal records as owner of all the property of the said Jamna Prasad, as the adopted son of the said Jamna Prasad, and both the defendants are falsely giving out that Badri Prasad, defendant, has been validly adopted by Smt. Ramo defendant.

4. The said Badri Prasad was, as a matter of fact, never adopted by the said Smt. Ramo.

5. In the alternative the plaintiff submits that the said Badri Prasad was 18 years old and could not be adopted because of his age, there being no custom in the community to which the parties belong permitting the adoption of boys aged more than 15 years.

6. In the alternative it is submitted that the said Badri Prasad was an orphan and Ram Prasad (his guardian) who purported to give his consent had not obtained the permission of the District Judge.

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of his wife or wives. But if his wife, or any one of his wives, has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, her consent may be dispensed with.

(3) A widow or an unmarried woman or woman whose marriage has been dissolved can adopt without seeking any one's consent.

(4) A married woman whose husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind can adopt without seeking any one's consent.

(5) An orphan can be given in adoption by his guardian with the previous permission of the court.

(6) A step mother cannot give a child in adoption (*Dhanraj* v. *Suraj Bai*, A 1975 SC 1103).

(7) The person to be adopted must be unmarried unless there is a custom to the contrary. When a married person is given in adoption, his wife passes to the adoptive family because husband and wife form one entity and one body. But their son existing on the date of adoption does not lose *gotra* of father nor loses right of inheritance in family of father before adoption. But son born after the date of adoption though conceived earlier succeeds as heir to father's property in adoptive family (*Tarabai Himgonda Patil* v. *Babgonda Bhan Patil*, A 1981 Bom 13).

(8) The person to be adopted must not have completed the age of 15 years, unless there is a custom to the contrary.

(9) If a male adopts a daughter or a female adopts a son, the difference between the ages of the persons adopting and adopted must be at least 21 years.

(10) Performance of *Datta Homan* is not necessary.

7. That no giving or taking actually took place.

The plaintiff claims:

(1) A declaration that the defendant Badri Prasad is not the adopted son of the said Jamna Prasad.

(2) In the alternative, a declaration that the adoption of Badri Prasad by Smt. Ramo is null and void.

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(11) An adoption takes effect from the date of adoption and does not relate back to the death of the father (*Banabhai* v. *Wasudeo*, A 1979 Bom 181).

(12) Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property, transfer *inter vivos* or by will.

(13) An adopted child cannot divest any person of any property which vested in him or her, before adoption (*Vasant* v. *Daltar*, A 1987 SC 398; *Y.K. Nalavada* v. *Ananda Chavan*, A 1981 Bom 109).

(14) If a registered deed of adoption, signed by the person giving and the person taking, is produced in court, the court shall presume that a valid adoption has been made until it is disproved.

A custom recognising adoption does not cease to operate after the enforcement of the Hindu Adoption and Maintenance Act, 1956 (*Jupudi Venkata Vijaya Bhaskar* v. *Jupudi Kesava Rao*, A 1994 AP 134). No inference is to be drawn that a person who has performed the funeral rites of the deceased is adopted son of the deceased, the factum of adoption must be established by evidence (*V. Lakshminaraya* v. *V. Bhoodamma*, 1994 (2) ALT 445 AP). In Bombay, custom permits adoption of a child at any age (*Kondiba Rama Papal* v. *Narayan Kondiba Papal*, A 1991 SC 1180). The mother's power to take in adoption is not revived by the re-marriage of her deceased's son's widow (*Ashbai Kate* v. *Vithal Bhika Nade*, A 1990 SC 670). Effect of adoption see *Dina ji* v. *Daddi*, A 1990 SC 1153).

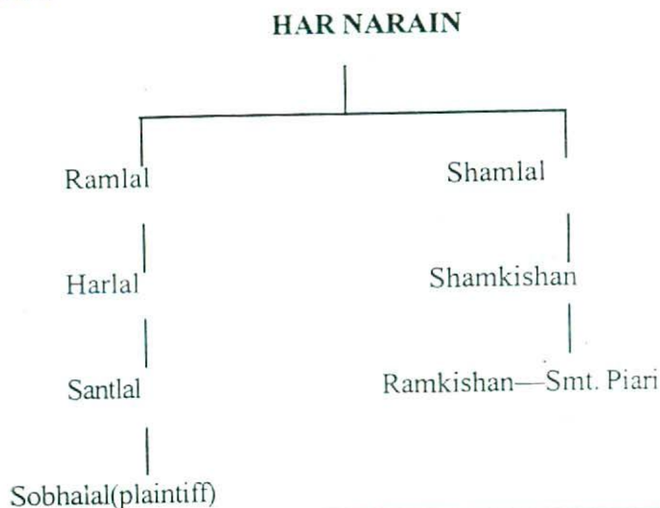
Limitation: Three years under Article 57 from the time when the alleged adoption becomes known to the plaintiff.

Defence: The defendant may affirm the fact of his adoption, if it is denied. He may challenge the ground on which it is sought to set aside the adoption. For instance, **if want of authority is alleged by the plaintiff, the defendant may set up authority of the husband, giving particulars of it as to when, how, and in what terms the authority was given.** He may similarly set up any custom to justify the adoption of a person of otherwise prohibited relationship or the adoption of a grown-up man. Whenever any such custom at variance with the ordinary Hindu Law is alleged by the defendant, particulars of it should be set out, e.g., whether the custom is local or communal, (i.e., of the particular caste or sub-caste) and what are the terms and incidents of the custom (*Lachmi* v. *Sangram*, 15 IC 322, 10 ALJ 136), and a plea of one particular custom cannot be altered into that of another during the progress of the suit (*Suraj Bali* v. *Tilok Chand*, 36 IC 66, 3 OLJ 327). If the plaintiff is the

No. 248—Suit by a Reversioner for Possession of Property Against Transferee of a Widow *(c)*

1. The plaintiff is, and one Ramkishan was, a Hindu governed by the Mitakshara law of the Benares school.

2. The plaintiff is related to Ramkishan as shown by the pedigree given below—



adoptive father, the defendant may plead an estoppel by showing that circumstances have arisen in which the likelihood of hardship to be caused to him by upsetting the adoption on which all parties have acted for a long time is so great that it will be inequitable and unjust to allow the plaintiff to bring the suit. In such a case it is not necessary for the defendant to prove that he was actually damnified by the plaintiff resiling from the story of adoption but it would be enough if he proves the likelihood of his being prejudiced by the alteration of position *(Josyam* v. *Josyam* 103 IC 855). In such a case all the circumstances should be fully alleged and the onus lies on the plaintiff to prove that the adoption never in fact took place, or that the adoption was invalid.

(c) The Hindu Succession Act (30 of 1956) has revolutionised the Hindu law. It makes a female Hindu the absolute owner of the property possessed by her, whether it was acquired before or after the commencement of the Act. A reversioner cannot now avoid, on the mere ground of the absence of legal necessity, the alienations made by widows after the commencement of the Act. He will have also to allege that the property had been acquired by the widow by way of gift or under a will or any other instrument or under a decree or order of a Civil Court or under an

3. The said Ramkishan was owner of the property mentioned at the foot of the plaint.

4. On the death of the said Ramkishan in 1940. Smt. Piari entered into possession of the property as his widow. (*If the widow died on or after 17-6-56. say that* after the death of said Ram Kishan, Smt. Piari entered into possession of his estate under a gift or a will or any other instrument, or under the decree or order of a Civil Court or under an award and the terms of the said gift, will or other instrument or the decree or order or award gave her a life estate only").

[*Give particulars of such instrument, decree, etc.*]

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award and the terms of the said gift, will or other instrument or the decree or order or the award gave her a life estate only (*Mst. Karmi* v. *Amru*, A 1971 SC 745). A female Hindu possessed of the property on the date when the Hindu Succession Act came into force could become absolute owner only if she was a limited owner. The legislature did not intent to extend the benefit of enlargement of estate to any or every female Hindu irrespective of whether she was limited owner or not (*Kalawati Bai* v. *Soiryabai*, A 1991 SC 1581). Where the widow was entitled only to limited estate for maintenance and was in possession of her limited estate enlarged into full absolute ownership and by operation of section 14(1) of the Hindu succession Act she became absolute owner of the property (*Vijay Pal Singh*, v. *Dy. Director of Consolidation*, (1995) 5 SCC 212, A 1996 SC 146).

Where a Hindu wife gets land in lieu of maintenance from her husband and she enjoys the produce thereof, her rights become absolute by virtue of section 14 (1) of the Hindu Succession Act (*Maharaja Pillai Laksmi Ammal* v. *Maharaja Pillai Thillanaya- Kom Pillai*, (1988) 1 SCC 99; *Gulwant Kaur* v. *Mohinder Singh* A 1987 SC 2251). On remarriage a Hindu widow is not divested of the right vested in her in the property of the first husband (*S. Gajodhari Devi* v. *Gokul*, A 1990 SC 46).

The Act came into force on June 17, 1956. As a widow becomes full owner under the Act she can alienate as she likes but alienations made by widow prior to the commencement of the Act will be governed by the old law and can be challenged by the reversioners (*Roopa Ram Bhargava*, v. *Hanuman Pd. Bhargava*, A 1966 SC 216).

For the effect of section 14 (1) or 14 (2) of Hindu Succession Act, on the right of a widow who succeeded to her husband's estate prior to June 17, 1956, see *Gummalapura Taggina Matada Kotturuswami* v. *Setra Veeravva*, A 1959 SC 577; *R.B.S.S. Munnalal* v. *S.S. Rajkumar*, A 1962 SC 1493; *Sukh Ram* v. *Gauri Shankar*, A 1968 SC 365; *Badri Prashad* v. *Kando Devi*, A 1970 SC 1966; *V. Tulsammi* v. *Shesha Reddi*, A 1977 SC 1944; *Bai Vajia* v. *Thakorbhai*, A 1979 SC 933; *Mst. Karmi* v. *Amru*, A 1971 SC 745.

5. The said Smt. Piari sold the property to the defendant without any legal necessity on 20th August 1941 and the defendant is in possession of the said property since that date.

6. Smt. Piari died on August 10, 1954.

In such a suit **the plaintiff must allege his title to the property and the defendant's possession under the transfer from the Hindu widow. It is always proper in cases governed by Hindu Law to state by what branch of that law the parties are governed** and then other inferences of law, e.g., that the widow's interest was limited to her life or was an absolute interest, need not be alleged as the court will presume them.

A party dealing with a Hindu widow or other limited owner and advancing money to such limited owner so as to bind the estate in the hands of such owner must take particular care to see that his dealing could be supported even if they happen to be impeached after a length of time. The alienee or transferee is bound to secure the necessary evidence even at the inception so that he may be in a position to defend his title at the time, an attack is made long after wards. after the death of the widow by the then reversioner (*Thampuranthozha Illai* v. *Thiruwavakarasu Bandaram*, 5 DLR (TC) 507). In such a suit if the defendant has erected buildings on the land transferred to him, the plaintiff may ignore the building in his claim and pay court fee on the value of land only (*Durga* v. *Nihal*, 110 IC 319, A 1928 Lah 852).

The plaintiff some time offers in the plaint to pay as much as is found to have been taken for legal necessity, but such offer is not necessary as the court can always give such relief.

Mesne Profits: Such a transfer is not void *ab initio* but only voidable (*Jugalkishore* v. *Charoo Chandra*, 181 IC 341, A 1939 PC 159, 1939 MWN 963). Therefore *mesne profits* can be claimed only from the date on which it is impeached. The plaintiff should, therefore, specify that date. It can be impeached by an oral demand for possession which, if refused, converts the posssession forcibly (*Sitaram* v. *Maroti*, 103 IC 259). If it is not impeached before suit, it will be considered to be impeached when the suit is filed and mesne profits can be claimed only after that date (*Bhirgu* v. *Narshing*, 14 ALJ 1161; *Mohan Lal Khub Chand* v. *Jaitiwala Anandram*, ILR 1938 Bom 292, 40 BLR 394, A 1938 Bom 298, 175 IC 76).

Limitation : Twelve years from the widow's death (Article 65) for mesne profits only three years under Article 113.

Defence: The defendant may deny the pedigree or set up a nearer heir, or may plead that the widow's right was absolute and not limited for life (e.g. under a custom or under a transfer by the husband), or that the transfer was justified by legal necessity. Where necessity is shown, lender is not bound to ascertain how it was brought out (*Rajeshwar Bali* v. *Har Krishan Lal*, 10 OWN 147, A 1933 Oudh 170). The particulars of the necessity for which the transfer was made should be set out in the written statement. If the alienation was made after the commencement of the Hindu Succession Act defendant can contend that the widow had become

7. All the persons mentioned in the above pedigree except the plaintiff has died before the death of Smt. Piari and the plaintiff, therefore, became the sole heir of the said Ram Kishan on the death of the said Smt. Piari.

8. On June 20, 1955 the plaintiff sent a registered notice to the defendant impeaching the said transfer and demanding delivery of the said property to him.

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absolute owner and therefore the reversioner has no interest in the property.

Consent of the person who was the next reversioner at the time affords a good presumptive proof of necessity, and the transferee may rely on it without giving evidence *aliunde* of the legal necessity or of his honest belief in the necessity. He will succeed if the presumption raised by the consent is not rebutted by the plaintiff by contrary proof of the absence of necessity (*Rangaswami v. Nachiappa* 42 M 523 PC; *Indermit v. Jaddu*, 1933 ALJ 42, A 1933 All 169, 149 IC 108; *Debi Prasad v. Golab Bhagat*, 40 C 721). But if there were several reversioners at the time of transfer, the consent should be of all and not that of some of them only (*Yeshwantrao v. Tulsibai*, 99 IC 835 Nag.). If a transfer, was unjustified (as a dedication of 3/4th of the property to a deity), the consent of reversioners cannot make it valid. Even the consenting reversioners can impugn it, as consent only amounts to an agreement, not to question which being without consideration is void (*Debi Dayal v. ShriRadha Krishna*, 180 IC 880, A 1939 Oudh 145). However, if the circumstances are such that the consent amounts to estoppel, the reversioners will be estopped, e.g., when he was himself a party to the alienation and had received benefit under it (*Ramgowda v. Bhau Sahib*, A 1927 PC 227; *S. Shanmugham Pillai v. K. Shanmugham Pillai*, A 1972 SC 2069), but the reversioner can challenge the alienation if he can prove that his consent was obtained by a false representation as to the existence of necessity (*Harendra Nath v. Hari Pada*, 182 IC 852, A 1939 Cal 387). But mere attestation by a reversioner is no presumptive proof in the absence of recitals of necessity (*Satya Narain v. Vaikama*, 145 IC 862, 1933 MWN 1301, A 1933 Mad 637). Also see *Ram Dulare v. Baitul Bibi*, A 1976 All 135). The consent of a presumptive reversioner will, however, not be binding on one who later becomes the actual reversioner (*Kalishanker v. Dhirendra Nath*, A 1954 SC 505).

The defendant may show that the transfer in dispute was made with the consent of the plaintiff, as in that case, even if it was without legal necessity, the plaintiff cannot impeach it by reason of his having elected to treat it as valid (*Akaram v. Sayadhkhan*, 51 B 475, 102 IC 232, 29 BLR 386, A 1927 Bom 260 FB; *Fateh Singh v. Thakur Rukmani*, A 1923 All 387, 45 A 339, 72 IC 8, 21 ALJ 235 DB; *Umakant Naik v. Naka Palai*, 1973 (1) CWR 497). The Supreme Court in *Jaisri Sahu v. Rajdewan Dube*, A 1962 SC 83, held that the widow as owner has the fullest discretion to decide what form the alienation should assume if there is necessity for transfer. A sale to pay off a usufructuary mortgagee, who has no right to sue for his money was on that ground held valid. The defendant can rely on this principle also.

The plaintiff claims:

(1) Possession of the said property.

(2) Rs.1,000 on account of one year's mesne profits from June 20, 1955 to the date of suit with interest, and future mesne profits until the date of delivery of possession.

No. 249—Suit by a Reversioner for Declaration that a Hindu Widow's Transfer is not Binding *(d)*

1. One Ramkishan was a Hindu governed by the Mithakshara law of the Benares school.

2. The said Ram Kishan was owner of the property detailed at the foot of the plaint.

3. The said Ramkishan died in 1960, and on his death defendant No.1 entered into possession as his widow under a will [*or*, gift *or* any other instrument *or* under a decree *or* order of a civil Court *or* under an award] and the terms of the said will [*or*, gift *or* other instrument *or* the decree *or* order *or* award] gave her life estate only. [*Give particulars of instrument, decree, etc*].

Partial Justification: If the vendee has made enquiries and found that there was necessity for the sale, he is not bound to show the application of the whole consideration money to the said necessity (*Sri Krishandas* v. *Nathu Ram*, 35 ALJ 80, 100 IC 130, A 1927 PC 37, 1927 MWN 89, 38 MLT 48, 4 OWN 184). If the application of the bulk of the proceeds of the sale are accounted for, the fact that a small part is not accounted for will not invalidate the sale, but in such cases transferee can be ordered to pay the money not accounted for (*Inderjit* v. *Jaddu*, 144 IC 108, 1933 ALJ 42, *Subramanya* v. *Kupuswami*, 1933 MWN 152; *Ishwardevi* v. *Jagannath*, 1940 ALJ 15). This does not mean that the sale will be invalidated whenever the part of the consideration not accounted for cannot be described as small. If the sale is justified by legal necessity it will stand (*Srinath* v. *Jagannath*, A 1930 All 292). In a case where it was found that half of the total consideration was for binding purposes, the purchaser was allowed to retain half the property for the entire consideration (*Mahalakshmi* v. *Tirupurasundrama*, 133 IC 198, 62 MLJ 478, A 1931 Mad 53). This principle does not, however, apply to a mortgage which is good only to the extent of necessity proved (*Shidaya* v. *Basaprap Happa*, 183 IC 568, A 1939 Bom 301; *Purushottam* v. *Gangadhar*, A 1939 Bom 445).

(d) After the commencement of the Hindu Succession Act such a suit is not maintainable merely on the ground of the absence of legal necessity. Allegations contained in para 3 (precedent No. 249) will have also to be made besides raising the plea of absence of legal necessity. Such a suit can be brought only by a

4. The plaintiff is related to the said Ramkishan as per pedigree given below.

Pedigree

* * * * *

5. All the persons mentioned in the said pedigree of a degree higher than the plaintiff are dead, and the plaintiff is therefore, the nearest reversionary heir of the said Ramkishan.

(*Or*, all the persons mentioned in the said pedigree higher than the plaintiff are dead, except Ram Bihari who is colluding with the defendant and does not challenge the transfer hereinafter mentioned).

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reversioner and not by a stranger as the alienation is not void but voidable at the instance of the reversioner (*Mst. Kishori Kunwar* v. *Parmeshwar*, A 1948 Pat 457). A reversioner is not bound to institute such a suit. The object of such a suit is to secure a declaration to be of help to the reversioners after the death of the widow, as otherwise evidence regarding the true character of the alienation might disappear (*Dula* v. *Bai Jivi*, 39 BLR 1072, A 1938 Bom 37, 174 IC 24). Such a suit is brought on behalf of the entire body of reversioners or the person who would be the actual reversioner on the death of the widow, and no suit for the benefit of the plaintiff alone can be maintainable (*Banshidhar* v. *Dulhatia*, 23 ALJ 329). Therefore on the death of the plaintiff the other reversioners and not his personal heirs should be substituted (*Rameshwar* v. *Ganpati Devi*, A 1936 Lah 652). The prayer should **therefore, be not (as is common) a declaration that the transfer is null and void against the plaintiff but that it would be null and void after the death of the widow, or against the reversioners of so and so.** The result of such a suit would be binding on the whole body of reversioners on the death of the widow (*Kuar Mata Pd.* v. *Kuar Nageshar Sahai*, A 1925 PC 272), whether anyone was or was not in existence at the time the decree was obtained (*Narain* v. *Waryam*, A 1928 Lah 545, 111 IC 139 DB), unless the suit is proved to have been collusive (*Gadhu Singh* v. *Bansgopal* A 1929 All 859 DB). Sometimes when a suit it brought for possession on the death of the widow, a long time after the alienation, courts are prepared to accept slight evidence of the legal necessity and comment on the plaintiffs not having sued for declaration at a time when full evidence was available.

The plaintiff must show that he is the next reversioner, i.e., if the widow died immediately he would succeed to the property. He has to establish the relationship and to satisfy the court that to the best of his knowledge there are no nearer heirs (*Javitri* v. *Gendansingh*, 102 IC 167; *Sarfaraz* v. *Mt. Rajana*, 112 IC 834, A 1929 Oudh 129, 4 Luck 19). It is not necessary that the plaintiff should be reversioner to the full proprietary interest but even a reversioner who will take only for life, e.g., a daughter, can sue (*Matru Mal* v. *Mehri*, A 1940 All 311, 189 IC 600). Even a remote reversioner can sue (1) where the next reversioner refuse without sufficient cause

6. The defendant No.1 has sold the said property to defendant No.2 without any legal necessity on 20th August 1960 and put the defendant No.2 in possession of the said property.

The plaintiff claims a declaration that the said sale would be null and void after the death of defendant No.1.

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to sue or has colluded with the limited heir, or has concurred in the alienation (*Avola* v. *Avola*, 18 IC 212 M; ***Bakhtawar*** **v.** *Bhagwan*, 32 A 176; *Satindra* v. *Sarola* 27 CLJ 320, 45 IC 59; ***Somnath*** **v.** ***Laxman***, A 1962 Orissa 38), or (2) when he is himself the transferee but in all such cases, **the plaintiff must state the exceptional circumstances giving him a right to sue** (*Musammat Viranwali* v. *Kundal Lal*, 9 Lah 106). If he does not, but sues merely as a next reversioner, he cannot on being found not to be the nearest reversioner, plead that he had brought the suit because the nearest reversioner had refused to bring the suit or had precluded himself from bringing it (*Sita Ram* v. *Jagat*, 102 IC 296 A; *Lalta Prasad* v. *Dwarka*, 195 IC 492, A 1941 All 313). A remote reversioner cannot sue merely because the next reversioner is a female but he can be allowed to sue if there are special circumstances, for example collusion, concurrence or refusal of the next reversioner. It is proper in such cases to implead the next reversioner as a *proforma* defendant, though there is no defect if he is not impleaded (*Deoki* v. *Jwala Prasad*, 26 ALJ 449). If the nearest reversioner is a minor, a remote reversioner cannot bring a suit except in the minor's name as his next friend (*Kali Charan* v. *Baghera*, 23 ALJ 653, A 1925 All 585).

The plaint should next allege facts showing that the tranferor has only a life estate in the property and that she has made transfer extending beyond her life, and that without any legal necessity. The prayer should be for a declaration that the alienation would be void against the reversionary heir after the death of limited owner. One should be careful not to sue for a declaration that it is immediately void, for such a declaration cannot be given, nor can a declaration of the plaintiff's reversionary rights to inherit the property be claimed (*Mannumal* v. *Raja Ram*, 20 ALJ 282; *Janki Ammal* v. *Narayanasami*, 31 MLJ 225, 14 ALJ 997, 24 CLJ 309, 37 IC 161). There is only one cause of action for the whole body of reversioners in respect of their right to challenge an alienation by a limited owner and if such a suit is not brought within the period of limitation, the whole body of reversioners existing or subsequently born are debarred from suing (*Dehai Mahton* v. *Moti Mahton*, 19 PLT145, A 1938 Pat 510, 178 IC 643).

Limitation: Twelve years from date of alienation (Article 108). When a minor widow's guardian made a mortgage and the widow on coming of age renewed it by executing another mortgage deed, it was held that the reversioner's suit brought more than 12 years after the former mortgage was time-barred though filed within 12 years of the latter (*Adeyya* v. *Govinda*, 58 MLJ 417).

Defence: Same as in a suit for possession on the death of the widow.

No. 250—Suit by a Reversioner to Restrain Waste by a Hindu Widow *(e)*

Paras 1-5 (*As in the previous precedent, except that "defendant" should be substituted for* "defendant No.1")

6. The defendant is mismanaging the said property and is deliberately committing waste thereof to injure the plaintiff's reversionary rights, and threatens and intends unless restrained from doing so, to dissipate the whole property, so that nothing or a very small portion of it, may be left after her death.

Particulars of Waste

(i) In the month of October, 1984, the defendant lent certain valuable silverware and carpets of the estate of her husband to her brother's son Ramadhin on the occasion of the marriage of the latter's daughter. The said Ramadhin never returned them and defendant has taken no steps to recover them.

(ii) In December, 1984, the defendant has cut down 20 green and useful trees from the grove of her husband at Islamnagar and converted them into money.

(iii) In January, 1985, in consideration of substantial cash payments, the defendant has given permission to one Sridhar to dig *Kankar* in the whole land of village Shamspur forming part of her husband's estate, thereby. rendering the land unfit for cultivation.

(iv) In the rains of the last week of January, 1985, a portion of the roof of the house of Ramkishan in *mohalla* Ramapura had fallen down, and instead of repairing the same, defendant pulled down the house and sold the materials and appropriated the price thereof.

(e) No such suit lies if the widow has become an absolute owner under section 14 (1) of the Hindu Succession Act. A suit will, however, lie if the widow's status is that of a limited owner on the allegations made in para 3 of the preceding precedent No. 249. **After showing his right as a reversioner and the defendant's right as a limited owner, the plaintiff must go on to allege that the woman is committing waste of the property.** The court will not issue an injunction unless a very clear case of real danger to the *corpus* of the property is made out (*Suraj Narain* v. *Ramdevi*, 179 IC 447, A 1939 Oudh 78), and instances of waste must be set forth in the plaint. Mere alienation is not waste and no suit to restrain the widow from alienating the property can lie (*Renka* v. *Bholanath*, 28 IC 896, 37 A 177; *Dhup*

Particulars of Mismanagement

(In addition to the above acts)

(i) The defendant has dismissed without any sufficient reason, Babu Ram Pratap who had very creditably managed the property in the lifetime of her deceased husband and has appointed one Rahim Baksh as the manager.

(ii) The said Rahim Baksh has granted long leases on very small rents to Bulla, Abdulla, Nisar and Mushtaq and has taken Rs.11,500 from Bulla, Rs.7,800 from Abdulla and substantial but unknown sums from Nisar and Mushtaq as premiums.

The plaintiff claims:

(1) An injunction to restrain the defendant from committing any act of waste in respect of the said property.

(2) Appointment of a receiver.

No. 251—Suit for Setting Aside Alienation Made by a Hindu Father *(f)*

1. The plaintiffs are sons of defendant No.2 and are, and have always been, members of a joint Hindu family with him. The said family is governed by the Mitakshara law of the Benares school.

Rani v. *Chail Bihari*, 5 OWN 556, 111 IC 248). The plaintiff may pray for an injunction to restrain her from committing waste, or if there is a strong case of mismanagement, for her removal from the management of the property and for the appointment of a receiver (*Tanikachala* v. *Alamebelu*, 25 IC 153 M; *Shyam Lal* v. *Bhagwanti Bai*, 1977 MPLJ 143), but this is done only in very rare cases.

Limitation : Three years from the time when the waste begins (Article 89). Section 22 will not apply though the waste is continuing wrong, as time under the Article runs from the beginning of the waste (*Dhanjibboy* v. *Hirabai*, 25 B 644).

Defence: Besides pleading that the plaintiff is not the reversionary heir, or that the defendant's right is not a limited one, the defendant may deny that she is committing waste, and may explain away the instances alleged by the plaintiff.

(f) An alienation made by one member without the consent of the other members of a joint Hindu family governed by the Mitakshara law as prevalent in Bengal and Benares is altogether invalid and is not valid even to the extent of the transferor's share (*Babu Singh* v. *Lal Kr.*, 1933 ALJ 1547, A 1933 All 830; *Laxmi Devi* v. *Kala Devi*, A 1977 All 509; *Manoharlal* v. *Dewan Chand*, A 1985 P & H 313, FB; distinguished *Balmukund* v. *Kalawati*, A 1964 SC 1385). The Madras High Court is of the view that while a coparcener can alienate his own undivided share

2. The property mentioned at the foot of the plaint was the joint family property of the plaintiffs and defendant No.2.

3. By a hypothecation deed, dated November 20, 1980 the said defendant No.2 mortgaged the said property to defendant No.1.

4. The mortgage was made without a legal necessity, or, at any rate, there was no legal necessity to borrow money at such a high rate of interest.

(*Or*, the plaintiffs do not admit the existence of the antecedent debts alleged in the mortgage-deed as being the consideration of the mortgage).

(*Or*, the antecedent debts, alleged to be the consideration of the mortgage, were incurred for the purpose of gambling at *Diwali* which fell a few days before the date of mortgage.

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for a consideration, he cannot make a gift or devise of it and such a transaction is void (*Kulasekhara Perumal* v. *Pathakutty*. A 1961 Mad 405) the alienee for consideration can sue for partition as he stands in the shoes of the alienating co-parcener (*Sellammal* v. *Perimmal*, A 1962 Mad 144). According to the Assam High Court interpretation of the Benares School, a coparcener can alienate for value his undivided interest without the consent of his other coparceners, only for legal necessity or for payment of the father's antecedent debts. The transfer is not void, but voidable at the instance of the non alienating coparceners (*Ramprasad Karu* v. *Kripesh Kumar*, A 1961 Assam 54). The transferor's son under the Bombay School, or subsequently adopted son cannot challenge it (*Basawantappa* v. *Mallappa*, 182 IC 302, A 1939 Bom 178). Under the orthodox Benares School even the consent of the manager, who is under disability cannot validate a transfer by a junior member (*Sarju Pd.* v. *Ram Saranlal*, 132 IC 568, 1931 ALJ 400, A 1931 All 541). The only exceptions to this general rule are the cases of father and manager. Both can alienate the family property for a legal family necessity or to pay off antecedent debts but if the alienor is the manager, the antecedent debts must be proved to have been incurred for family necessity. This is not necessary in the case of a father (*Raja Bahadur* v. *Mangala Prasad*, 21 ALJ 934 PC). A pronote executed by *Karta* of Hindu joint family to discharge antecedent debt is binding on the coparceners (*B. Bhogeswara Rao* v. *P. Ramkrishna Rao*. 1995 All. HC 3134 (AP). It has been held in Madras that even if no legal necessity is proved but the alienation was for the benefit of the estate it will be upheld (In the matter of *A.T. Vasudevan*, A 1949 Mad 260, (1948) 2 MLJ 47).

The *Karta* rightly sold joint family property to pay debt and taxes incurred by the firm run by all major members of the joint family (*Mukesh Kumar* v. *Col. Harbans Waraiah*, A 2000 SC 172). Even where the debt incurred by the father is not for legal necessity or for the payment of the antecedent debt, the son is liable to pay the same under the theory of pious obligation. Thus where the father and the son were living as members of joint family, the father stood surety for the payment of certain

(*If necessary, add*, —5. Though the plaintiffs were born after the date of the said transfer, yet their elder brothers Ramlal and Kishanlal were in existence when the said mortgage was made and they did not consent to the said mortgage).

The plaintiffs claim, a declaration that the said mortgage is null and void.

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amount to the defendant, the son was held liable (*Velumani* v. *Narayansami*, (1996) 1 Mad 195 (Mad).

It seems, however that one member can transfer his share in season of distress, or for the sake of the family or for spiritual purposes. It has been held that a junior member can transfer the family property and incur debts binding on it in times of distress and family necessity (*Dhanukdhari* v. *Rambirich*, 70 IC 391, 1 Pat 171, A 1922 Pat 553 DB). In some cases without insisting on the condition of "distress" it has been held that a member can borrow money on the security of family property or can alienate it for a family necessity just like a manager (*Inder Chand* v. *Bidya Dhar*, 60 IC 282, A 1921 Pat 45 DB; *Ramdas* v. *Tanak Singh*, 111 IC 51, A 1928 Pat 557 DB). A mortgage by one member of his individual share in joint property is not *ab initio* invalid and therefore it attaches to the share which he gets on partition (*Kharag Narain* v. *Janki Rai*, 169 IC 906, A 1957 Pat 546). Such an alienation is voidable at the instance of the persons affected by it (*Jageshar* v. *Deo Dat*, 21 ALJ 608, 45 A 654; *Ram Kumar* v. *Mohanlal*, A 1940 Pat 270, 185 IC 788; *Ram Prasad Kalita* v. *Kripesh Kumar*, A 1961 Assam 54; contra *Kahinath* v. *Bapu Rao*, A 1940 Nag 305). Therefore a member of the joint family who did not join in, or consent to, the alienation can sue to have it set aside. A person who was not in existence or even in his mother's womb at the time of the alienation cannot question it after his birth (*Tulsi* v. *Babu*, 8 ALJ 733; *Deonarain* v. *Ganga*, 13 ALJ 69; *Daulat Kuer* v. *Ramdas*, A 1940 All 549, 189 IC 712, 1940 ALJ 366). If the transfer was not made with the consent of other members then in existence, even an afterborn son can impugn it (*Tulsi* v. *Babu*, 8 ALJ 733; *Surajpal* v. *Panchaiti*, 183 IC 270, A 1939 All 486; *Bhagwat Pd.* v. *Dehi Chand*, 20 Pat 727; contra *Adapa* v. *Vernalepatti*, A 1944 Mad 33, relying on *Lal Bahadur* v. *Ambika Pd.*, A 1925 PC 264). But if there is a person in existence at the time of alienation who is competent to challenge the alienation, an afterborn reversioner can challenge it, but he cannot avail of any extension of limitation on this account as time begins to run against all persons competent to challenge it from the date of alienation, though he can avail of any extension which could be allowed to the reversioner in existence (*Govind* v. *Ram Lal*, A 1937 Lah 420; *Sri Sai Baba* v. *M.L. Hanumantha Rao*, (1980) 2 MLJ 518). If the reversioner in existence fails to challenge it within limitation, another reversioner who was minor at the time cannot claim extension of time on account of his minority (*Matu* v. *Jati*, 170 IC 541, A 1937 Lah 485). If the child who objects to the alienation is conceived after the alienation but during the life of a child conceived before the alienation, then that overlapping of the two lives enables the later born son to

No. 252—Suit for Possession of Family Property Sold in Execution of a Mortgage Decree

Paras 1-3 (*as in the previous precedent*).

4. The said property was sold in execution of a decree for sale obtained by the said defendant No.1, against defendant No.2 and has been purchased by defendant No.3, who is in possession as such purchaser.

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contest the alienation (*Shri 108 Pujapad* v. *Surajpal*, A 1945 PC 1). A debt by a father required by him for a trade, which is not the normal occupation of the family cannot be branded as immoral so as not to be binding on the sons. The liability of the grandsons and sons to pay ancestral debt is only to the extent of their interest in the joint family property (*Subbu and Co.* v. *Minor Madhava Sudarsanam*, 1995 (2) MLJ 152 (Mad) DB).

The plaintiff may make an alternative prayer that if the transfer be held to be valid to the extent of the father's share—a decree for possession of his share only may be passed. In that case, defendant may sue for general partition so that both the suits may be tried together and the transferred property may be allotted to him in lieu of the father's share but the sons's suit cannot be converted into one for partition. (For full discussion of this matter and the form of decree in such cases see *Kandaswami* v. *Velayutha*, 96 IC 993, 51 MLJ 99, A 1926 Mad 774 DB).

In a suit to contest the alienation, **the plaintiff should allege (1) that he is a member of a joint Hindu family, (2) that he has an interest in the property alienated (for he has no right to attack a sale of self-acquired property of a transferor); (3) the particulars of the alienation and (4) facts showing its invalidity.** The last item requires some explanation. Ordinarily, a plaintiff, impeaching the alienation either by a suit for declaration of its invaldity, as in the case of a simple mortgage, or in a suit for recovery of possession, as in the case of a sale or usufructuary mortgage, must allege that the transfer was made without a legal necessity. If it purports to have been made by the father for an alleged antecedent debt, the plaintiff may simply deny the existence of such debt, or may impeach it on the ground of immorality or illegality. For a clear and concise statement of the law relating to the liability of the son's share of the joint family property for the debts of the father. see *Panna Lal* v. *Mst. Naraini*, A 1952 SC 170; *Viridhe Chalam* v. *Chaldean Bank*, A 1964 SC 1425; and *Vathilinga Naicker* v. *Vivekananda Reddiar*, (1981) 2 MLJ 86. The burden of alleging and proving circumstances justifying the transfer will be on the transferee. Where however, the property has been sold in execution of a decree on a mortgage, by the father has thus passed out of the hands of the family, the plaintiff cannot succeed without proving that the debt for which the mortgage was made was an immoral or an illegal debt (Jadubir v. Gajadhar, 21 ALJ 809), and the auction purchaser, if he is a stranger, was aware of the fact (*Suraj Bansi* v. *Sheo Prasad*, 5 C 148 PC; *Sitla Prasad* v. *Chameli*, 21 ALJ 683). In

5. The plaintiffs were no parties to the said decree.

6. The mortgage of November 20, 1980 was made by defendant No.2 in order to pay off his debts incurred in *badhni* or grain gambling transactions with the said defendant No.1 in *Baisakh, Samvat* 2030

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such cases it is not sufficient to allege mere want of legal necessity. but it should be definitely alleged that the debt was an immoral or an illegal one and that the purchaser knew it (*Faqir Chand* v. *Harnam Kaur*, A 1967 SC 727).

Father's alienation even when for legal necessity can be impeached by son on the ground of inadequacy of consideration (*Dudhnath* v. *Satnarain Ram*, A 1966 All 315; *Prasad* v. *Govindswami Mudaliar*, A 1982 SC 84). The sons while attacking the mortgage can attack the rate of interest also (*Nawab Nazeer Begum* v. *Rao Raghunath*, 17 ALJ 591, 36 MLJ 521). It is, therefore, better to take this ground also in the plaint in the alternative if possible.

In a suit for partition where the plaintiff assails the alienations made by his father during his minority, it is not necessary for the plaintiff to seek cancellation of the same and to pay court-fee for the same (*Kamakshi Ammal* v. *Rajalakshmi*, A 1995 Mad 415 (DB); *C.R. Ramaswami* v. *C.S. Rangacharia*, A 1940 Mad 113 followed).

It is not sufficient to establish general immorality or extravagant life of the father but it must be proved that the particular debt was incurred for immoral or illegal purposes (*Shanti Sarup* v. *Jangiri*, 110 IC 273; *Tulsi Ram* v. *Bishnath*, 50 A 1, A 1927 All 735 DB; *Sri Narain* v. *Lala*, 17 CWN 124, 17 IC 729 PC; *Narayan* v. *Chamber of Commerce*, 1969 Raj LW 107). General allegations of immorality of the father should not therefore be made in the plaint in support of the allegation of want of necessity. If the debt is alleged to be immoral, that fact may be definitely alleged and full particular of the alleged immorality showing how the debt was connected with the acts of immorality must be given. It would not do merely to allege that the debt was taken for immoral purpose or for gambling (*Tulsi Ram* v. *Bishnath*, A 1927 All 735, 50 A1 DB).

"Immoral" in this connection is not to be taken in a narrow sense, but if the action of the father which resulted in the debt, was infected with an element of criminality, the debt is immoral, e.g., in case of money misappropriated by him. A transfer to pay up on such money would be void (*Jagannath* v. *Jugal Kishore*, 23 ALJ 882, 89 IC 492; *Brijendra Pal* v. *State of U.P.*, 1975 ALJ 232). If there was no criminality, but only a civil liability, the debt cannot be said to be immoral. Where the taking of the money was not a criminal act, the subsequent appropriation of it will not make the liability immoral (*Sri Venkateswar Temple* v. *Radha Krishna* A 1963 AP 425 FB). "Immoral" means repugnant to good morals and that the liability of a Hindu father who was Managing Director of a Cooperative Bank, incurred as a result of negligence of his duties was not an immoral debt (*S.M. Jakati* v. *S.M. Brorkar*, A 1959 SC 282).

An offer is sometimes made that if any portion of the consideration for the

(*or*, to raise money for drinking purposes, *or* for expenses incurred by the said defendant No.2 in maintaining at Agra, a mistress, by name Smt. Putli).

7. The defendant No.3 was, at the time of his auction purchase of the said property, aware of the facts alleged in para 6 above.

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alienation is found to be binding, the plaintiff is ready to repay that amount. It is not strictly necessary to make this offer, for the court can always grant whatever relief it thinks equitable and proper (*Ganakapati* v. *Ganakapati*, 37 M 275, 17 IC 508). If any part of the consideration is found not to be binding, the transfer is generally set aside on plaintiff's paying back the amount (with interest, if necessary), but if this part is insignificant in comparison with that for which the necessity is proved, the transaction will be upheld (see footnote (c) above). This rule does not, however, apply to mortgages, as only so much money could be borrowed as was really needed (*Misrilal* v. *Bhawani Pd.*, 8 OWN 1002, 134 IC 1809). Where the sale is void for want of legal necessity and for inadequacy of consideration no question of giving any equities to the vendee arises even if some amount paid by him to some creditors of the vendors be genuine (*Prasad* v. *Govindaswami*, (1982) 1 SCC 185 (para 56), A 1982 SC 84).

It is not necessary to allege in the plaint that the transferor was not competent to transfer the family property or the transfer is legally void and plaintiffs have a right to have it set aside, as all these being matters of law, should have no place in a pleading.

Mesne Profits: See note (c) above.,

Limitation: Twelve years from the time when the transferee takes possession (Article 65 or 109: See *Ganpate* v. *Ramachandra*, A 1985 Karn 143). If the suit is for mere declaration that the alienation is null and void, Article 58 would apply (three years).

Defence: In such cases the transferee may plead (i) that the plaintiff was born after the transfer and the transfer was made with the consent of the members then in existence; or (ii) that the property was the self-acquired property of the transferor; or (iii) that the defendant had made inquiries into the necessity for the transfer and had advanced money because he was satisfied, as a result of such inquiries, that the money was needed for a family necessity (though necessity is after wards found not to have really existed as in such a case the alienee is not bound to see the application of the money. *Atma Ram* v. *Sadhu*, 1938 ALJ 190, 172 IC 1004, A 1938 PC 77, 40 BLR 742), or (iv) that the transfer was justified by legal necessity; or (v) that the transfer was made in lieu of antecedent debts of the father or manager, in the latter case adding that the manager's debt was also taken for a family necessity. Pleas (iii) and (iv) may be taken in the alternative. Particulars of the necessity and the antecedent debts alleged by the defendant must be given in the written statement and it is not enough to state simply that there was legal necessity or an antecedent debt. If the transfer impeached is not of the father, but of another member, and the

The plaintiffs claim :

(1) That the said mortgage and the said decree and sale be declared to be null and void.

(2) Recovery of possession of the said property.

No. 253—Suit of Setting Aside a Sale in Execution of a Simple Money Decree against the Father *(g)*

1. The plaintiff and his father Satya Narayan are, and have always been, members of a joint Hindu family governed by the Mitakshara law of the Benares school.

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plaintiff has not admitted in the plaint that the latter was the manager of the family, the transferee must not omit to plead that the transferor was the manager of the family, because if he does not plead that, a mere plea of legal necessity will not justify the transaction. If the father has transferred only his share, the defendant may take an alternative plea that the father was separate from the plaintiff. Where the plaintiff relies on the immorality of the debt which was discharged by the money raised on the mortgage. transferee can succeed on proving that they had made reasonable inquiries and acted *bona fide* (*Periaswami* v *Vaidhilingam*, A 1937 Mad 718).

Even if the suit is brought after the death of the father, the defendant cannot make a claim for refund of the price paid to the father, on the ground of pious duty of the plaintiff to pay his father's debts as the price does not become a debt until the sale is set aside. The defendant can, however, in case sale is set aside bring a separate suit for recovery of price paid by him to the father as debt of the father (*Madan Gopal* v. *Sati Prasad*, 15 ALJ 425, 40 IC 451, 39 A 485; *Raghunath Prasad* v. *Rambharose*. 100 IC 745 A).

In a suit in which the plaintiff can succeed only on proof of immorality or illegality of the debt, all that the defendant need plead is a denial of the plaintiff's allegation of immorality or illegality of the debt; the necessity for which the debt was borrowed need not be specified in the written statement though evidence of it may be necessary to rebut the plaintiff's case. If however, the same is specified, the pleading is not objectionable. It has been held in Lahore and Nagpur that if the defendant proves that the plaintiff is merely a figurehead and the real plaintiff is the alienor himself who has caused the suit to be instituted for the purpose of undoing his act, the court should refuse to declare the invalidity of the alienation (*Dad* v. *Lal*, 82 IC 626, 5 Lah 389, A 1925 Lah 24 DB, 6 Lah LJ 334, *Gangabai* v. *Hansadas*, 103 IC 905, A 1927 Nag 213, 10 NLJ 64).

Propositions of law, e.g., that the mortgage is binding on the plaintiff, or that the plaintiff cannot question the acts of his father need not be stated in the written statement.

(g) A judgment-creditor of a father can sell the whole joint family property,

2. The property described below was the joint property of the said family.

Description of the Property

* * * * *

3. In execution of a simple money decree against the said Satya Narayan, one Sobharam attached and sold the said property, and the defendant purchased it on November 14, 1984 but has not obtained possession (*or*, and obtained possession on January 20, 1985).

4. The bond. on the basis of which the said decree was passed was executed by the said Satya Narayan to pay the losses which he had incurred in speculating on the price of wheat with the said Sobharam during the seasons of 1980 and 1981. The losses on the said wheat transaction amounted to Rs.5,690 for the season of 1980 and to Rs.4,390 for the season of 1981.

5. The defendant was, at the time of his auction-purchase, aware of the facts alleged in para 4 above.

The plaintiff claims:

(1) A declaration that the said auction sale is null and void against the plaintiff and that the defendant is not entitled to any portion of the said property under the said sale; and

(2) Recovery of possession of the said property.

No. 254—Suit for Setting Aside an Alienation by One Member of a Family *(h)*

1. The three plaintiffs and defendant No.2 are brothers and form

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and the sons cannot object to it, unless they prove that the debt was immoral or illegal, and that the auction-purchaser was aware of the fact, but other members of the family, e.g., nephews or brothers of the judgment-debtor can have their shares released simply on showing that they were not parties to the decree. The latter may simply show that they have got a share in the property and that they were not parties to the decree. The former must further not only allege that the debt was illegal or immoral but should also give full particulars of the alleged illegality or immorality. In such cases the plaintiff can recover his own share in the property and not the whole property as in the case of a mortgage.

Limitation: For declaration, 3 years (Article 58) and for possession 12 years (Article 65 or 109).

(h) As to the capacity of one member to alienate family property or any part

and have always formed, joint Hindu family governed by the Mitaskhara law of the Benares school.

2. The house described below is the ancestral property of the plaintiffs and defendant No.2.

3. By the sale-deed, dated February 14, 1985 defendant No.2 purported to sell the said house to defendant No.1.

The plaintiffs claim:

(1) A declaration that the said sale is void, and recovery of possession of the said house.

(2) *Or*, in the alternative, if defendant No.2 be found to be separate from the plaintiffs, recovery of plaintiffs' 3/4th share in the said house.

No. 255—Suit by a Wife against her Husband for Maintenance *(i)*

1. The plaintiff was married to the defendant in 1978 and is still the wife of the defendant.

2. On November 14, 1993 the defendant took a mistress one Smt. Ramo, and thereafter began to beat the plaintiff and confine her in a room for days together, without giving her food, and has, on January 6, 1994, without any justification turned her out of his house, and threatened that if she attempted to return, he would kill her.

of it. see note *(f) ante*. This form of action may be used even if the transferor was the manager. Let the defendant transferee allege that the transferor was the manager and the facts justifying the transfer. If, however, it is admitted in the plaint that the transferor was the manager, it should be alleged that the transfer was made without a legal necessity. If the transferor has described himself in the deed of transfer as a manager and that fact is intended to be denied it is better to deny it in the plaint thus : "The said defendant No. 2 is not the manager of the said joint family." But it must be remembered that the mere omission of the transferor to describe himself in the deed as manager would not prevent the transferee from showing that he was the manager and competent to transfer (*Chhajju Mal* v. *Multan Singh*, A 1936 Lah 996). If the suit is brought for declaration that the alienation is void to the extent of plaintiff's share, the extent of such share should be determined with reference to the date of suit (*Viswesara Rao* v. *Varahanarasimham*, A 1937 Mad 631).

(i) Ordinarily a wife's place is with her husband and she is not entitled to live apart from him and claim maintenance (*Nagamma* v. *Rajiya*, 110 IC 30, A 1928 PC 187, 48 CLJ 17; *Laxmi* v. *Maheshwar*, A 1985 Ori 11). The Hindu Adoptions and Maintenance Act (78 of 1956), section 18 (2), however, entitles a wife to live

3. The defendant is a big landlord having house property yeilding a net income of about Rs.94,000 per mensem and having regard to the position of the parties and the needs of the plaintiff, the plaintiff claims Rs.21,000 per month as her maintenance.

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separate from her husband without forfeiting her claim to maintenance if and only if (a) he is guilty of desertion, i.e. of abandoning her without reasonable cause and without her consent or against her wish or of wilfully neglecting her; or (b) he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with him; or (c) if he is suffering from a virulent type of leprosy; or (d) he has any other wife living; or (e) he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere; or (f) he has ceased to be Hindu by conversion to another religion; or (g) there is any other cause justifying her living separately. But she is not entitled to maintenance while living separate from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion. **In a suit for maintenance, therefore, she should allege in the plaint the grounds on which she claims right to live separately and the amount she claims.** Such amount is generally fixed in accordance with the position and status of the husband and the needs of the wife, and these should be alleged in the plaint. She should be enabled to live consistently with her position as the wife of her husband with the same degree of comfort and reasonable luxury (*Gajendra Nath* v. *Sulochana*, 68 CLJ 559).

Where property is acquired by a Hindu female in lieu of right of maintenance on or before the commencement of the Hindu Succession Act, it shall be held by her as full and absolute owner (*Nazar Singh* v. *Jagjit Singh*, (1996) (27) ALR 106 (SC).

The plaintiff may, if she likes, also ask for a charge on the property belonging to her husband (*Annappa Bilappa* v. *Malabai Annappa Shirhatti*, (1976) 78 BLR 539). But as the husband is liable personally, independently of the fact whether he has any property or not, no charge attaches to his property until it is attached by a decree; therefore, if the husband transfers his property pending a suit by the wife, the transfer is not void under section 52, Transfer of Property Act. The case of the widow's suit against the husband's relations is different as in that case the right of the widow is dependant on the existence of the property in the hands of the relations (*Paruchuri* v. *Surugutchi*, 101 IC 806, 52 MLJ 520, 1927 MWN 314), while husband's liability is not dependant on possession of property (*Radhabai* v. *Gopal*, A 1944 Bom 50; *Satayanarain Murthy* v. *Ram Subbamma*, (1963) 2 An. WR 400).

The suit against husband may be brought at the place where marriage was performed (*Chandrawati* v. *Suraj Narain*, A 1955 All 387). If after obtaining a decree, she resumes cohabitation with the husband the decree becomes ineffective and cannot be executed (*Venkayya* v. *Raghavamma*, 1941 MWN 978). Ordinarily maintenance is granted from the date of suit, but if demand was made for before, arrears from date of demand should be granted (*Pallamreddy Andema* v. *Varadareddy*, A 1949 Mad 31, 1948 MWN 224, (1948) 1 MLJ 30). In suit based on

The plaintiff claims :

(1) A decree fixing Rs.21,000 per month as the plaintiff's maintenance and directing the defendant regularly to pay the same to the plaintiff.

(2) Rs.42,000 for arrears of maintenance, at Rs.21,000 a month, for the period the plaintiff has been living separately from the defendant.

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the ground of husband marrying another woman, maintenance can be awarded from date of second marriage.

The right of wife under section 18 Hindu Adoptions & Maintenance Act, 1956 is not a right only for future maintenance but for past maintenance also, subject to law of limitation. Such a right for past maintenance is not affected by an order of maintenance *pendente lite* passed under section 24 of the Hindu Marriage Act (*Shakuntalabai Sahabrao Pawar* v. *Sahabrao Rambhau Pawar*, 1976 Mah LJ 512). An order for payment of interim maintenance can also be passed on proof of *prima facie* case during the pendency of a suit for maintenance (*Jadumani* v. *Kumudini*, A 1986 Ori 10).

If the maintenance claimed is not more than Rs. 500 a month, and the wife has no private means to maintain herself, it is sometimes more convenient to have recourse to the Criminal Court under section 125, Cr. P.C. But an order under that section is no bar to a suit for more maintenance than that awarded by the magistrate.

Defence : In such cases the defendant may charge the wife with unchastity or may show that the reasons alleged by her for living separate from him are not sufficient. The amount may also be contested. Unchastity will disentitle a wife even to maintenance due under a bond executed by the husband (*Sita Devi* v. *Gopal Saran Narayan Singh*, 111 IC 762, A 1928 Pat 375 DB). An offer to take the wife back is a good defence unless the wife can show sufficient grounds justifying her refusal. Such grounds would be the same as would be sufficient to justify the refusal of restitution of conjugal rights to the husband (*Venkatapathi* v. *Puttamma*, 165 IC 314, A 1936 Mad 609).

Limitation for a suit under the Hindu Law for declaration of right of maintenance and fixing the amount of maintenance is 3 years from the time the right is denied (Article 58), and for arrears of maintenance after maintenance has been fixed is 3 years from the date when the amount is payable (Article 105). When maintenance is not claimed under Hindu Law, the suit for declaration will be governed by Artcile 58 and in respect of arrears by Article 113. If maintenance is claimed under a contract, Article 55 will govern the suit.

No. 256—Suit by a Widow against the Husband's Brothers for Maintenance (j)

Omitted

MOHAMMEDAN LAW

No. 257—Suit of Divorce on Ground of Husband's Impotence *(k)*

1. The parties are Mohammedans.

2. The plaintiff was married to the defendant on April 6, 1995 and thereafter the parties resided together at the defendant's house until September 10, 1995 when the plaintiff returned to the house of her father.

3. The defendant was, at the time of the said marriage, impotent and is still impotent, and has not, and cannot, consummate the said marriage.

4. The plaintiff was, on the said April 6, 1995 wholly unaware of the impotency of the defendant.

The plaintiff claims dissolution of her marriage with the defendant.

(j) This precedent related to a case where the widow's husband died before the commencement of the Hindu Women's Right to Property Act, 1937 and has therefore been omitted as no longer of any practical utility. Where the death takes place after the coming into force of the Act, the widow will inherit a share in her husband's separate as well as coparcenary property and cannot claim maintenance. If the husband leaves no property and the widow has no property of her own nor has any other earnings she can now under the Hindu Adoptions and Maintenance Act of 1956 sue her son (natural or adopted) or her daughter for maintenance. It has been held that section 22 (2) of the Act is an exception to section 22 (1), and the widow who has a right to a share in the property of her father-in-law has no right to claim maintenance from her husbands's brothers (*Jai Lal* v. *Smt. Dulari*, 1976 ALJ 641). If she is a childless widow she can sue her step-son. If the widow happens to be a minor she can, during her minority, claim maintenance from her parents also. If she is unable to obtain maintenance from any one of the aforesaid persons she may claim it from her father-in-law. But this obligation shall not be enforceable if the father-in-law has not the means to meet it from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share. Widow's claim for maintenance against all above-mentioned persons shall cease if she re-marries or ceases to be Hindu. There is no charge on the property unless one is created by decree or agreement (*Jamnabai* v. *Balakrishna*, 102 IC 104, 53 MLJ 176; *Mohini* v. *Purna*, 30 CWN. 153, 55 CLJ 198, A 1932 Cal 451; see also *Ramarayudu* v. *Sitalakshmammu*, A 1937 Mad 915 : in which a charge on her husband's share

No. 258—Suit for Divorce on Ground of *La'an*

1. The parties are Mohammedans.

2. The plaintiff was, on November 14, 1988 married to the defendant and is still wife of the defendant.

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was maintained). If there is no such property, the widow has no right to be mantained by any relation except that there is a moral (but not legal) duty of the father-in-law to maintain her out of his separate property, but on his death the heirs who take that property become legally bound to maintain her (*Ethirajamma* v. *Subbarayudeu*, 1938 NWM 1135; *Jagmohan* v. *Smt. Jiana*, 1979 AWC 695). An alienee from such an heir is bound to maintain her if the condition specified in section 28 are satisfied (*Parul Bala Desai* v. *Bangshedhar Nandi*, A 1971 Cal 270). The donees or devisees, however, are not so bound (*Sankarmurthy* v. *Subbamma*, 1938 MWN 922. A 1928 Mad 914). Even a permanent concubine, whose connection with the deceased was an open one and who resided permanently and openly as a member of the family is entitled to maintenance (*Bai Nagubai* v. *Bai Monghabai*, 96 IC 20), but she must be a Hindu. A Mohammedan mistress is not so entitled (*Haidri* v. *Nariandra*, 13 OLJ 245, A 1926 Oudh 294, 93 IC 767, 3 OWN 284).

A suit may be brought either for declaration of the amount of maintenance or for arrears of maintenance, or for declaration of charge for maintenance on the husband's property. The last-mentioned relief is particularly necessary where there is a danger of the property being transferred by the heirs of her husband. It has been held that in such a case she would be able to realise her future maintenance by execution of the decree, and cannot be driven to a separate suit for sale of the property charged (*Indramani* v. *Surendra*, 64 IC 852, 35 CLJ 61, A 1922 Cal 35 DB; *Radhakrishna* v. *Bachni*, A 1937 Pat 654, 172 IC 234). In such a suit **the plaintiff must allege her right and the amount she claims and facts showing defendant's liability. The property to be charged must be specified. In a suit for arrears, it should be alleged that the maintenance was wrongfully withheld by the defendant** (*Sheshama* v. *Sabbaravadu*, 18 M 403), as mere non-payment may be due to the plaintiff not needing it as when she comfortably lives with her parents. No previous demand is however necessary (*Panchakshara* v. *Pattammal*, 39 MLT 32, A 1927 Mad 865; *Parwatibai* v. *Chatru*, 39 B 131; *Ramarayuda* v. *Sitalakshmammu*, A 1937 Mad 915).

The amount of maintenance will be fixed with regard to the income of the family property and the position and status of the plaintiff, but cannot be more than the income of her husbnad's share in the property. Even the income of property subsequently acquired by the joint family should be taken into account (*Chunilal* v. *Bai Saraswati*, A 1943 Bom 393). The general principle is that the sum awarded must enable the lady to live consistently with the position of a widow in something like the degree of comfort and with the same reasonable luxury of life which she enjoyed in her husband's lifetime (*Mt. Ekradedwari* v. *Homeshwar*, 56 IA 182, 8 Pat 840, 27 ALJ 695, 31 BLR 816, 49 CLJ 579, 116 IC 409, A 1929 PC 128, 27 MLJ 50). The

3. On January 14, 1994 the defendant filed a complaint before the Sub-Divisional Magistrate of Gaya against one Mohammad Hashim under section 498, Indian Penal Code for having enticed away the plaintiff, and in the complaint he falsely charged the plaintiff with having committed adultery, and made the following false statement regarding the plaintiff :

widow's income from separate property cannot be taken into consideration (*Annapooranma* v. *Veeraraghav*, A 1940 Mad 547; *Nunevarahalu* v. *Nunesithamma*, A 1961 AP 272 FB). The amount of maintenance includes residence or the cost thereof and a widow is not therefore entitled to maintenance equal to her husband's share in joint family property, plus residence (*Kewalmal* v. *Isribai*, A 1926 Sindh 135, 93 IC 353 DB; *Padibai* v. *Manglomal*, A 1940 Sindh 188). Maintenance fixed by agreement or decree can be enhanced or reduced on a proper case being made out for change due to change in the circumstances (*Chinnamal* v. *Venkatasami*, 101 IC 752 M; *Sansar Chand* v. *Shanti*, 96 IC 255 L; *Ram Pal Singh* v. *Lal Surendra B. Singh*, 166 IC 194, A 1937 Oudh 82; *Indira Bai* v. *B.A. Patel*, A 1974 AP 303), except when the terms of the agreement expressly and definitely lays down that no change would be made (*Kameshwaramma* v. *Thammanera*, A 1939 Mad 798; *Trimbak* v. *Mst. Bhagubai*, A 1939 Nag 249). But where the circumstances are such that a claim for increase should be considered to have been waived a suit for increase would not lie, e.g., when the husband and wife agreed to live apart, the husband agreeing to pay to the wife the income of a certian property as maintenance and the wife agreeing not to claim maintenance from any other property, she cannot after his death, sue the executors for increased maintenance from other property (*Purshotamdas* v. *Rukshamani*, 170 IC 897, A 1937 Bom 358). The amount is not to be varied on every fluctuation in the income, but only on a permanent increase or decrease (*Maheshwari Prasad* v. *Sahdei*, 165 IC 227, 1936 OWN 902). Any personal income made by the widow by her own exertions will not justify reduction (*Bai Jaya* v. *Ganpatram*, A 1941 Bom 305, 196 IC 607). The increase can be effected from the date of order and not in respect of past arrears (*Trimbak* v. *Mst. Bhagubai*, A 1939 Nag 249; *Savitribai* v. *Radha Kishan*, A 1948 Nag 44).

Limitation for suit for arrears of maintenance is 3 years under Article 105 of the Act of 1963.

Defence : The plaintiff's unchastity used to be a complete defence but it is not so if the suit is not under Hindu law but under an agreement (*Shivalal* v. *Bhai Sankli*, 35 BLR 490, 132 IC 444, A 1931 Bom 297; *Bhuep Singh* v. *Lachman Kr.*, 26 A 321; contra *Kishanji* v. *Laksimi*, 33 BLR 510, A 1931 Bom 286, which is single Judge case), or if it is under the Hindu Adoption and Maintenance Act of 1956.

If, however, a widow, though at first unchaste, has given up that life and leads a moral life, she will be entitled to *bare* maintenance, i.e., just sufficient for her living (*Bhikubai* v. *Hariba*, 49 B 459, 27 BLR 13, A 1925 Bom 153 DB, 94 IC 655; see *Mh. Shibi* v. *Jodh Singh*, A 1933 Lah 747). The defendants cannot compel the

"My wife Mst. Shakuran had illicit connection with the accused person before she ran away and she has committed adultery with the accused person."

The plaintiff claims that her marriage with the defendant be dissolved.

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plaintiff to live with them, unless the husband's will contains any such condition (*Girianna* v. *Honarma* 15, B 236; *Tincouri* v. *Krishna*, 20 C 15), and her refusal to live with the defendants is no ground for reducing maintenance (*Bhairon* v. *Ram Sewak*, 107 IC 552, A 1928 Oudh 1). Even such a direction in the husband's will can be ignored for just cause (*Jamuna Kunwar* v. *Arjun Singh*, 1940 ALJ 750). In a suit for arrears, defendant may show a waiver or abandonment. The fact that the widow has separate private funds which also yield an income is irrelevant if the income of the joint family property is sufficient for the maintenance of all members (*Khodandarani* v. *Chenchamma*, A 1930 Mad 479, *Jai Ram* v. *Shiva Dei*, A 1938 Lah 344, 177 IC 539). So also the fact that she has received some property under her husband's will, if that property is insufficient (*Kanakshi* v. *Krishnammal*, 1938 MWN 64, (1938) 1 MLJ 252, 47 LW 146, A 1938 Mad 240, 177 IC 688). So also the fact that she has a right to a share in the non-agricultural property of her husband under the Hindu Women's Right to Property Act (*T. Sarojini* v. *T. Sri Krishna*, A 1944 Mad 401). But the fact that she has got ornaments (which are her *stridhan*) of great value which are of no use to her and which she can dispose of can be taken into account (*Gurushiddappa* v. *Parwatewwa* 167 IC 973, A 1937 Bom 135). That the joint property has been sold away is no defence, unless the sale was made for a family purpose which has priority to the maintenance, otherwise the coparcener will be personally liable to the extent of the joint family property sold away by him (*Chunilal* v. *Bai Saraswati*, A 1943 Bom 393).

The fact that in the life time of the husband the widow has refused to obey a decree for restitution of conjugal rights passed against her is no defence (*Perimbal* v. *Sundrammal*. A 1945 Mad 193, 220 IC 334).

(k) Such a suit at the instance of the husband is unnecessary as the husband can very easily divorce the wife by pronouncing the divorce and no assistance of the court is required. A wife may obtain dissolution of marriage by mutual agreement with her husband, but under the Hanafi law she could not claim a divorce through court, except (1) on the ground of impotence of the husband, or (2) on the ground of *la'an*. The Muslim law in this respect has been modified by the Dissolution of Muslim Marriages Act, 1939, section 2 of which provides that a woman may obtain a decree for dissolution of marriage on seven other grounds, namely : (i) that the whereabouts of the husband have not been known for a period of four years; (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years; (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards; (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years; (v) that the husband has been insane for a period of two years or is

No. 259—Suit by a Mohammedan Heir for Possession against a Widow, with Alternative offer to Pay Dower Debt

1. One Muhammad Ali was the owner of the property detailed at the foot of the plaint.

2. The said Muhammad Ali, died in August 1991 leaving behind him Hamid Ali, his brother, and the defendant, his widow, as his only legal heirs and thus Hamid Ali inherited 144 out of 192 *sihams* out of the said property.

3. The said Hamid Ali died on September 4, 1993 leaving the plaintiff, a son, Mst. Kulsum, a widow and Mst.Hajra a daughter, as his only heirs and the plaintiff thus inherited 84 *sihams* and Mst. Kulsum inherited 18 sihams out of the 144 *sihams* of the said Hamid Ali in the said property.

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suffering from leprosy or a virulent venereal disease: (iv) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years: provided that the marriage has not been consummated: (vii) that the husband treats her with cruelty, that is to say—

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical illtreatment; or

(b) associates with women of evil repute or leads an infamous life; or

(c) attempts to force her to lead an immoral life: or

(d) disposes off her property or prevents her exercising her legal right over it, or

(e) obstructs her in the observance of her religious profession or practice; or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the *Quran*.

If a Mohammedan wife stays away from husband without any justifiable grounds, she is not entitled to dissolution of marriage (*Mst. Mobiya Khatun* v. *Shri Anwar Ali*, A 1971 Cal 218). If the husband is impotent and unable to discharge his marital obligations, this is a very just ground for the wife for refusing to live with him and to claim maintenance (*Sirajmahemedkhan Jan Mohamad Khan* v. *Hafizunnissa Yasinkhan*, A 1981 SC 1972, 1981 Cr. LJ 1430 SC). The courts construe the Act in a liberal spirit in favour of the wife (*Sofia Begum* v. *S. Zaheer Hassan*, 1947 ALJ 157; *Abbas Ali* v. *Rabia Bibi*, A 1952 All 145).

The specific ground on which dissolution is claimed must be alleged in the plaint with full particulars.

When dissolution is claimed on the ground of husband's impotency, the

4. The said Mst. Kulsum died in November 1994, leaving the plaintiff, a son, Mst. Hajra, a daughter, and Mst. Bano, mother, and the plaintiff thus inherited 10 out of 18 Sihams of the said Mst. Kulsum in the said property.

5. The plaintiff is thus now owner of 94 *sihams* of 192 sihams in the said property.

6. In reply to a notice sent by the plaintiff to the defendant and the latter has, by a letter dated June 4, 1993 asserted a claim to possession of the said property in lieu of her alleged dower debt of Rs.10,000.

7. The defendant's dower was verbally agreed at the time of her marriage, to be only Rs.2,000.

8. The defendant verbally relinquished her dower debt in the presence of the said Muhammad Ali a few hours before his death.

9. Alternatively, the said dower debt has been satisfied by the usufruct of the said property.

The plaintiff claims :

(1) Possession of 94 out of 192 *sihams* in the said property.

(2) Rs.294 on account of the three year mesne profits in respect of the said share as per account given below.

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court should if the husband applies to that effect, postpone the case for one year and dissolve the marriage only if the infirmity continues at the end of the year. Unless the husband makes an application for such an order a final decree can be passed forthwith. A decree on ground No.(i) does not take effect for a period of six months and if within this period the husband appears and is prepared to perform his conjugal duties, the decree is set aside. If a divorce is claimed on ground (ii) it is not necessary to show that the default is wilful. It is immaterial whether the default was due to poverty, loss of work, failing health or imprisonment or any other cause (*Manak Khan* v. *Mt. Malkhan*, A 1941 Lah 167, 194 IC 567).

If a husband neglected a wife for 10 years, and during the last 2 years was made to pay maintenance money under order of a magistrate, wife can base her suit on the ground of neglect prior to those 2 years (*Asoma Bai* v. *Umar Mahomed*, A 1941 Sindh 28, 193 IC 847). The word neglect in section 2 (ii) implies wilful failure and the words 'has failed to provide' imply omission of duty; consequently, where the wife through her own conduct led the husband to stop maintenance, the court would not allow dissolution of marriage (*Mt. Badrulnisa Bibi* v. *Md. Yusuf*, A 1944 All 23; *Zafar Hussain* v. *Akbar Begum*, A 1944 Lah 236).

In a suit on the ground of *la 'an*, the plaintiff must allege the particulars of the imputation of adultery made by the defendant, i.e, when, and on what occasion,

In the alternative,

(1) that an account be taken from the defendant of the profits which she has realised from the said property from the date of her possession up to date;

(2) if any surplus is found in the defendant's hands after satisfaction of her dower debt, possession of 94 out of 192 sihams in the said property, with proportionate share out of the said surplus; and

(3) If any portion of the dower debt is found to be still due to the defendant, possession of 94 out of 192 sihams in the said property conditional on the plaintiff paying his proportionate share out of the said portion of the dower debt.

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it was made, whether verbally or in writing and in the latter case, the writing should be identified. The exact words of the charge had better be quoted. Though the more reasonable view would be as held in *Khatijabi* v. *Umar Shah*, 52 B 295, 110 IC 131, A 1928 Bom 285 DB, that only false imputation would give a right to the wife to claim divorce, yet, according to the orthodox Muhammedan Law, there is no such restriction and any imputation (whether true or false) would entitle the wife to claim divorce (See Wilson's Anglo-Mohammedan Law). In the case of *Md. Husain* v. *Begum Jan*, 93 IC 1017, a decree was passed on the ground of an accusation without proof that it was false because the High Court considered that in the circumstances it was impossible to prove that it was true. They did not commit themselves to the proposition that even a true charge gives the wife a right to claim divorce. If the charge is that a third person enticed away the woman and committed adultery without her consent, there is no charge against her.

Limitation: 3 years under Article 113. When dissolution is claimed on the ground of impotency advantage of section 22 can be taken as the cause of action is continuous (*Mt. Sahibzadi* v. *Abdul Ghafoor*, A 1939 Lah 454).

Defence: There is ordinarily no defence except denial of the allegations. A suit on the ground of impotency may be defended on the ground that the infirmity is not permanent, but is temporary. In the case of a suit on the ground of *la'an* a retraction is a good defence (*Tufail Ahmad* v. *Jamila Khatun*, A 1962 All 570), but it must be unqualified retraction of the accusation by admitting that it was false, and should be made in the begining of the trial. A qualified retraction made or one made at the end of trial was held to be insufficient (*Abdul Ghani* v. *Nanhi*, 24 ALJ 88; *Abdul Rahman* v. *Mt. Shah Bibi*, 118 IC 680, A 1929 Nag 262; *Shamsannessa* v. *Mir Abdul*, 70 CLJ 289, 186 IC 605; *Saju* v. *Mujsed*, 45 CWN 122).

RESTITUTION OF CONJUGAL RIGHTS

No. 260—Suit for Restitution of Conjugal Rights *(l)*

1. The defendant was married to the plaintiff on November 18, 1988 and is still the wife of the plaintiff.

2. The defendant has, in February, 1994 deserted the plaintiff and lives at her father's place, and without any lawful excuse refuses to come to the plaintiff's house.

The plaintiff claims a decree directing the defendant to live with the plaintiff and to allow the plaintiff a free exercise of his conjugal rights with the defendant.

(l) In such suits **it is necessary to allege the marriage and, if denied, to prove it strictly. The fact that the defendant had deserted the plaintiff should be alleged** (*Lalitagar* v. *Bai Suraj* 18 B 316).

In a Burma case, it was held that before the suit there should be a demand in a conciliatory form (*Ezra* v. *Ezra*, 54 IC 65, 12 Bur LT 120), but in case of Mohammedans this is not necessary (*Binda* v *Kunsilia*, 13 A 126). Such cases are usually instituted by husbands against wives, though, there is nothing in the Mohammedan Law to prevent a wife from instituting a similar suit against the husband, and, in fact, O. 21, R. 33, contemplates the possiblility of such suits. In execution of a decree for conjugal rights the wife cannot be sent to jail, and both the passing and the enforcement of such decrees are entirely within the discretion of the court (*Mohammad* v. *Mst. Saeeda Amina Begum*, (1976) 1 Karn LJ 427, A 1976 Karn 200). A wife cannot be compelled to live with husband if her life is apprehended to be in danger (*Shakila Banu* v. *Gulam Mustafa*, A 1971 Bom 166).

Sometimes it so happens that the relatives of the wife also prevent her from going to her husband. In such cases, an injunction may be claimed against them, but unless it is proved that they are responsible for her not going to the plaintiff, an injunction cannot be granted, and, when granted it will not be to restrain the parents from harbouring her, but to restrain them from preventing her from going to the plaintiff *(Bai Jamma* v. *Dayali*, 44 C 544, 57 IC 571).

Forum : Petitions for restitution of conjugal rights under the Divorce Act (for Christians) or the Hindu Marriage Act, 1955, can only be instituted in forum provided under those Acts (See precedents and notes under "Miscellaneous Applications" *post*), while suits by Muslims can be instituted in the court competent under sections 15 and 20, C.P.C.

Limitation : 3 years under Article 113 but section 22 applies and therefore, such a suit is practically never barred.

Defence: Besides denial of marriage, the defendant wife may successfully plead physical or legal cruelty of the husband as a justification of refusal to go to

No. 261—Suit for Restitution of Conjugal Right with a Prayer for Injunction against the Relatives of the Wife

1. Defendant No.1 is the wife of the plaintiff, and defendant No.2 is the father, and defendant No.3 is the mother of defendant No.1.

2. Defendant Nos.2 and 3 had called defendant No.1 to their house in October, 1994. Since then defendants Nos.2 and 3 have been preventing defendant No.1 from coming to the plaintiff and defendant No.1 now refuses to come to the plaintiff's house.

The plaintiff claims:

(1) A decree directing the defendant to live with the plaintiff and to allow him a free exercise of his conjugal rights.

(2) An injunction restraining defendant Nos.2 and 3 from preventing defendant No.1 from coming to the plaintiff's house.

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the plaintiff. **Full fact of the alleged cruelty must be laid before the court.** Mere disagreement between the familes of the parties is no defence (*Bajid* v. *Satto*, 48 IC 231 Punj) nor petty quarrels between the husband and wife, nor the ill health of the wife (*Kuppammimal* v. *Kuppanana Chari*, 24 IC 380, 26 MLJ 361). But something short of even legal cruelty may in certain cases amount to a good defence as the court has to find from all the circumstances whether it is a proper case in which to pass a decree (*Dular Koer* v. *Dwarkanath*, 34 C 971). It has been held that a false accusation of adultery made by a husband amounts to legal cruelty (*Maqbulan* v. *Ramzan*, 4 OWN 247, 101 IC 261, A 1927 Oudh 154, 2 Luck 482 DB). False allegation by husband that wife has married again, amounts to legal cruelty (*Mohinder Kaur* v. *Bhag Ram*, A 1979 Punj 71). Beatings at irregular intervals extending over a considerable period as a result of which the wife is in a condition of mental anxiety, apprehension and unhappiness, furnish a good defence (*Tanni* v. *Kallu*, 25 ALJ 1100; *Mt. Sofia* v. *Syed Zahir Hasan*, A 1947 All 16, 1947 ALJ 157). Habitual nagging of wife by husband's parents is also a good defence (*Ravindra Nath* v. *Pramila Bala*, A 1979 Orissa 85).

Insanity, leprosy, and venereal disease of the husband have been held to be good defences under the Hindu Law (*Binda* v. *Kaunsilia*, 13 A 126; *Yamuna* v. *Narayan*, 1 B 264), but not impotence of the defendant (*Purshotam* v. *Mani*, 21 B 610). Even impotence not known to the wife at the time of marriage may be a defence under the Mohammedan Law, as that is a good ground for annulment of marriage. Sodomy or beastiality may also be a good defence under any law. Non payment of prompt dower is no defence according to the Allahabad High Court (*Hijaban* v. *Ali Sher*, 19 ALJ 880), but according to Bombay High Court this will be a defence in the sense that a decree conditional on payment of dower will be passed, but if the marriage has been consummated non-payment of dower will in no case be a defence

No. 262—INTERPLEADER SUIT *(m)*

1. On June 15, 1989, one Ramkishan, now deceased deposited with the plaintiff for safe custody, four G.P. Notes Rs.1,000 each (being Nos.____) and one box of jewellery.

2. The said Ramkishan died in 1992.

3. The defendant No.1 claims the said notes and box from the plaintiff as the adopted son of the said Ramkishan.

4. Defendant No.2 also claims the same from the plaintiff as the widow of the said Ramkishan and denies the adoption of defendant No.1.

5. The plaintiff is ignorant of the respective rights of the defendants.

6. The plaintiff has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such person as the court shall direct.

7. There is no collusion between the plaintiff and either of the two defendants.

The plaintiff claims:

(i) that the defendants be restrained by injunction from taking any proceeding against the plaintiff in relation to the said property;

(*Abdul* v. *Hussenbi*, 6 BLR 728; *Bai Honsa* v. *Abdulla*, 30 B 122; see also Mulla's Mahomedan Law [XVIII Edn] section 293). But courts have always discretion to grant the relief on any conditions they think proper, e.g., payment of dower (*Anis Begum* v *Malik Muhammad Itafa*, A 1933 All 634, 1933 ALJ 1079). That defendant is under 13 years of age, will be a good defence, as intercourse with a wife of that age is a criminal offence. It has been held that such a decree passed against a minor is a nullity (*Mathein* v. *Maungpa*, A 1937 Rang 226, 170 IC 532). An agreement by the plaintiff to allow the defendant to live separately from the plaintiff is void and can be no defence (*Abdul* v. *Hussenbi*, 6 BLR 728). Abandonment by a Hindu husband of his wife may be a good defence (*Sitabai* v. *Ram Chandra*, 12 BLR 373, 6 IC 525; *Baburam* v. *Mt. Kokla*, 22 ALJ 68, A 1924 All 391, 79 IC 634; *Bai Jur* v. *Nar Singh*, 101 IC 403, 29 BLR 332); gross failure to perform marriage obligations e.g., not caring to call the wife for ten years, not consummating marriage and marrying another wife and living with her, may be a ground for refusing a decree (*Imam Baksh* v. *Amiran*, 107 IC 607 L; *Jagram* v. *Lakshmi*, 1940 MWN 525). Long unexplained delay may be a ground for refusing the relief which is discretionary (*Mt. Bano* v. *Ghulam*, 165 IC 961, A 1936 Lah 752).

(m) Such suits cannot be brought by an agent or tenant against his principal

(ii) that they be required to interplead together concerning their claims to the said property and it may be declared which of the defendant is entitled to it;

Add if necessary, (iii) that the said property may be allowed to be deposited in court or some person may be authorised to receive the same pending this litigation ;

(iv) that upon delivery of the same to such person or deposing the same in court, the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 263—Interpleader Suit

(Form No. 40, Appendix A. C.P.C.)

(Title)

AB, the above-named plaintiff, states as follows :

1. Before the date of the claims hereinafter mentioned, *GH* deposited with the plaintiff [*describe the property*] for [safe-keeping].

2. The defendant *CD* claims the same [under an alleged assignment thereof to him from *G H*].

3. The defendant *EF* also claims the same [under an order of *G H* transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the court shall direct.

6. The suit is not brought by collusion with either of the defendants.

The plaintiff claims :

(1) That the defendants be restrained by injunction from taking any proceeding against the plaintiff in relation thereto;

(2) that the defendants may be required to interplead together concerning their claims to the said property;

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or landlord so as to compel him to interplead with any person claiming adversely to such principal or landlord (O. 35, R. 5): but a Railway company is not an agent for the purposes of this rule, (*Chaganlal* v. *B.B.&.C.I. Ry.Co.*, 17 BLR 330). Requirements of a plaint are given in O.35, R. 1.

Limitation : 3 years under Article 113.

(3) that some person be authorised to receive the said property pending such litigation;

(4) that upon delivering the same to such [person], the plaintiff be discharged from all liability to either of the defendants in relation thereto.

PARTITION

No. 264—Suit for Partition of Joint Hindu Family Property *(n)*

1. The plaintiff and the defendants are members of a joint Hindu family and their relationship with each other will appear from the following pedigree :

Pedigree

* * * * *

Defence : Any defendant may plead that there is collusion between the plaintiff and the other defendants; or that he never preferred any claim to the property, or that he is the owner of the property.

(n) Such suit can be brought by any co-parcener or by a purchaser of the interest of any co-parcener. A minor co-parcener cannot however, bring a suit unless it is proved that partition would be for his benefit. He should, therefore, allege this in his plaint. Even if an agreement for partiton is entered into between the minor's father and his brother it cannot be enforced unless it is shown that it was fair and not injurious to minor's interest (*Kishan Lal* v. *Lachmichand*, 170 IC 577, A 1937 All 456). In view of the provisions of the Hindu Succession Act females can acquire absolute interest in the separate as well as coparcenary property of a deceased Hindu. As such they can claim partition. But an exception has been made in respect of a dwelling house in which they can claim a separate share only when male heirs choose to divide their respective shares. The dwelling house does not include a tenanted house (*Narshimah Murthy* v *Susheelabai*, A 1991 SC 1826).

In Punjab, as a matter of custom, a son cannot sue in the lifetime of his father (*Punjab National Bank* v. *Jagdish*, 163 IC 114, A 1936 Lah 390). According to the Gujrat and Bombay High Courts, a son cannot sue in the lifetime of his father if the latter is joint with his brothers or father. (*Aher Hamer Duda* v. *Aher Duda Arjan*, A 1978 Guj 10; *Apaji* v. *Ramchandra*, 16 Bom 29, FB), but this exception has not been accepted by other High Courts (Gupte's Hindu Law, III Edn., Article 41).

Parties : All coparceners, females who are legally entitled to a share, puchasers and mortgagees of the interests of coparceners, are necessary parties to a partition suit. Females entitled to a provision for their maintenance and marriage are also considered, by some, to be necessary. In any case, they are proper parties. A grandson is not a necessary party as his interest is represented by his father (*Thakur* v. *Sant Singh*, A 1933 Lah 465, 141 IC 567). In a suit for partition all the co-

2. The property detailed at the foot of the plaint is the property of the said joint family and the parties are in joint possession of the same. (*Or*, property entered in schedule A is in the possession of the plaintiff, that entered in schedule B is in possession of defendant No.1, and that entered in schedule C is in possession of defendant No.2).

3. The share of the plaintiff in the whole of the said property entered in the said three schedules is 1/4th. [*If the plaintiff is a minor, add an allegation about benefit*].

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sharers are plaintiffs and defendant, and in the absence of even one party, the suit cannot proceed (*Ram Mehar* v. *Surat Singh*, 1989 (1) HLR 628 (P&H); *Ramchandra Pillai A.* v. *Valliammal*, (1987) 100 LW 486 (Mad) (DB). Where division between two branches of a family is claimed, it is sufficient if the heads of those branches are parties and it is not necessary to join all coparceners (*Bishambar* v. *Kanshi*, 1 L 483, A 1932 Lah 641). In a suit by auction purchaser of the share of a coparcener, such coparcener is not a necessary party (*Delu Singh* v. *Jagdip*, A 1948 Pat 317; *Santosh Chandra* v. *Gyan Sunderbai*, 1974 MPLJ 679). A mortgagee of undivided share is a proper party as his security will, after partition, be upon divided share. If he has proceeded to a sale on his mortgage, the auction purchaser will be a necessary party (*Jadu Nata* v. *Parameshwar*, A 1940 PC 11, 185 IC 234).

The suit should embrace the whole coparcenary property, unless any portion is not immediately available for partition or where it is held jointly by the family with a stranger (*Purshottum* v. *Atmaram*, 23 B 597; *Harey H. Sinha* v. *Hari C. Sinha*, 40 CWN 1237; *Santosh Chandra* v. *Gyan Sunderbai*, 1974 MPLJ 679; *Hardeo* v. *Mahadev*, A 1966 All 543). If the suit is by a purchaser of the interest of a coparcener, he may sue only for partition of the property in which he has a share (*Ram Mohan* v. *Mulchand*, 28 A 39; *Delu Singh* v. *Jagdip*, A 1948 Pat 317, 28 Pat 398), but according to the Bombay, Calcutta and Madras rulings, even he must sue for a general partition (*Murarrao* v. *Sitaram*, 23 B 184; *Palani* v. *Masa*: 20 M 243; *Koer Hasmat* v. *Sunder Das*, 11 C 396). The High Court of Andhra Pradesh has held that an alienee of a coparcener's interest in the joint property has a legal right to sue for a general partition ignoring the private partition effected between the coparceners. In such a suit he can pray that his alienor should be allotted the items which he has purchased (*Malisetti Redda Apparao* v. *Chamarathi Ramchandran*, (1971) 1 APLJ 314). [See discussion in Gupte's Hindu Law, (III Edn.), Art. 48, note 82]. But in the converse case of a suit by coparceners against the auction-purchaser of a share in a particular property, there is no difference of opinion as to the right to sue for partition of such property alone.

If some property is left out no objection is taken by defendant or if by consent of parties some property is left in joint possession, a subsequent suit for its partition will lie (*Gopulal* v. *Gajasa*, A 1932 Nag 92, 138 IC 186), but not if the decree for partition declares that any property will remain joint (*Sasimohan* v.

4. The defendant No.1 is the father of the plaintiff and manager of the said family.

5. The said defendant No.1 is leading an immoral life and has incurred enormous debts and has been transferring portions of the family property, and the plaintiff apprehends that the whole family property would be wasted. The defendant No.1 has made the following, among other, mortgages and transfers :

* * * * *

6. For the above reasons it would be to the plaintiff's benefit to have his share separated by partition.

The plaintiff claims partition of the said property and separate possession of the plaintiff's 1/4 share.

Harinath, 32 CWN 1023). If any property is left out, the court has no power to compel plaintiff to include it but should dismiss the suit (*Chandi Shah* v *Bhora Shah*, 120 IC 544, A 1930 Lah 286).

If the properties are within the jurisdiction of different courts, section 17, C.P.C. permits a suit to be brought in any such court, but if a part of the property is within the jurisdiction of a foreign court, the same may be excluded from the suit brought in India. As a matter of fact, even if such property is included, Indian Courts will have no jurisdiction to partition it nor can any order be passed as regards movables outside India when the defendant does not reside in India (*Prem Chand* v. *Hiralal*, A 1928 Nag 295, 111 IC 135).

All that has to be alleged in a plaint for partition is the plaintiff's title to the share claimed, with such particulars of that title as are necessary, and the fact that the property is joint. Reasons for partition are not necessary to be alleged, e.g., that there are family quarrels or differences between co-sharers, etc. The mere fact of the property being joint gives a sufficient cause of action for a suit for its partition, as a right to claim partition is incidental to every joint ownership (*Kishan Lal* v. *Lotan Singh*, 39 PLR 876). Neither need any prior demand for partition be alleged, as none is necessary to enable the plaintiff to sue for partition (*Rajendra* v. *Brojendra*, 37 CLJ 191). Of course **when a suit is by a minor member of the coparcenary, the reasons for claiming the partition must be alleged.** For though a minor has a right to claim partition the court in its discretion may refuse it, if it is not for his benefit (*Bishundas* v. *Seogeni Rao*, A 1953 SC 280).

The date of the cause of action for a suit for partition would be the date when plaintiff acquired an interest in joint property. When the plaintiff is a coparcener, this would be the date of his birth. If the plaintiff is a purchaser, the date would be the date of his purchase. If the plaintiff has been excluded from the enjoyment of joint property, the date of such exclusion may be alleged as that of the cause of action.

No. 265—Suit for Partition by Purchaser of the Interest of one Coparcener

1. The defendants are members of a joint Hindu Family.

2. The property detailed in the plaint is part of the joint property of the said family and the defendants have been, and are, in joint possession of it.

It should also be mentioned in the plaint whether the plaintiff is or is not, in joint possession of the property, as that would determine the court-fee to be payable. In the relief claimed, the plaintiff need only claim partition and separate possession. He need not pray for appointment of commissioner to carry out the partition, or for any other matters of detail and procedure, as it is for the court to determine whether a commission is necessary or not and to give such directions for carrying out the partition as it thinks fit. But if the plaintiff wants any special matter to be taken into consideration for which an adjudication may be necessary, e.g., that the plaintiff has spent his own money in improving a particular item of the joint property and wants that property to be allotted to him, or the value of the improvement to be credited to him, he must not only make a prayer for the same but should also make allegations of such facts in the body of the plaint. In a joint Hindu family, if the manager has been in receipt of cash for the family, the plaintiff may ask for an order to him to render accounts of the savings in his hands for the purpose of partition (*Vikuntam* v. *Avudiappa*, 170 IC 234, A 1937 Mad 127). This account is unlike that of a trustee and is intended only to discover what are the joint properties of the family and in the absence of fraud or other improper conduct, the parties have no right to look back and claim relief against past inequality of enjoyment of the members (*Joytibali* v. *Lachhmeshwar*, A 1930 Pat 260; *Bhaurao* v. *Mangha*, 1961 NLJ Notes 435; *Jyoti Bhushen* v. *Gopal Chand*, 1959 ALJ 110; *Budhu* v. *Raghu*, A 1973 Orissa 85). The members are not entitled to any interest on the savings. All expenditure made by him must be accepted and a member can only show that they are not incurred in fact, but can not show their impropriety. The plaintiff may also ask for account from the date when separation takes effect.

Mesne profits are not ordinarily allowed in a partition suit but when plaintiff has been kept out of enjoyment he may be given mesne profits (*Sanbeerangonda* v. *Basangonda*, 184 IC 337, A 1939 Bom 313). If a defendant also wishes to have his share partioned off, he may make an application to the court to that effect, and the court shall separate his share also. If the defendant does not so desire the court will seperate the share of the plaintiff alone but ascertain and declare the shares of all of them (O. 20, R. 18) There is clear distinction between a *malafide* partition and an unreal or fictitious partition.

When the intention is that the past creditors of the father may be defeated or delayed and no provision is made in the partition for the payment of their debts, the partition is *malafide* and is not binding on the past creditors. The son may, how-

3. On November 14, 1982, at an auction sale in execution of decree No.475 of 1980, passed by the 1st Munsif of Burdwan, the plaintiff purchased the interest of defendant No.1 in the said property, but has not obtained possession (*or*, has on June 20, 1984, obtained joint possession through the court).

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ever, intend, that the son's interest may be safeguarded against future liabilities which may be contracted by the father. In such a case the partition may be genuine and not unreal. Where the intention is to defeat or delay the past creditors as well as to save the property from the clutches of the future creditors, the partition may be *malafide* as far as the past creditors are concerned, but it may not be unreal or fictitous as far as the future creditors are concerned (*Hirday Narain Rai* v. *Ram Das*, A 1951 All 606). Even if the motive is to defeat or delay the creditors and to save the property, the partition will be binding between the members, because the desire to save property from creditors will not prove fraud (*Lilawati* v. *Paras Ram*, A 1977 HP 1).

Under Hindu Law, joint status is a matter of intention. Separation results from intention to sever the joint status followed by conduct to effectuate that intention. Without such intention mere specification of share does not result in separation (*Ganga Narain* v. *Brijendra Nath Chaudhary*, A 1967 SC 1124). Definite and unequivocal intention of a member of joint family to separate himself can be expressed in several ways, one of the ways being the institution of a suit for partition of property (*Asa Nand* v. *Baldev Raj*, A 1975 All 139; *Nasirabad Urban Cooperative Bank Ltd.* v. *Gyan Chand*, A 1980 Raj 73). A coparcener's declaration of intention to separate must also be brought to the notice of other members and then it relates back to the date of manifestation of intention (*R. Raghavamma* v. *Cheehamma*, A 1964 SC 136). Revenue paper entries of ownership in equal shares alongwith some co-owner's statement that they are separate and render accounts to different co-owners according to their shares is the best evidence of separation (*Durga Pd.* v. *Ghanshiam Das*, A 1948 PC 210; *Charanjit Das* v. *Debi Das*, A 1957 All 522).

No right is acquired by mere mutation of the name in the revenue papers (*Kanhaiyalal* v. *Ramkunwarbai*, 1995 MPLJ 998, *Nirman Singh* v. *Lal Rudra Partab*, A 1926 PC 100). The entries in the Record of Rights regarding the factum of partition is a relevant piece of evidence in support of the oral evidence adduced to prove the factum of partition. Under the Hindu Law it is not necessary that the partition should be effected by a registered deed, even a family arrangement is enough to effectuate the partition between coparceners and to confer right to a separate share and enjoyment thereof (*Digambar Adhar Patil* v. *Devram Girdhar Patil*, A 1995 SC 1728). Mutation entries are inadmissible in evidence and cannot be relied upon (*Pakhar Singh Atwal* v. *State of Punjab*, A 1995 SCW 1565). Mere disagreement between father and son does not amount to a declaration of son's intention to separate from the family (*Indra Narayan* v. *Doop Narayan*, A 1971 SC

4. The share of defendant No.1 in the said property on the date of the said auction sale, was one-third.

The plaintiff claims partition and separate possession of the said one third share.

No. 266—Suit for Partition of Joint Family Property

Para Nos.1 and 2 as in precedent No.265.

3. Of the houses mentioned in the list of joint property at the foot of the plaint, the house No.1 has all along been in the possession of the plaintiff and his father, and the plaintiff has built a second storey on it with his self earned money at a cost of Rs.62,000.

1962). Where the court decrees a suit for partition brought on behalf of a minor, such decree relates back to the date of the institution of the suit for the purpose of determining the date of the severance in status (*Lakkireddi* v. *Lakkireddi*, A 1963 SC 1601; *Narsha Begum* v. *Arumuga Theoar*, A 1974 Mad 273; *Wasudeo Madhaorao* v. *State of Maharashtra*, 1975 Mah LJ 404). Where both the plaintiff and the defendant are minors, and a partition is alleged to have taken place between them it cannot be held to be binding unless confirmed or ratified by the minors on coming of age (*Tukaram* v. *Gangawai*, A 1952 Hyd 23).

Properties having joint family nucleus till the date of partition are to be treated as joint family properties. In the case of a Hindu joint family, there is a community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the coparcenery property. The possession of one therefore, is the possession of all. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other. (*Annasaheb Bapusaheb Patil* v. *Balwant Bapusaheb Patil*, A 1995 SC 895, 1995 ACJ 19 (SC), (1995) 2 SCC 544). There is no presumption that a family because it is joint, possessed joint property and therefore the person alleging the property to be joint has to establish that the family was possessed of some property with the income of which the property could have been acquired (*Surendra Kumar* v. *Phoolchand*, 1996 (2) SCC 491).

According to the notions of Hindu law, hereditary priesthood must be treated as immovable property capable of partition (*Bharthu* v. *Bhushan Prasad*, A 1952 Nag 307; *Angoorbala* v. *Devabrata*, A 1951 SC 295; *Rajkali* v. *Ramratan*, A 1955 SC 493). There is no justification why an insurance policy taken in the name of a member of a joint family should not be taken into account while making a partition, if the premia of the policy were paid out of the joint family funds (*Manharran Lal* v. *Jagiwan Lal*, A 1952 Nag 73).

4. Of the movable property of the joint family detailed in the plaint, the plaintiff is in possession of the following articles of jewellery and is

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Where a father of joint Hindu Family sells a specific property to a stranger and the sale is neither for legal necessity nor for payment of an antecedent debt, the sons are entitled, instead of bringing a suit for general partition, to sue for partition and possession of their share in the particular property which has been sold in order to get rid of the joint possession of the stranger (*Savandarbai* v. *Ram Ji Govinda*, 1952 NLJ 435). A purchaser of the share of the joint family property is entitled on partition of the share to which the vendor was entitled on the date of sale. The purchaser has no right of possession either exclusive or joint, his only right is to sue for partition as he is not tenant in common with other members (*Bhagwati Prasad* v. *Ushadevi*, A 1995 MP 205).

A partition once made cannot be reopened except on the ground of fraud or mistake in including property which did not belong to the joint family. If certain property is omitted from partiton it is not necessary to reopen partition but the excluded property can be divided according to the shares. It continues to be joint property till it is thus divided (*Balaji Ganoha* v. *Annapurnabai*, ILR 1952 Nag 99). Other grounds on which partitions can be reopened are (1) when partition is prejudical to the interest of minor coparcener (2) when it took place in the absence for an adult coparcener or for other allied causes (*Baidya Nath Misra* v. *Loknath Rath*, 1974 (1) CWR 163). If it can be shown that partition was obtained by fraud, coercion, misrepresentation or undue influence, it can be reopened. If some members are minors and partition is proved to be unjust and unfair and detrimental to their interest, it can be reopened, no matter when. it had taken place (*Ratnam Chettiar* v. *Son Kuppuswami Chettiar*, A 1976 SC 1; *Sukhrani* v. *Hari Shanker*, A 1979 SC 1436). There is no justification, however, for reopening the partition merely because some properties have not been partitioned or unequality of share (*Harekrishna Sahu* v. *Bhagirathi Sahu*, (1974) 40 CLT 597. A 1975 Orissa 97).

Except in the case of reunion, the mere fact that separated coparceners choose to live together or act jointly for purposes of business or trade in their dealings with properties would not give them the status of coparceners under the Mitakshara Law (*Bhagwati Prasad* v. *Rameshwari Kuer*, A 1952 SC 72; *Kalyani* v. *Narayan*, A 1980 SC 1173). An attachment of the undivided share of a member of Mitakshara causes a severance of status (*Muneswari* v. *Jugal Mohini*, A 1952 Cal 368).

A suit by a member of joint Hindu family for partition of residential house impleading only such of the members as are interested in the property in suit, is maintainable. Members who are interested in the joint family properties other than the property in suit, are not necessary parties. The plaintiff need not bring into the hotchpotch all the properties which belong to the joint family (*Kasiwar Basu* v. *Nakuleswar Bose*, A 1952 Cal 738).

The court may pass a preliminary decree under O. 20, R. 18 declaring the share of the parties to be divided actually by a final decree at once, e.g., in case of

prepared to place it in the hotchpotch, and the rest is all in the possession of the defendant (*Description of jewellery*).

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cash. If it passes preliminary decree, the subsequent procedure differs in different states. In some states, the case continues and the court takes steps to pass a final decree without any application by the plaintiff while elsewhere the court leaves the case after passing a preliminary decree and does not take up the matter of actual partition until moved to do so. Where the latter practice prevails, there is no limitation for such application (*Lalta Prasad* v. *Brahma Din*, 5 Luck 280). Where a prayer for *mesne profits* is also joined, such profits can be awarded in final decree (*Swaminath Odyar* v. *Gopal Swami Odayar*, (1938) 2 MLJ 704, 1938 MWN 1214). In a partition decree court can impose a condition that plaintiff shall discharge debts binding on the family from the joint estate (*Arvapalli Subramaniyam* v. *Official Receiver Guntier*, (1975) 2 APLJ 251).

Family debts : If the father has incurred any debts which the son is under a pious obligation to pay, either sufficient property must be allotted to the father in addition to his proper share to cover the son's proportion of debts or the debts must also be equally divided between the co-sharer. If this is not done the creditor will be entitled to recover the debt from the shares of the sons also after partition (*Subramania* v. *Sadapathi*, 110 IC 141, 51 M 61, A 1928 Mad 657; *Ganga Ram* v. *Lalumal*, 125 IC 39; *S.M. Jakati* v. *S.M.Borkar*, A 1959 SC 282) but the sons should be made party to the suit or decree before their share can be attached (*Surajmal* v. *Motiram*, 41 BLR 1177, A 1950 Bom 278; see contra, *Suryanarayana* v. *Ganesulu*, A 1954 Mad 203). The proper course is to make provision for payment of the debts and to partition the rest of the property only (*Sat Narain* v *Sri Kishen*, 164 IC 6, 40 CWN 1382, A 1936 PC 277; *Krishnamurthy* v. *Sundarmurthy*, 13 IC 251, 32 M 381; *Virupaksha* v. *Chanalal*, A 1943 Mad 652, 1943 MWN 429). Creditors of the father can be made parties to a suit for partition and the father can insist that provision should be made in the decree for payment of those debts provided of course they are legally binding on the sons (*Gangaram* v. *Lalumal*, 125 IC 39). Where an alienee is also party, attempt should be made as far as possible to allot to him the property alienated (*Virupaksha* v. *Chanalal*, A 1943 Mad 652; see also *V.D. Deshpande* v. *Kusum Kulkarni*, A 1978 SC 1791).

Limitation : 3 years under Article 113 of the Act of 1963; but as this is a continuing right under section 22, partition suit can be filed any time during joint possession of the joint property. If the plaintiff is out of possession, limitation is 12 years from the date of exclusion (Article 110). Where the plaintiff was a purchaser of the interest of a coparcener, old Article 120 (now Article 113), was held to apply if he was not in joint possession (*Bai Shevant Bai* v. *Janardhan*, 184 IC 23, A 1939 Bom 322). The same limitation applies in cases of movable property also (*Ganesh Dutta* v. *Jawach*, 31 C 262 PC). But if the parties are not members of joint Hindu family, Article 110 will not apply, and Article 64 or 65 will apply, depending upon the nature of claim. The limitation is 12 years under both Articles.

The plaintiff claims (1) Partition of the said property and separate possession of his 1/4th share.

(2) That house No.1 be allotted to the plaintiff's share.

Defence : The defendant may dispute the plaintiff's share. He may plead that the plaintiff has been out of possession and should pay *ad volorem* court-fee, or that the plaintiff's title has been extinguished by adverse possession of the defendant, but a mere want of possession of the plaintiff, **without actual exclusion**, is no defence, hence a plea that the plaintiff, has not been in possession within 12 years is not ordinarily sustainable in such cases. If any property has not been included in the partition, the defendant may take that objection. If he has substantially improved any property with his separately acquired money, he may either claim that the portion so improved should be allotted to him (*Nutbehari* v. *Nainilal*, 167 IC 321, 41 CWN 613, A 1937 PC 61), or may claim credit for the expenses incurred (*Dayaram* v. *Shyam Sunder*, A 1965 SC 1049). He may plead that there has already been a private partition between the parties, but such previous partition must have been made according to the rights of parties and not merely for convenience of enjoyment (*Sarat Chandra* v. *Ganga Charan*, 43 CWN 181, 698 CLJ 527). He may plead that any property is impartible under any law or custom or may set up an agreement of the coparceners not to make a partition as such agreement is valid (*Kameshwar* v. *Rajbansi*, A 1943 Pat 433). He may pray for sale of the property, instead of partition, under section 2, Partition Act, showing that the property is incapable of proper enjoyment after partition, e.g., that a house is too small (*Chandrawati* v. *Kallu*, A 1973 All 406). A family settlement can be oral, which can be proved subsequently, and the same does not require registration (*Ram Lal* v. *Harbhagwan Dass*, (1995)1 Punj L R 368 (P&H); *Gulabchand* v. *L.Rs. of Ganpatlal*, 1995 AIHC 2116 Raj DB).

If the suit is by a purchaser of the share of coparcener in a dwelling house belonging to an undivided family, the defendant may offer to purchase the plaintiff's share under section 4, Partition Act. Even a defendant may be treated as a plaintiff for the purpose of section 4 (*Satyabhama* v. *Jatindra Mohan Deb*, 116 IC 161, A 1929 Cal 269 DB; *Shesadhar* v. *Kishen Prasad*, 190 IC 117 Pat; see also *Sakhawat* v. *Ali Husain*, A 1957 All 357 FB). An application under section 4 may be made after the preliminary decree (*Mian Jaffar* v. *Mt. Bibi*, A 1943 Pat 79; *Dwarkadas* v. *Godhana*, A 1939 All 313); but not in execution after decree (*Mst. Mohamafi Begum* v. *Md. Nabi*, 1954 ALJ 621), or even at the appellate stage (*Satyabhama* v. *Jatindra Mohan Deb*, 116 IC 161, A 1929 Cal 269 DB). "Undivided family" does not mean Hindu family only but the family may be Mohammedan (*Rukia Bibi* v. *Rajia Bibi*, A 1953 Mad 298; *Tejpal Khandelwal* v. *Mst. Purnimabai*, A 1976 Orissa 62), or a Christian family (*Chatterji* v. *Maung Mye*, A 1940 Rang 53; *Tejpal Khandewal* v. *Purnimabai*, A 1976 Orissa 62). Any one of the defendants may apply for separation of his share also, and there is no objection to the prayer being made, in the alternative, in the written statement in which the defendant disputes the plaintiff's

(3) That the material of the second storey of house No.1 be not taken as part of the joint property.

(4) That if the house No.1 be not allotted to the plaintiff, he should be given credit for the cost of materials of the second storey.

No. 267—Suit for Partition between Other Co-owners (o)

1. The house described below was the property of one Ramlal.

Description of the House

* * *

2. The said Ramlal left two sons, Kishanlal and Shamlal.

3. The said Shamlal transferred, under a sale-deed, dated June 4, 1990, his half share in the said house to the plaintiff.

4. The said Kishanlal transferred, under a sale-deed dated January 15,1992, his remaining half share in the said house to the defendant.

5. The defendant is in possession of the said house.

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right to claim partition. The court cannot refuse the request except for some special reasons (*Loke Nath* v. *Radha Gobinda*, A 1926 Cal 184, 86 IC 76 DB), but such a request cannot be made after the preliminary decree has been passed (*Ramnarain* v. *Ramdas*, 111 IC 713, A 1929 All 65 DB). There is no objection to his claiming share by metes and bounds even in property in which plaintiff has no share but one of the other defendants claims a share (*Insane Nilgobind* v. *Sri Rukmini*, A 1944 Cal 42).

He may plead that he has been in long possession of any item of property or has improved it, and therefore it should be allotted to him (*Dhian Singh* v *Dalip Singh*, 18 Lah LT 10).

(o) Every co-sharer in the joint property, whether a minor or a major, is entitled to bring a suit for partition of the property. All the remaining co-sharers must be made defendants. It is essential that the plaintiff should be in actual or constructive possession (which may be through another co-owner whose possession is *prima-facie* the possession of the plaintiff also). If, however, he is not in possession at all of any portion of the joint property, and there has been a complete ouster, he must sue for recovery of possession and partition. If, however, the possession of the plaintiff is admitted or established over what forms part of the joint estate the suit does not cease to be one for partition merely because the defendant denies the title of the plaintiff to a share of the estate or to specific lands of the estate and asserts a hostile and adverse possession therein (*Sabjan* v. *Asanulla*, 101 IC 622, 31 CWN 406).

All that has to be alleged in the plaint is the bundle of facts showing the plaintiff's title to the share claimed, and showing that the property is joint. It

The plaintiff claims possession of a separate half share of the said house by partition thereof.

DECLARATION

No. 268—Suit for Declaration of Title *(p)*

1. The plaintiff is the owner of the fields detailed at the foot of the plaint and is, and has been, in possession thereof as such owner.

2. The defendant made an application to the settlement officer that he was the owner of the land and that the plaintiff was his tenant, and that

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should also be alleged whether the plaintiff is in possession or not. If partition is sought in a particular way, e.g., by allotment of a particular property to a particular co-sharer, fact on which such claim is founded should be alleged. Almost the same pleas as are mentioned in the last note may be urged by the defendant. All equities between the co-owners should be worked out, e.g., if the property was jointly purchased but the defendant had advanced more than half the money, he can claim the excess due from the plaintiff before allowing partition (*Poovanalingam* v. *Veerayi*, A 1926 Mad 186, 22 MLW 782). A co-sharer cannot be compelled to pay for the improvements made on the common property by another co-sharer without the former's consent. But the court will make every effort to effect partition in such a way that the cosharer who made the improvements, is allotted the portion of the property where the improvements stand so long as this can be done without prejudice to the other co-sharers (*Kochummini Kassinkunju* v. *Sankara Pillai Velayudhen Pillai*, 1972 Ker LJ 883).

(p) A declaration can be made only in respect of (a) any right to any property or to any legal character (b) that the defendant has denied or is denying and (c) where the plaintiff is not in a postition to claim any further relief (*State of M.P.* v *Khan Bahadur H.H. D.H. Bhiwandiwala*, A 1971 MP 65). The power of court to grant a mere declaratory decree is not confined to section 34 Specific Relief Act only. Such decree can be granted under section 6, or O.8, R. 7 C.P.C. (*Ramaraghava Reddy* v. *Seshu Reddy*, A 1967 SC 436. Declaration that the compromise decree is not binding upon the deity). A suit for declaration that the termination of services is illegal and the service subsists would lie if there has been violation of any constitutional or statutory provision (*High Commissioner* v. *I.M.Lal*, 1946 ALJ 266; *Surendra Nath* v. *Indian Air Lines Corporation*, A 1966 Cal 272). But suit for declaration about subsistence of purely personal contract will not lie as it is not a legal character (*Guntur Tobacco Co.* v. *Tarabettur*, A 1965 AP 266; *Rama* v. *Narain*, 39 M 80). A suit would not lie for a declaration of rights affecting only pecuniary liability (*Mahabir Jute Mills* v. *Kedar Nath*, 1959 ALJ 890; *Nathuram* v. *State*, 1961 MPLJ Notes 172), nor a suit for a declaration that the plaintiff did not infringe defendant's trade mark (*Mohammad Abdul Kadir* v. *Finlay*, 111 IC 136, A 1928

officer has, by an order, dated January 19, 1996, directed that the defendant should be entered in the papers as owner of the said fields.

The plaintiff claims a declaration that he is the owner of the said fields.

Rang 256, 6 R 291), but a declaration that plaintiff is the legitimate son of the defendant can be given (*Haji Abdul Karim* v. *Mst. Sarayya*, A 1945 Lah 266). A declaration of merely legal consequences of want of registration of compromise cannot be made (*Uday Chand* v. *B.H. Parmer*, 44 CWN 1063). **The plaint should, therefore, show both these things, viz. (1) the plaintiff's title to the property or to the legal character and (2) that the defendant has thrown a cloud on it,** e.g., by claiming it as his own or by denying the plaintiff's title, or by having his name recorded in the papers as a proprietor of the property claimed by the plaintiff. The mere assertion by a plaintiff in possession of property that the defendant intends to transfer the property and that he has declined to admit plaintiff's right does not amount to an invasion of plaintiff's right or to a clear threat to invade that right so as to give cause of action or a suit for declaration (*Nanak* v. *Faqira*, A 1940 All 424, 1940 ALJ 459). A suit simpliciter for a negative declaration about the status of the defendant is not maintainable (*Mool Raj* v. *Atma Ram*, A 1986 J & K 24). Though a declaration can be claimed about plaintiff's right and not about absence of defenfdant's title, yet where the former followed from the latter, the court allowed the suit (*Jasoda* v. *Mangal*, 45 CWN 570). The object of the proviso to section 42 (now section 34), Specific Relief Act is to prevent multiplicity of suit by preventing a person from putting a mere declaration of right in one suit and then later seeking the remedy without which the declaration would be useless. The "further relief" referred to in the proviso must be a relief flowing directly and necessarily from the declaration sought and a relief appropriate to and necessarily consequent on the right or title asserted (*Manku Charan* v *Hari Narain*, A 1947 All 351).

Declaration is a discretionary relief and cannot be claimed as of right. It will be refused if it is useless to grant it (*Sain Das* v. *Chowla*, A 1940 Lah 1, 186 IC 646), or it is unnecessary because mere denial of plaintiff's right is not likely to injure him (*Ahmad Yar* v. *Haji Khan*, A 1944 Lah 110). It will also be refused if the object of the suit is to evade payment of stamp duty and court fee (*Anil Kumar* v. *Suman Bala*, A 1980 Delhi 103). If the plaintiff's title depends on a contract entered into in contravention of government rules, the court may refuse the declaration, e.g., if a *patwari* acquires land within the circle (*Shiamalal* v. *Chakkenlal*, 22 A 220; *Sheo Narayan* v. *Mata Prasad*, 27 A 73).

A plaintiff's right to maintain a mere declaratory suit must be determined as it exists on the date of the suit and is not affected by the fact that during the pendency of the suit, the right to claim consequential relief has also accured to him. The expression "omits to do so" in the proviso to section 42 (now section 34) of the Specific Relief Act, apparently refers to the ability of the plaintiff on the date of the institution of the suit and cannot be stretched to include subsequently acquired

No. 269—Suit for Declaration and Alternatively for Possession

1. The plot of land lying to the south of the plaintiff's house in *mohalla Kazi* in the town of Basti and shown in the map annexed to the plaint (which should be deemed to be part hereof) by letter A is part of the plaintiff's said house and belongs to him.

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ability also (*Jethu Singh* v. *Kishan Singh*, A 1951 Pepsu 48). A suit for mere declaration that the plaintiff is owner of a portion of the amount deposited in court without consequential relief for refund is maintainable if at the time of the institution of the suit the amount is in possession of the court pending the decision of the suit (*Neelamoni Sahu* v. *Khetrabasi Sahu*, A 1954 Orissa 37). Suit for declaration that plaintiff is owner of truck which was seized by police from custody of plaintiff is maintainable without seeking relief for recovery of possession, as the custody of police is for the benefit of the party found entitled to its possession (*S. Gurdial Singh* v. *Sunda Hire Purchase Corporation*, A 1970 Pat 7). A suit for declaration about date of birth is maintainable because the date of birth is intermingled with the status of a person (*State of Orissa* v. *Indapali Babaji*, 1971 (2) CWR 596).

Absence of prayer for consequential relief is immaterial when the plaintiff is incompetent to seek any further relief (*Jyotermoyee Devi* v. *Durgadas Banerjee*, A 1976 Cal 238). Thus when a creditor has filed suit under section 53 of Transfer of Property Act for a declaration that the decree for partition obtained by the insolvent is fraudulent and is intended to defeat the creditors, and that the transfer will not bind the creditiors, no further relief can be claimed by the plaintiff and section 34 of Specific Relief Act, 1963 does not bar the suit (*K.D. Talwar* v. *Adeshwar Lal*, A 1972 Delhi 122.) Where property is owned by deity or Math or by some other juristic person, and the only dispute is about the human agency which should administer the affairs of such institution, the plaintiff need not claim relief of possession over property (*D.A.V. College* v. *S.N.S.H. School*, A 1972 P & H 245). But when the plaintiff's title to be the manager of the Waqf is denied by defendant and the defendant also denies that property is Waqf property, then the plaintiff should also claim relief of possession (*Mir Ghulam Hasan* v. *Mir Maqbool Singh*, A 1975 J & K 57).

Suit of plaintiff for declaration that he was the only heir of the deceased was held maintainable although the plaintiff had not prayed for cancellation of the succession certificate granted in favour of the defendant. It was observed that cancellation of succession certificate was not necessary consequential relief because plaintiff could have got insurance amount from insurance company by showing the declaratory decree (*Indramani Bedbagis* v. *Hema Dibya*, A 1977 Orissa 88). Suit for declaration of title to house has been held to be maintainable without praying the relief of declaration of title over the site (*Haladhar Sharma* v. *Assam Go-Sewa Samity*, A 1979 Gau 23). A co-owner's suit for declaration of joint

2. At the last revision of records of the town of Basti the said plot has been denoted in the *khasra* by No.659 and has been shown therein as the property of the defendant.

3. The plaintiff is still in possession of the said plot.

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ownership is maintainable without any prayer for partition and separate possession, because he may like to enjoy the property as co-owner (*Chhamman Khan* v. *Allah Dei*, 1980 AWC 523). When the plaintiff prayed for a mere declaration that the retention of his pistol in the State *malkhana* was illegal and that he is the owner of the pistol, he cannot be compelled to seek a relief for possession of pistol, as the possession of State is that of a trustee for the rightful owner (*Narain Singh* v. *State of Uttar Pradesh*, A 1981 All 246).

Limitation : 3 years under Article 58 from the date when the right to sue first accrues. Also see Article 113 for suit for declaration of title. The plaintiff is not, however, bound to rush to court at the earliest whisper of denial but may wait until the title is jeopardised or lost by adverse possession. etc. (*H.K. Dasappa* v. *Tammanna*, A 1984 Karn 153). A compulsory cause of action depends upon thequestion whether that threat effectively invades or jeopardizes the title (*Mst. Rukhmabai* v. *Laxminarayan*, A 1960 SC 335).

Defence : The defendant may plead that the plaintiff could claim a further relief, such as possession, injunction, etc., and therefore the suit for mere declaration is barred. He must allege the consequential relief which the plaintiff could claim and a bare plea that the suit is barred by section 34, Specific Relief Act (as in usually taken) should not be allowed without such particulars. If the consequential relief cannot be granted against the defendant, but is available against a third person, this plea cannot be urged. For example, a suit can be brought for a mere declaration that the plaintiff is the owner of the property and the defendant cannot sell it in execution of a decree against a third person and the defendant cannot plead that the plaintiff is not in possession. Similarly, if neither party is in possession, one may sue the other for declaration of title (*Chinnammal* v. *Varadarajulua*, 15 M 307). The consequential relief omitted must be such as could be obtained on the date of suit (*Thakurji* v. *Kamta Prasad.*, 27 ALJ 1201, A 1929 All 974 DB). Therefore, if defendant obtains possession during pendency of a suit for declaration, the suit cannot be dismissed (*Mogaji* v. *Anant*, A 1948 Bom 396). A relief for redemption of a mortgage is not consequential to a declaration that the plaintiff as the reversioner of the mortgaged land is entitled to redeem (*Sheo Pd. Singh* v. *Ram K. Singh*, 181 IC 570, A 1939 All 249). The defendant may show that the case is one in which the court should exercise its discretion against the plaintiff. It is unnecessary to plead that the plaintiff has not been in possession of the property within 12 years. If the defendant is in possession, a plea of section 34 should be raised. If the defendant has become owner by adverse possession for over 12 years, that plea should be raised but the mere fact that plaintiff had not been in possession within 12 years would not negative the plaintiff's title. A defendant cannot raise the question of title of a third person who is not in possession (*Kaniz Fatima* v. *Jai Narain*, A 1944 Pat 334).

The plaintiff claims :

(1) A declaration that he is the owner of the said plot of land.

(2) Alternatively, if the plaintiff is found to be out of possession, possession of the same as against the defendant.

REGISTRATION

No. 270—Suit to Compel Registration *(q)*

1. On October 4, 1994, the defendant executed the mortgage deed hereunto annexed, in favour of the plaintiff.

2. On November 14, 1994, the plaintiff presented the said document to the Sub-Registrar of Meerut for registration, but the said Sub-Registrar refused to register the same on the ground that the defendant did not appear before him.

(q) Such a suit can be instituted only under section 77, Registration Act and not independently of it (*Uma Jha* v. *Chetu Mander*. 95 IC 187, A 1926 Pat 89 DB). The plaintiff may, instead of this suit, sue for specific performance of the contract, using the unregistered deed as evidence of contract (*Jhamman* v. *Amrit*, A 1946 Pat 62; *Bhagwati Prasad* v. *Katori Devi*, 1981 ALJ 677). It can be brought by a person claiming under a document only when the Registrar has refused to register the document under section 72 or 76 of the Registration Act, that is :

(1) When the Sub-Register refused to register it on any ground other than denial of execution and the Registrar confirms that order in appeal; or (2) when the Sub-Registrar refuses to register the document on the ground of denial of execution and the Registrar refused to interfere on an application made to him under section 73; or (3) the document is presented initially to the Registrar and he refused to register it on any ground except want of territorial jurisdiction or that the document ought to be registered in the office of a Sub-Registrar. The alleged executant of the document is the only person who should be made a defendant, and as a question of title is not within the scope of the suit, a prior purchaser of the property should not be impleaded (*Bikuntha* v. *Sarat*, A 1925 Cal 1257 DB; *Jokhan Jha* v. *Rama Saran Jha*, A 1973 Pat 443; see also *Nawab Ali* v. *Ram Murti*, A 1984 All 325). An order returning a document on the ground that the executant is dead and the question of his successor has not been settled is tantamount to an order refusing to register the document (*Barkha* v. *Shiv Ram*, 102 IC 76, 8 Lah 208, 28 PLR 349). No other claims can be joined in such suit (*Probodh* v. *Banka*, 56 CLJ 413), but if they are joined, the plaint should be ordered to be amended but the suit should not be dismissed (*Venkata* v. *Veeramma*, 9 MLJ 105). No suit can be brought after Sub-Registar's refusal, unless an appeal has been filed and the Registrar has refused registration (*Kisian* v. *Dalsuk*, 182 IC 943, A 1939 Bom 254; *Ram Singh* v. *Jasmer Singh*. A 1963 Punj 100).

3. The plaintiff preferred an appeal to the District Registrar of Meerut, but that officer, by an order, dated January 15, 1995, refused to direct the registration of the said sale deed.

(*Or*, 2. On November 15, 1994, the plaintiff presented the said sale-deed to the Sub-Registrar of Meerut for registration, but the defendant denied its execution before the said Sub-Registrar, who therefore refused to register it.

3. The plaintiff applied to the District Registrar of Meerut for reversal of the said order of the Sub-Registrar, but that officer by an order, dated January 15, 1995, refused to direct the registration.)

The plaintiff claims a decree directing the document to be registered.

PRE-EMPTION *(r)*

No. 271—Suit for Pre-emption Based on Mohammedan Law *(s)*

1. One Rasula sold 3/4th share in the house described below to the

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Registrar is not a necessary party, and even if he is impleaded, notice under section 80, C.P.C. is not necessary (*Sultan Ahmad* v. *Gaudar Begum*, 186 IC 505, A 1940 All 108).

In such a suit the plaintiff must allege execution of the document, its presentation at the proper time and one of the above three facts. In case of a document executed by a lady the question whether it was executed under circumstances which would make it operative against her as a *pardanashin* lady is alien to the enquiry (*Abdul Gafar* v. *Badial*, A 1931 Cal 588, 139 IC 234, 55 CLJ 103).

Limitation : The period of limitation for this suit is very short, viz. 30 days from the date of the refusal as provided in section 77 itself. If the order is passed in the absence of the plaintiff and the plaintiff had no previous notice of the date on which it was passed, the period can be counted from the date on which the order is communicated to him (*K.V.F. Swaminathan* v. *Letchmanan Chettiar*, 53 M 491).

Defence : The defendant may deny execution of the deed, but he cannot raise an issue of invalidity of the document or any other such issue (*Ram Ghulam* v. *Meda*, 19 ALJ 224; *U.T.Jain* v. *Daud*, A 1938 Rang 176, 176 IC 140). He cannot plead that the document is not binding on him (*Jwala Sahai* v. *Balbhaddar*, 88 IC 494 Oudh). He may plead that the document was not duly presented for registration or document had been tampered with (*Probodh* v. *Banka*, 56 CLJ 413). The court cannot, in such a suit go into the defence as to whether the document was obtained by fraud or misrepresentation or even a defence that the mind of the executant did not accompany his signature (*Boparayya* v. *Bangaria*, A 1949 Mad 215).

(r) A right of pre-emption is a right of substitution and is not a right of

defendant by a sale-deed, dated January 14, 1995, for an ostensible consideration of Rs.40,000.

Description of the House

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2. The real consideration was only Rs.30,000.

3. The plaintiff and Rasula are both Sunni Mohammedans.

4. The plaintiff owns 1/4th share in the house and is a *Shafi-i-Sharik* and the defendant has no right equal, or superior to, that of the plaintiff.

5. The plaintiff heard of the sale for the first time on February 20, 1995, and immediately declared his intention to assert the right of pre-emption.

6. The same day, i.e., on February 20, the plaintiff made a formal *talab-i-istishad* in the presence of witnesses, and in the presence of the defendant and the said Rasula (*or*, on the said house).

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transfer (*Kundal Lal* v. *Amar Singh*, 25 ALJ 739). A claim for pre-emption can be based on Mohammedan law, or on local custom, or on a contract, or on a special statute such as section 3, 4, of Partition Act (*Bholanath* v. *Sailendra*, A 1984 Cal 319) or the Punjab Pre-emption Act (*Thoilu* v. *Krishna Gopal*, A 1984 HP 58). It can be based on more than one of these grounds in the alternative (*Chadammilal* v. *M. Baksh*, 1 A 563; *Maratah Ali* v. *Abdul Hakim*, 1 A 567). If such alternative grounds are taken the allegations required to be made in case of claim on each of such grounds must be fully and separately stated. Pre-emption on the ground of vicinage has become invalid on the coming into force of the Constitution and pre-emption on this ground cannot be claimed any more (*Bhauram* v. *Baijnath Singh*, A 1962 SC 1476; *Sant Ram* v. *Labh Singh*, 1964 ALJ 852 SC). The courts have not looked upon the right of pre-emption with great favour, presumably for the reason that it operates as a clog on the right of the owner to alienate his property. The right of pre-emption is lost by estoppel and acquiescence based on conduct of a party (*Indira Bai* v. *Nand Kishore*, A 1960 SC 1368; *Roop Bai* v. *Mahaveer*, A 1994 Raj 133; *Indira Bai* v. *Nand Kishore*, A 1991 SC 1055).

If the defendant has not paid the whole money, which the plaintiff admits to be the consideration, to the vendor, but a portion has been left with him for payment to a creditor of the vendor, the plaintiff is liable to pay the defendant only so much as he has paid actually or by passing a pronote or a bond, either to the vendor or to his creditors. If any sum remains unpaid, the plaintiff is not liable to pay it to the vendee but will retain it in his hands for payment according to the directions in the sale deed. The plaintiff should, therefore, offer to pay only so much as has been paid by the defendant. If he pays the whole price, though a portion was left with the

The plaintiff claims possession over 3/4th share of the said house on payment of Rs.30,000 or whatever sum the court may hold to be the real price (*or*, of a half share in the said house on payment of Rs.15,000, *or* half of what the court holds to be the real price).

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vendee to pay off a prior mortgage on the property to be pre-empted, he may have to pay the mortgagee over again (*Ram Richa* v. *Raghunath*, 16 ALJ 531). But the plea that he will retain a portion of the consideration for payment to creditors and will not pay the whole to the vendee should be raised in the suit, and if a decree is passed directing payment by plaintiff, plaintiff cannot be allowed to deduct the money left with purchaser for payment to creditors (*Umrao* v. *Kanwal*, A 1933 All 30,141 IC 10, 33 A 113).

In all cases when the plaintiff does not offer to pay the full amount entered in the sale-deed, he should offer, in the alternative, any amount which the court thinks proper.

Limitation : One year from the date, the purchaser taking physical possession, but if the property is not capable of such possession, from the date of registration of sale-deed (Article 97). Legal disability does not save limitation (section 8). But if the sale is disguised as a mere creation of occupancy rights in order to deceive the pre-emptor, he can claim limitation from the date on which he becomes aware of this fraud (*Ganesha* v. *Sadiq*, A 1937 Lah 97, 172 IC 104).

(s) There are three classes of pre-emptors under the Sunni Mohammedan Law, viz. (1) co-sharers, (2) participators in appendages and amenities, and (3) owners of adjoining property, in cases of houses, gardens, etc. A suit on the third gound is, however, not maintainable now because of the decisions in *Bhauram* v. *Baijnath Singh*, A 1962 SC 1476 and *Sant Ram* v. *Labh Singh*, 1964 ALJ 852. After the sale, and before a suit, a plaintiff has to make two demands: (1) *talab-i-muwasibat*, and (2) *talab-i-istishad*. Want of any such demand is fatal to the suit. The right of premption is a weak right and strict compliance of demands is insisted (*Rajendra Kumar* v. *Rameshwar Das Mittal*, A 1981 All 391).

The plaint in a suit for pre-emption must allege the class of pre-emptors to which the plaintiff belongs, and the fact that the vendee does not belong to any of the two classes or belongs to any class lower than that to which the plaintiff belongs. If the vendee is of the same class as the plaintiff, the plaintiff cannot sue, according to the Calcutta High Court, unless the former has joined with him a stranger (*Sobiram* v. *Raghubardyal*, 15 C 224), but according to Allahabad High Court, the plaintiff and the vendee will take the property in equal shares, and in such a case, the plaintiff must claim pre-emption only in respect of a proportionate share, e.g., of half, if there is only one plaintiff and one vendee, a third, if there is only one plaintiff and two vendees (*Abdulla* v. *Amanatulla*, 21 A 292). The plaintiff should allege the particulars of the sale, and if he does not admit the consideration, he should state what the real consideration was. He should allege the making of the two *talabs*. If the *talab* has not been made by him but by an agent, the agent should be named.

No. 272—Suit for Pre-emption Based on Local Custom *(t)*

1. There is a local custom of pre-emption in cases of sales of house in *mohalla* Abupura in the town of Muzaffarnagar. The Mohammedan law of pre-emption is, by the said custom, applicable except that no

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Transfer in lieu of dower debt is a sale and subject to pre-emption according to the majority of High Courts (*Nathu* v. *Shadi*, 37 A 522; *Saburannesa* v. *Saledu*, 152 IC 422, A 1934 Cal 693, 38 CWN 747; *Khamrunisha* v. *Shah*, 21 MLJ 958). The right is also available in court sales (*Chenne Kunj* v. *Kesavari*, A 1966 Ker 260).

The whole property sold by the sale-deed should be included in the claim except when the plaintiff is not entitled to pre-empt any specified part (*Zainab Bibi* v. *Umar Hayat*, 1936 AWR 492,161 IC 753, A 1936 All 732). Besides the *talabs*, no other notice or demand or tender is necessary before the suit, and even if one has been given or made in fact, it need not be alleged in the plaint. The plaintiff should, in the plaint, offer to pay the price admitted by him. It is better to offer, in the alternative whatever the court may find to be the real price, for some High Courts have held that if the price was more than that offered by the plaintiff, the suit should fail.

If the suit is claimed to be within time from the date of defendant's taking possession, the date on which the defendant obtained possession must be alleged in the plaint, otherwise the date of registration of sale deed.

Defence : Besides denial of the right by which the plaintiff claims and of the performance of one or both of the *talabs*, the defendant may plead that he has a superior or an equal right. He may plead a surrender or acquiescence by the plaintiff of his right of pre-emption. He may plead a refusal by the plaintiff to purchase the property before it was actually sold to the defendant, but such refusal can bar the suit only if it was made *after the contract with the defendant had been completed*, and not if the property was offered to the plaintiff before or during the negotiations with the defendant (*Kanhailal* v. *Kalka Prasad*, 2 ALJ 390, 29 A 670). The defendant may plead that the whole property is not included in the claim. An issue about the price may also be raised. As the right of plaintiff must extend up to the date of the decree, the defendant may show that the plaintiff has lost that right (*Ishaque Hajam* v. *Addl Member, Board of Revenue*, A 1986 Pat 53). Estoppel is a good defence (*Indira Bai* v. *Nandkishore*, A 1991 SC 1055).

(t) Where the Mohammedan Law does not apply and there is no statutory law of pre-emption, no pre-emption can be claimed except under a contract or under a local custom or usage. In such cases the Mohammedan Law applies with such changes, if any, as have been made by the said custom. For example, the Mohammedan Law of Pre-emption applies by custom to Hindus of Bihar, that part of Rajasthan which was formerly called Ajmer-Merwara and certain parts of Gujarat, and to house property in certain places in the U.P. (e.g., in Muzaffarnagar town, the

particular form of *talab* or demand is necessary, but a demand is required to be made in any form.

2—4. (*Same as paras 1,2,4, of previous precedent*).

5. The plaintiff made a demand of pre-emption by a registered notice sent on March 14, 1995, to the defendant but the defendant did not give any reply to the said notice.

The plaintiff claims, etc.

MINORS

No. 273—Suit by a Minor for Setting Aside a Decree Obtained against him as Major *(u)*

1. The plaintiff was born in 1977, and in 1993 was a minor (*or*, the plaintiff was born on December 3, 1975 and was, on November 4, 1993, a minor).

2. The defendant instituted a suit against the plaintiff in this court (being suit No.225 of 1993), and obtained a decree on November 4. 1993.

City of Varanasi and the Kumaun division). The custom prevails in Ahmedabad and Godhra, but not in Madras or Bengal. As noted by the Supreme Court the custom has been recognised mostly in North India but not in South India (*Bhuaram* v. *Baijnath Singh*, A 1952 SC 1476).

In all suits based on local custom, there should be an allegation of the custom with particulars (see Chapter II, *ante*). Ordinarily the presumption is that the custom of pre-emption is in accordance with Mohammedan Law (*Ram Prasad* v. *Abdul Karim*, 9 A 513), and therefore the terms of the custom need not be detailed in the plaint, but where that law is modified to any extent by custom (e.g., it has been found that *talab-i-ishtishad* is not necessary in case of houses in a part of Muzaffarnagar town) such modification must be alleged. The plaint should contain all the allegations necessary in a suit under the Mohammedan law; except those which are not necessary by reason of any modification of the law.

(u) A decree obtained against a person who is described as major but who was in fact a minor is a nullity (*Radha Krishan* v. *Ram Nagar*, A 1951 All 341 FB; *Inderpal* v. *Sarnam Singh*, A 1951 All 823; *Nathumal* v. *Nair*, A 1955 All 584; *Mahashay Prabhu* v. *Man Singh*, 1962 ALJ 631; *Jang Bahadur Singh* v. *Rai Nihore Singh*, A 1975 All 463), but an objection cannot be taken to its execution under section 47 (*Sathuranjan* v. *Guruswami*, 170 IC 86, A 1937 Mad 509), unless the minority is apparent on the face of the record (*Sitaram Reddy* v. *Chinnaram Reddy*, A 1959 AP 159). The Allahabad High Court in a similar case without going

3. The defendant described the plaintiff in the said suit as major, and the said decree was passed against the plaintiff as major.

The plaintiff claims that the said decree be declared null and void.

No. 274—Minor's Suit for Setting Aside a Decree on Ground of Irregularities *(v)*

1. The plaintiff was born in 1986 and is a minor and sues through a next friend Smt. Ramo, his mother.

2. The defendant brought a suit (being suit No. 105 of 1994) in this court, for the enforcement for a mortgage bond, dated May 10, 1988, alleged to have been executed by the plaintiff's father, Chandrabhan, in respect of joint family property belonging to the plaintiff and the said Chandrabhan.

3. There was no legal necessity for the said mortgage nor was it executed for the benefit of the estate or for the benefit of the plaintiff.

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into the question whether the judgment-debtor could or could not treat the decree as a nulity, allowed the execution objection to be treated as a suit under section 47(2) and gave a declaration that the decree was a nullity (*Daulat Singh* v. *Raja Ramji*, 24 ALJ 379, 98 IC 376 DB). But, in any case, a suit for declaration of the invalidity of such a decree is maintainable (*Rashid-uddin* v. *Md. Ismail*, 6 ALJ 688, 3 IC 864, 13 CWN 1182, 10 CLJ 318, 11 BLR 1225, 19 MLJ 621). In such a suit the decree can be set aside, without inquiring into any other fact (e.g., prejudice to the minor), even if the plaintiff had fully contested the suit and he himself was under the impression that he was major (*Champi* v. *Tara Chand*, 22 ALJ 665) or even if the decree was obtained on a compromise to which he was himself a party (*Ganganand* v. *Rameshwar Singh*, 102 IC 449 Pat). **All that he has to allege is that he was, at the time of the decree, a minor.**

A decree obtained against a major described as a minor is not a nullity and cannot be set aside unless it is shown that the defendant was prejudiced (*Hargovind* v. *Hukum Chand*, A 1924 All 94 DB; *Sarat Chandra* v. *Bibhabati Devi*, A 1921 Cal 584 DB). A decree obtained in favour of a minor without being represented by the next friend in the suit cannot be treated as nullity (*Raja Ram* v. *Naveen Chand*, 1995 RD 175, 1995 Lucknow Civil Decisison 622 All). Where a suit has been filled against a defendant without being represented by a guardian *ad litem*, no effectual or valid decree can be passed against the defendant (*Raja Ram* v. *Naveen Chand*, supra).

(v) If a minor is sued as minor, but either a proper person is not appointed as his guardian or there have been irregularities in the appointment of the guardian. e.g., there has been no formal order of appointment, or usual notices have not been sent or consent of the guardian to his apppointment has not been taken, or the interest of the guardian was adverse to the minor, the decree is not a nullity, and

4. The plaintiff was impleaded in the said suit as a defendant, and the said Chandrabhan was appointed as his guardian *ad litem*.

5. The interest of the said Chandrabhan was adverse to that of the plaintiff in the defence of the said suit, and he was not, therefore, a fit person to act as the plaintiff's guardian for the said suit.

6. The said Chandrabhan did not defend the suit on behalf of the plaintiff. [*Or*, The said Chandrabhan in his defence failed to plead that the mortgage had been executed without legal necessity and for no benefit to the estate or to the plaintiff].

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cannot be challenged in execution proceedings but can be set aside by a regular suit, if it is shown that the minor has been prejudiced (*Mahadeo* v. *Somnath*, 48 A 828; *Aramitta* v. *Audithrao*, 105 IC 537, 29 BLR 1357; *Phul Kuer* v. *Nahimunisa*, 125 IC 779; *Radhey Shyam* v. *Gopal Rai*, 169 IC 508, A 1937 All 374; *Brij Kishan* v. *Lal Narain*, A 1954 All 599; *Abhiman Singh* v. *Ram Hit Singh*, A 1958 All 437; *Umar* v. *Mahabir*, A 1940 Pat 59; *Madhusudhan* v. *Jogendra*, A 1945 Pat 133). When notice was given to natural guardian and court guardian was appointed, the decree passesd was null and void against the minor (*Judhisther Das* v. *Ekamra Chaudhry*, (1972) 38 CLJ 173). Complete disregard of the provisions of O. 32, R. 3(4) or R. 4(3) would make the order appointing a guardian *ad litem* for a minor, one without jurisdiction and the decree obtained against minor as null and void (*Amrik Singh* v. *Karnail Singh*, A 1974 P&H 315, following *Nirmal Chandra* v. *Khandu*, A 1965 Cal 562, and dissenting from *Ramchandra Singh* v. *B. Gopi Krishna*, A 1957 Pat 260). Where a defendant is minor, but no guardian is appointed for him, the suit is not legally instituted (*Alangadu Immudi Aghora S.A Mutt* v. *Sankarasubramaniam*, A 1990 Mad 76). When guardian has an interest adverse to minor, the decree passed by court is a nullity against the minor (*Jaya Singh* v. *Gangadharan*, 1973 KLR 434).

In *Balkrishan* v. *Topeshwar*, 15 CLJ 446, 14 IC 845; *Murlidhar* v. *Pitamber*, 20 ALJ 329; *Sellappa Goudan* v. *Masa*, A 1924 Mad 297, 76 IC 1018, 45 MLJ 675 DB, it was observed that when a father was appointed guardian of his minor son in a suit on a mortgage made by the father himself, his interest must be presumed to have been adverse and the decree should be set aside; but this view has since been modified in later cases and it has been held that even in such cases prejudice to the minor must be shown, e.g., by showing that the debt was not for a legal necessity (*Shaik Abdul Karim* v. *Thakurdas*, 113 IC 843, A 1928 Cal 844, 32 CWN 655 DB; *Sundar Lal* v. *Hari Har*, A 1937 All 552, 171 IC 36, 1937 ALJ 468; *Venkatasomeswara* v. *Lakshmanaswami*, 115 IC 801, A 1929 Mad 213 FB). In Bombay and Patna, the same view has been taken (*Chitradhar* v. *Khedar*, A 1938 Pat 437, 177 IC 886; *Mahadeo* v. *Shankar*, A 1943 Bom 387). In other cases, it may be necessary to go into the merits of the case, and the plaintiff should allege in the plaint both the irregularity as well as the prejudice, as the former without the latter, would give no cause of action (*Venkatachalam* v. *Paramasivam*, 104 IC 405, 52 MLJ 790, A 1927

7. The suit was decreed, on November 14, 1995, against the plaintiff also.

The plaintiff claims that the said decree be set aside as against the plaintiff.

No. 275—Like Suit, Another Form

1. The plaintiff is a minor of 15 years of age, and sues through his next friend Ram Pratap, his uncle.

2. The said Ram Pratap was appointed a guardian of the person and property of the plaintiff by the District Judge, Meerut, by an order, dated January 4, 1990.

3. In 1992, the defendant brought a suit in this (being suit No. 105 of 1992) court for arrears of rent for three years in respect of a shop.

Mad 668). Absence of a formal order of appointment of guardian is no more than a mere irregularity if the minor was in fact effectually represented (*Walian* v. *Banke Behari*, 30 Cal 1021, PC). If there was no effective representation the decree will be a nullity (*Khairajmal* v. *Daim*, 32 C 296, 9 CWN 201, 2 ALJ 71, 32 IA 23, 7 BLR 1; *Sardamani* v. *Rajendram*, (1981) 2 MLJ 166). The appointment of a person other than a certificated guardian, as guardian *ad litem* is also a mere irregularity and not an illegality (*Dammar Singh* v. *Pribhu Singh*, 4 ALJ 155). If a minor attains majority during the pendency of the suit but no amendment is made, a decree passed against him showing him as minor is not a nullity (*Ratan Prasad* v. *Birdhi Chand*, A 1939 Pat 601, 186 IC 298). When any question arises as to whether a person is bound by any decree or order passed during minority, the proper test is whether he was effectively represented in the proceedings leading to the decree or order in question as in justice, equity and good conscience to justify, in the circumstance of the particular case, the conclusion that he was party to those proceedings (*Ramadhar Singh* v. *Ram Surhat Singh*, A 1948 Pat 281).

If provisions of O. 32, R. 7, are completely disregarded and permission of court is not obtained for entering into a compromise on behalf of minor, the compromise decree is liable to be set aside at the instance of minor (*Mathura Singh* v. *Devdhari Singh*, A 1972 Pat 17; *Ved Prakash* v. *Ram Kishan*, A 1974 Punj 297). But if permission of court has been obtained, a compromise in a suit on behalf of minor cannot be challenged (*Gurcharan Singh* v. *Sukinder Singh*, A 1972 Punj 19). A compromise decree against a minor can also be avoided on the ground of negligence (*Bhubaneshwar* v. *Ujalamani Devi*, A 1980 Ori 181).

Result of setting aside a decree against a minor should not always be to wipe away the minor's liability altogether as that may give him an undue advantage. The parties should be placed in the same position in which they would have been had no irregularity occurred. If a minor was sued as major, and the decree is set

4. The defendant proposed the plaintiff's grandmother Smt. Ram Dei as a guardian *ad litem* of the plaintiff.

5. No notice of the said proposal of the defendant was served upon the plaintiff, and plaintiff had no knowledge of the said suit before it had been decreed.

6. The said Smt. Ram Dei was, at the time, a blind and deaf old woman of 90 and incapable of defending the suit on behalf of the plaintiff.

7. The said Smt. Ram Dei did not contest the suit and *ex parte* decree was passed against the plaintiff on November 14, 1992.

8. The rent of the said shop for the said period had been paid up by the plaintiff before the institution of the said suit and no part of it was in arrears.

The plaintiff claims that the said decree be set aside.

No. 276—Ditto, on Ground of Gross Negligence of the Guardian *(w)*

1. The plaintiff was born on November 20, 1977, and was a minor up to November 19, 1995.

2. On May 25, 1990, the plaintiff's mother Smt. Tulsa acting as plaintiff's guardian mortgaged to the defendant a house belonging to the plaintiff for Rs.53,000 borrowed by her to provide money for her brother Ram Singh to carry on a cloth shop.

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aside, the suit should be restored after removal of the defect (*Sunderlal* v. *Kr. Harihar Sahai*, 1937 ALJ 468). If there was any irregularity in the appointment of a guardian, the proceedings should commence after the removal of the irregularity and proper appointment of the guardian (***Zuhara Begam*** v. *Mt.Mashuq, Fatima*, A 1926 Oudh 32, 88 IC 175 DB; *Lakhanlal* v. *Sitaram*, 169 IC 513, A 1937 Nag 165; *Lokenath* v. *Beharee Lal*, 64 CLJ 497; ***Monmohini Das*** v. *Behari Shaha*, 40 CWN 1135, A 1936 Cal 421).

(w) If a guardian acted with gross negligence, as not setting up a valid available defence, the minor can have the decree set aside by a separate suit, although the gross negligence may not amount to fraud (*Chundura* v. *Rajam*, 70 IC 668, 45 M 425, A 1922 Mad 273, 42 MLJ 429 DB; *Ramalingam* v. *Venkatachalam*, A 1945 Mad 374; *Fazal Din* v. *Md. Shafi*, 10 IC 63 L; *Hanmantapa* v. *Jivabai*, 24 B 547; *Lala Sheo Charan* v. *Ramanandan*, 22 C 8; *Mahesh Chandra* v. *Manindra*, A 1941 Cal 401, 196 IC 77; *Sodamni* v. *Rajendran*, (1981) 2 MLJ 166). This is the minor's substantive right, which cannot be defeated merely because gross negligence is

3. In 1992, the defendant brought a suit (being suit No.205 of 1992) in this court against the plaintiff on foot of the said mortgage and the Head Clerk of this court was appointed guardian *ad litem* of the plaintiff.

4. The said Head Clerk grossly neglected his duties as such guardian by not putting forward the obvious defence that the mortgage having not been made for the benefit of the plaintiff was not binding on him, and by allowing an *ex parte* decree to be passed against the plaintiff in the said suit on November 15, 1995.

The plaintiff claims that the said decree be set aside.

No. 277—Suit by a Major for having a Decree Obtained against Him as Minor Set Aside.

1. The plaintiff was born in 1972 and was major in 1991.

2. On March 4, 1991, the defendant instituted a suit (being suit No.548 of 1991) in this court against the plaintiff for recovery of money said to be due to him on a bond alleged to have been executed by the plaintiff's deceased father Ramlal.

3. The defendant described the plaintiff in the said suit as a minor, and obtained an order for the appointment of one Prem Narain as guardian *ad litem* of the plaintiff.

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not mentioned in section 44 of the Evidence Act (*Iftikhar Husain* v. *Beant Singh*, A 1946 Lah 233). When decree against a minor is passed due to gross negligence on the part of his next friend, minor can avoid it, if it falls within the ambit of section 44, Evidence Act, in the proceeding in which it is sought to be relied, otherwise he may file a suit to get the decree set aside (*Asharafi Lal* v. *Kioli*, A 1995 SC 1440). A decree against a minor is void *ab initio* and a nullity, if it is passed in a suit in which no guardian is appointed for the minor or the appointment of the guardian is invalid or the validly appointed guardian does not properly represent the minor. To avoid such a decree it is not necessary to file a separate suit. It can be assailed in any proceeding whatsoever where this question may be relevant, provided, it is shown that the minor was not represented in the suit (*Inderpal Singh* v. *Sarnam Singh*, A 1951 All 823, 1951 AWR HC 91). For what is gross negligence, see *Mt. Siraj* v. *Mahomed Ali*, 138 IC 465, 1932 ALJ 437, A 1932 All 293; *Kali Charan* v. *Hirday Narain*, A 1935 Pat 24; *Hakim Bahauddin*, v. *Govind Singh*, A 1948 All 117. Omission to put forward a correct defence and putting an absurd defence amounts to negligence (*Subbaratnam* v. *Gunavanthalal*, 169 IC 694, A 1937 Mad 472).

The plaintiff must show that there was an available defence which, if raised and substantiated, would have led to a different result, and mere failure to appear

4. The said suit was decreed *ex parte* on July 20, 1995.

5. The plaintiff had no notice of the said suit or the said decree until February 4, 1996, and could not, therefore defend it.

The said suit was false, as the bond on which it was based had been satisfied by the plaintiff's father in his lifetime.

The plaintiff claims that the said decree be set aside.

No. 278—Suit for Setting Aside a Certificated Guardian's Transfer *(x)*

1. The plaintiff was born on January 20, 1971, and therefore attained majority on January 20, 1992.

2. One Raghubir Singh was appointed guardian of the plaintiff's property by order of the District Judge, Kanpur.

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and defend the suit does not amount to negligence (*Balbhadra* v. *Rangrao*, A 1937 Mad 846; *Pannalal* v. *Mohammed Zaki*, A 1937 Lah 563; *Sundar Lal* v. *Harihar Sahai*, 171 IC 36, A 1937 All 552). If the valid defence was raised by another defendant who fully fought out the case, the ommission of the guardian to raise the same defence was held not to justify the setting aside of the decree (*Profulla Kumar* v. *Beharilal*, 162 IC 804, A 1936 Cal 247). But if the guardian thought honestly that there was no valid defence his omission to defend is not negligence (*Visveswara* v. *Surya Rao*, 163 IC 712, A 1936 Mad 440). A guardian cannot be liable for counsel's dishonestly or negligence (*Daiva* v. *Selvaramanuj*, A 1936 Mad 479). The Bombay and Rajasthan High Courts have on the other hand, held that a decree cannot be set aside on the ground of gross negligence merely, apart from fraud or collusion (*Nana Nandeo* v. *Daipat Supadu*, 41 BLR 1280 A 1940 Bom 33, 186 IC 578; *Krisandas* v. *Vithoba*, 180 IC 51, A 1939 Bom 66, FB; *State* v. *R.D. Singh*, A 1972 Raj 241). In *Atmaj* v. *Dalpat*, A 1937 Bom 464, it was held that in such cases the decree may be challenged in the same suit, e.g., under O.9, R. 13. But omission to raise a doubtful plea involving great legal uncertainty, or one on which there is divergence of authorities, cannot amount to gross negligence (*Venkataramamiyer* v. *Subramania*, 108 IC 639 M; *Ramalingam* v. *Venkatachalam*, A 1945 Mad 374).

Facts showing gross negligence must be alleged. If it consists in not setting up a valid defence, the plaint should show the defence which was valid and available.

Limitation : Three years under Article 113 from the date when negligence comes to plaintiff's knowledge.

(x) A transfer made by a *de jure* or legal guardian, e.g., a natural guardian, such as a Hindu mother, is considered to be the act of the minor and is valid until it is set aside at the instance of the minor (*Manmohan* v. *Bidhu Bhusan*, 185 IC 6, A 1939 Cal 460). On attaining majority the minor can either repudiate the transaction

3. The plaintiff was the owner of the property detailed at the foot of the plaint.

4. The said Raghubir Singh sold the said property to the defendant on October 20. 1989, with the permission of the District Judge, Kanpur.

5. The said permission was obtained by the said Raghubir Singh by a false representation that money was required to pay off two debts said to be due from the plaintiff's deceased father to Pran Sukh and Ratan Lal respectively. The plaintiff's deceased father had not taken any loans from Pran Sukh or Ratan Lal and nothing was. therefore, due to them or either of them, from the plaintiff. No part of the consideration of the sale of said property was applied to the plaintiff's benefit.

The plaintiff. therefore, claims:

(1) that the sale be set aside;

(2) possession of the property;

(3) mesne profits from date of suit to the date of possession.

No. 279—Suit for Setting Aside a Natural Guardian's Transfer

1. The plaintiff was born in October 1974 and attained majority in October, 1992.

2. The plaintiff was the owner of the property detailed at the foot of the plaint.

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as a whole or accept it. He cannot approbate and reprobate (*Hira Lal* v. *Bhikari*, 1973 MLJ 500). The transfer would be set aside if it was not made for a legal necessity or for the benefit of the minor or his estate. The transferee has to prove the necessity or benefit. He can also succeed if he can show that he had made *bona fide* inquiries and had satisfied himself of the existence of the necessity. But if the transfer is made not by a *de jure* guardian but any other person, even if that other person be the *de facto* guardian or manager, it is, according to Mohammedan Law, the act of an unauthorised person and is absolutely void and cannot be sustained even if there was any necessity for the transfer (*Imambandi* v. *Mutsaddi*, 47 IC 513, 45 C 878, 35 MLJ 422, 16 ALJ 800, 28 CLJ 409, 23 CWN 50, 20 BLR 1022; *Fateh Din* v. *Gurmukh Singh*. 10 L 385, 113 IC 227, A 1929 Lah 810 DB; *Mohammed Sultan* v. *Abdul Rahman*, 171 IC 876, A 1937 Rang 175; *Mohammed Moizuddin* v. *Nalini Bala*, A 1937 Cal 284; *Karam Chand* v. *Vali Mohd.*, 107 IC 310, A 1937 Sindh 157; *Karim Khan* v *Jaikaran*, 170 IC 543, A 1937 Nag 390; *Sambhlu* v. *Piyari*, A 1941 Pat 351, 193 IC 253). Such a transfer cannot be validated even by minor's ratification on

3. On November 20, 1987, Smt. Raj Kali, mother and natural guardian of the plaintiff, executed a sale-deed in respect of the said property in favour of the defendant and the defendant has been in possession of it ever since.

4. The said sale was not made for any legal necessity or for the benefit of the plaintiff.

Relief, as in the previous precedent.

No. 280—Suit for Property Transferred by a De-facto Guardian

1. The plaintiff was born in April 1973 and was a minor in 1987.

2. During the minority of the plaintiff, Muhammad Baksh, an uncle of the plaintiff, used to manage the plaintiff's property.

3. The property detailed at the foot of the plaint belonged to the plaintiff.

4. On Match 14, 1987 the said Mohammad Baksh wrongfully made a usufructuary mortgage of the said property in favour of the defendant who has been in possession ever since.

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attaining majority (*Anto* v. *Reoti Kuar*, 1936 ALJ 1099, A 1936 All 837 FB). Sale in consideration of barred debt is not binding (*Thadavarthi* v. *Myreni*, A 1946 Mad 198).

The act of a certified guardian is regarded as that of *de jure* guardian or any authorised person, only if he has acted with the permission of the court. The alienee is protected by the order of the court and is not bound to make any other inquiries unless it can be shown that the sanction was obtained by fraud or underhand dealing and that the alienee was party thereto (*Benares Bank Ltd.* v. *Dip Chand*, 160 IC 64, A 1936 All 172; *Brij Raj* v. *Alliance Bank of Simla*, A 1936 Lah 946; *Balaji* v. *Sadashiv*, 165 IC 530, A 1936 Bom 389; *Abbas Husain* v. *Kiran Shashi*, 1941 NLJ 447). Though the necessity should be recited in the court's sanction, mere omission of it cannot be pleaded to invalidate the sanction (*Balaji* v. *Sadashiv*, A 1936 Bom 389). But if the transferee is the creditor who ought to know the facts, the burden will be on him to justify the transfer (*Rajah* v. *Bishen Prasad*, 15 PLT 787). If he has made a transfer without such permission or in contravention of the permission, his act is the act of an unauthorised person and is not binding on the minor (section 30, Guardians and Wards Act; *Abbas Husain* v. *Kiran Shashi*, 1941 NLJ 447, A 1942 Nag 12). It is not void in the sense that it can be treated as a nullity by any person, but it can be treated as a nullity *at the option of the minor*, and need be set aside by him within three years (*Nagendra* v. *Mohini*, 34 CWN 948). A plaintiff in such a

5. The net profit of the said property, as shown in the account given at the foot of the plaint, are Rs.14,000 a year.

The plaintiff claims:

(1) Possession of the said property.

(2) Rupees 42,000 on account of mesne profits for the last three years.

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case should restore the benefit which he has received under the transfer, before the transfer can be set aside (*Jai Narain Lal Tandon* v. *Bichoo Lal*, ILR 1938 All 614, 176 IC 369; *Abbas Husain* v. *Kiran*, A 1936 Bom 389; *Gondulal* v. *Abdus Sattar*, A 1948 Nag 353). But if it cannot be shown that he had been benefited by the purchase money, no order of refund should be made (*Venkatarama* v. *Sobhandri*, 40 CWN 545, 161 IC 29, A 1939 PC 91). Defendant is not, however, entitled to interest on the money ordered to be refunded and plaintiff is entitled to receive profits from the date of sale (*Rahima* v. *Amathul*, 161 IC 522, A 1936 Mad 140). Cases can be conceived in which court will not, in its discretion allow refund, e.g., when transferee was cognizant of the minority and the minor was not guilty of fraud or misrepresentation (*Mt. Bachai* v. *Hayat Mohammad*, A 1940 Oudh 119). But if transfer is made by a relation who cannot be a natural guardian and who is neither a certificated guardian nor a *de facto* guardian as he neither lived with the minor nor managed his property, the transfer is void as he had no authority to make it (*Kalipada* v. *Purnabala*, A 1948 Cal 269, *Athiappa Gounder* v. *Mohan*, (1995) 1 Mad LJ 357 (DB) Mad).

After the passing of Hindu Minority and Guardianship Act, 1956, the guardian of Hindu minor has power to do all acts which are necessary or reasonable and proper for the benefit of the minor or for realisation, protection or for benefit of minor's estate. This power applies even to a contract for purchase of immovable property. The liability to pay money is the liability of the minor under the Transfer of Property Act and not on account of any personal covenant and so such a contract is not excluded under section 8(1). The contract is enforceable (*Manak Chand* v. *Ram Chandra*, A 1981 SC 519, (1980) 4 SCC 22). However, under section 11 of the Act a *defacto* guardian of a Hindu minor is not entitled to dispose of or deal with the property of a minor.

There is also a difference between the remedies of the minor in the two cases. If the transfer was by an authorised person, e.g., by a natural guardian or by a certificated guardian acting under permission it is considered to be the act of the minor himself, and the minor must bring a suit to have it set aside within three years of attaining majority (Article 60), before he can recover the property. He cannot be permitted to succeed in a suit for possession, treating the transfer as nullity, brought after three years (*Fakiratpa* v. *Lumana*, 44 B 742; *Lubba Mal* v. *Malak Ram*, A 1925 Lah 619; *Babu Ram* v. *Saidunnisa*, 11 ALJ 783). But if the transfer was made by an unauthorised person or by a certificated guardian without, or in contraven-

(3) Future mesne profits from the date of suit to that of possession.

No. 281—Suit for Property Transferred by a Certificated Guardian Without Permission

1-3. *same as in precedent No. 278.*

4. The said Raghubir Singh usufructuarily mortgaged the said property to the defendant by a mortgage-deed, dated October 20, 1987 without the permission of the District Judge.

(*Or*, In contravention of the permission granted by the District Judge : the District Judge had permitted a usufructuary mortgage for Rs.5,000 for 7 years on the condition that the principal and interest should be

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tion of. the permission of the District Judge, the transfer can be treated by the minor as nullity and a suit could be brought by him for possession without a prayer for having the transfer set aside, within 12 years provided by Article 144 (corresponding to Article 65 of the Act of 1963) (*Matadeen* v. *Ahmad Ali*, 9 ALJ 215 PC; *Imambandi* v. *Mustsaddi*, 16 ALJ 800 PC; *Rahman* v. *Sukh Dayal*, 2 ALJ 567; *Mahadeo* v. *Samaji*, 99 IC 1050, A 1927 Nag 145; *Ponnammal* v. *Gomathi*, 165 IC 287, A 1936 Mad 884; *Kali Charan* v. *Sudhir*, A 1985 Cal 66). The Allahabad High Court has held that even a natural guardian's transfer can be treated as nullity and a suit for possession can be brought within 12 years (*Bachan Singh* v. *Kamta Prasad*, 7 ALJ 33; *Lallo Singh* v. *Jamna Prasad*, A 1940 All 320, 189 IC 372). **The plaint must specify the exact position of the person who had made the transfer and must allege fact showing how his act is not binding on the plaintiff.**

Mesne Profits: If the transfer was made by wholly an authorised person, the plaintiff can recover mesne profits up to a maximum period of three years. But if it was made by a legal guardian, this can be claimed from the date of repudiation. If there was no repudiation prior to suit, he can get profits from the date of suit only (*Bhurgu* v. *Nar Singh*, 14 ALJ 1161). A transfer by a certificated guardian without permission is only voidable at the option of the minor under section 30 hence the latter can claim profits only from the date of repudiation. The transferee can get compensation for improvements if made before he had notice of repudiation (*Venkataraman* v. *Ponnusami*, 106 IC 131, A 1927 Mad 1023 DB; contra *Bechu* v. *Bhabuti*, 124 IC 731).

Limitation is three years under Art. 60 from the date that minor attains majority, whether the guardian is appointed by court or not (*Dipchand* v. *Munnilal* 27 ALJ 1248, A 1929 All 879 DB). This will be so in all cases when the transfer is not void even though there is no prayer for setting aside the sale (*Sri Raja Sobhanadri* v. *Raja Muganti*, 129 IC 245, A 1931 Mad 45, 1930 MWN 1067, 60 MLJ 701, 54 M 352). In case of several Hindu minor sons of a mother who had made the transfer, a suit brought more than 3 years after the eldest son attaining majority was held to be

satisfied within that period. The said Raghubir Singh made the mortgage for Rs.5,000 without any fixed term at an interest of six per cent per annum).

5. The plaintiff repudiated the said mortgage by a registered notice sent to the defendant on March 10, 1994.

The plaintiff claims:

(1) Possession of the said property.

(2) Rs.1,600 on account of mesne profits for 2 years, from March 10, 1994 at Rs.800 a year.

(3) Future mesne profits.

No. 282—Suit against Minor's Property for Price of Necessaries Supplied to the Minor (y)

1. The defendant is a minor.

2. Between October 18, 1995 and November 20, 1995 the plaintiff supplied to the defendant at his request various commodities, the particulars of which, with their price are fully set out in schedule A appended to the plaint, which should be deemed to be part hereof.

3. The commodities mentioned in the preceding paragraph were articles of daily necessity of the defendant and his wife and were suited to the defendant's position and condition in life.

barred as the eldest being manager could sue for all (*Annia Pillai, In re*, 165 IC 656, A 1936 Mad 914). A suit to recover property conveyed under a transfer which is void, e.g., transfer by a *de facto* guardian without necessity is governed by old Article 144 (*Kailash* v. *Rajani* A 1954 Pat 298) now Article 65.

(y) Such a suit lies under section 68, Contract Act. The "necessaries of life" mentioned in that section are not restricted to the elementary necessities such as food and clothing but include other pressing necessities, e.g, payment of government revenue (*Mohammed Ali* v. *Chinku*, A 1930 All 128), meeting the expenses of the marriage of the minor himself or of any one whom he is legally bound to maintain and get married (*Phathak* v. *Ram Din*, 2 Pat LJ 627). The term has been held to include also cash needed to effect repairs in minor's house (*Ram Chandra* v. *Hari*, A 1936 Nag 12), or to perform necessary religious ceremonies (*Maharam* v. *Vadilal*, 20 B 61), or cost incurred in defending a suit to save minor's property (*Watikins* v. *Dhunnoo*, 7 C 140); or in defending himself in a criminal prosecution (*Sham* v. *Choudhri*, 21 C 872); or providing a house for living and continuing his studies (*Kunwarlal* v. *Surajmal*, A 1963 MP 58). Advances made for the marriage of a Hindu male minor would be a necessity (*Kalicharan Ram* v. *Ram Devi Ram*, A 1917

4. Out of the price of the said commodities the defendant has paid Rs.260 only and Rs.3,790 are still due from him as per account given in the said schedule A.

5. The government revenue of villages Radauli and Charka belonging to the defendant for *kharif* 1402 *fasli* fell into arrears and the movable property of the defendant was attached by the Tahsildar. The plaintiff advanced Rs.1,300 to the defendant on January 30. 1996. for payment of the said government revenue.

The plaintiff prays for a decree for the recovery of Rs.5.090 with costs and interest at 12 per cent per annum from the date of suit. from the moveable and immovable property of the defendant.

No. 283—Ditto, on the Basis of Contract by his Guardian *(z)*

1. The plaintiff is the widow of one X, a Hindu who died in 1960. leaving his son Y.

2. The said Y died in 1965. leaving a widow.

3. The said widow adopted the defendant as a son.

4. The defendant was on the date of adoption a minor and continued to be so up to the 1st October 1988.

5. During the defendant's minority his natural father Z acted as the guardian of his property.

6. On the 20th October. 1986 the said Z acting as such guardian executed a deed of maintenance in favour of the plaintiff. agreeing on behalf of the defendant to pay her a maintenance allowance of Rs.250 per month.

7. The defendant has not paid the plaintiff anything on account of maintenance since he has attained majority and three years allowance from the October 1, 1988 is in arrears.

Pat 332). Similarly marriage of a minor muslim girl is a necessity that would come within the purview of secion 68 (*Rahima Bibi* v. *A.K. Sherfuddin*. A 1947 Mad 155).

Defence : That he did not need the money or that the guardian did not apply it to his needs.

(z) Ordinarily a guardian has no power to bind a minor by a purely personal contract. but if by such contract the guardian incurs an obligation for which the estate of the minor is already liable under the personal law. such contract can be

The plaintiff claims Rs.9,000 with interest from the date of suit from the estate of the defendant.

TRUSTS

No. 284—Suit by a Specific Legatee against an Executor for his Legacy

See Precedent No.246

No. 285—Suit for Execution of Trusts

(Form No.44, Appendix A, C.P.C.)

1. AB is one of the trustees under an instrument of settlement, bearing date on or about the ___ day of ________, made upon the marriage of EF and GH, the father and mother of the defendant [*or*, an instrument of transfer of the estate and effects of EF for the benefit of CD, the defendant, and the other creditors of EF].

2. AB has taken upon himself the burden of the said trust, and is in possession of [*or*, of the proceeds of] the movable and immovable property transferred by the said instrument.

3. CD claims to be entitled to a beneficial interest under instrument.

4. The plaintiff is desirous to account for all the rents and profits of the said immovable property [and the proceeds of the sale of the said, *or* of part of the said, immovable or movable property, or the proceeds of the sale of *or* of part of the said movable property, *or* the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the court will take the accounts of the said trust, and also that the whole of the said trust-estate may be administered in the court for the benefit of the said CD, the defendant and all other persons who may be interested in such administration, in the presence of CD and such other persons so interested as the court may direct, or that the said CD may show good cause to the contrary.

[N.B.—Where the suit is by a beneficiary, the plaint may be

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enforced against the minor's estate. For instance, if a minor is liable for maintenance of his mother, a guardian's contract to pay for a maintenance allowance can be enforced against his estate (*Kondpali* v. *Putta*, A 1943 Mad 487, 1943 MWN 266). See the Calcutta case relating to reconveyance of minor's property, *Radheyshyam Kamila* v. *Smt. Kiran Bala Dasi*, A 1971 Cal 341).

modelled, mutatis mutandis, *on the plaint by a legatee, viz. Precedent No.246]*.

No. 286—Suit Under Section 92, C.P.C. *(aa)*

1. The defendant No.1 dedicated the property detailed in schedule A attached to the plaint, by a deed of trust dated July 4, 1957, in trust, for the following charitable object:

(a) Establishing and maintaining a vocational and technical school at Jaunpur;

(b) maintaining the temple known as the Seth's temple at Jaunpur, and defraying the expenses of *bhog* of the idol and the pay of the temple servants; and

(c) paying one-fifth portion of the net income of the said property to the Hindu orphanage at Varanasi.

2. By the said deed of trust, the said defendant No.1 appointed himself and defendants No.2-10 as trustees for carrying out the objects of the said trust and appointed himself as the managing trustee.

(aa) A suit under this section can be brought only with the leave of the court or by the Advocate-General, whose functions are exercised, outside the Presidency towns, by Collectors or other officers nominated by the State Government, (section 92 C.P.C.). But any suit which is outside the scope of this section may be brought by anyone in his private capacity or under O. 1, R. 8. The scope of the section should, therefore, be clearly understood. It applies when (i) the suit is not only in the interest of the plaintiff individually but in the interest of the public or in the interest of the trust itself; (ii) the suit relates to a trust for a public purpose of a charitable or religious nature; (iii) a breach of trust has been committed or directions of the court are deemed necessary for its administration; and (iv) one or more of the reliefs mentioned in section 92 is sought. Relief (h) of section 92, though worded in general terms should be *ejusdem generis* with the other reliefs. A relief directing account to be taken of the trust income and payment of the amount found due can be claimed (*Thushtu* v. *V. Krishnamurthi*, 100 IC 841, 52 MLJ 182, 1927 MWN 202, 38 MLT 143), but it is not obligatory on the court to direct accounts on the removal of a trustee (*Faizunnessa* v. *Moulvi Asad*, 41 CWN 298). Under the new sub-section (3), added by the Amendment Act of 1976, the original purpose of the trust can also be altered by applying the doctrine of *cy-pres (Ram Sarup* v. *Union of India*, A 1985 Del 318). A private trust is outside the operation of section 92 (*Chandra Warrier* v. *M.S.S. Narayogam*, 1991 (1) Ker LT 387).

A suit for *mere declaration that property is* trust property or that the plaintiff

3. The defendant No.1 has, since the date of trust, been in possession of the said property as such managing trustee, but has not applied any part of the income to any of the objects of the said trust but has appropriated the whole of it to his own use. The other defendants have taken no steps to compel the defendant No.1 to carry out the object of the said trust.

4. By a deed of sale, dated January 14, 1996, defendant No.1 has wrongfully sold as his private property the house in Jaunpur detailed in schedule B attached to the plaint, being part of the trust property specified in schedule A to defendant No.11.

is the trustee or is entitled to act as *mutwalli* is not covered by section 92 (*Jamal-ul-din* v. *Mujtaba*. 25 A 681; *Badri Das* v. *Chunni Lal*, 33 C 789; *Ram Das* v. *Hanumantha*, 36 M 364; *Miram Baksh* v. *Allah Baksh*, 99 IC 756 L; *Abdul Rahim* v. *Mohammed Barkat*, 55 C 519; *Ram Rup* v. *Sarm Dayal*, 160 IC 289, A 1936 Lah 283; *Shadi Ram* v. *Ram Kishan*, A 1948 East Punjab 49; *Mt. Khurshid Jahan* v. *Ram Qamali*, A 1947 Oudh 17), nor a suit for declaration of the validity of a trust (*Hafiz Mohammad* v. *Swarup Chand*, A 1942 Cal 1), nor a suit for ejectment of a trespasser from the trust property (*Acharya Guru* v. *Mahant Ramdhari*, A 1925 All 683, 23 ALJ 601; *O. Rm. O.M. Sp.Firm* v. *P.L.N.R.M. Nagappa*, A 1941 PC 1, 192 IC 1; *Govind Chunder* v. *Abdul Majid*, A 1944 Cal 163). Disputed questions of title cannot be gone into in such a suit (*Kalimala* v. *Mukerji*, A 1962 SC 1329). A suit primarily to vindicate the individual or personal rights of the plaintiff or of a third person is outside the purview of section 92 (*Kabul Singh* v. *Ram Singh*, A 1986 All 75). A suit for accounts by one trustee against another (*Sanmukhan Chettey* v. *Govind Chetty*, 1937 MWN 849; *Gurunathaswami* v. *Alangaram*, A 1939 Mad 594; *Balkishan Das* v. *Parmeshwari Das*, A 1963 Punj 187), or by trustees against past trustees (*Indu Bhushan* v. *Kiron Chandra*, A 1940 Cal 376, 44 CWN 327) is not covered by section 92, nor is one for an injunction restraining the defendant from dealing with *waqf* property in a manner opposed to the intention of the founder of the trust (*Nibal Shah* v. *Malan*, 99 IC 755, 2 LLJ 457), nor a suit for a declaration that the plaintiff is entitled as founder of the trust to appoint new trustees in place of deceased trustees (*Ruggan Prasad* v. *Bhanno* 99 IC 1045 A), nor a suit by the idol through a worshipper for declaration of title and possession of trust property even if *shebait* is acting adversely to the interest of the idol (*Bishwa Nath* v. *Thakur Radhe Ballabhji*, A 1967 SC 1044; *Pragdasji Guru Bhagwandasji* v. *Ishwarlalebhai Narsibhai*, A 1952 SC 143). Nor a suit by certain person on behalf of villagers for a declaration that an alienation by the *pujari* is void (*Sri Veerobhadraswami* v. *Maya Kone*, A 1940 Mad 81); nor a dispute between beneficiary and the trust (*Mt. Shabjehan* v. *Ibn Ali* A 1954 All 69). But when, on the death of trustees nominated by the creator of trust an adverse claimant takes possession of trust property and repudiates the trust, a suit for appointment of new trustees and for settling a scheme of administration is maintainable (*Eralappa* v. *Bala Krishinath*, 102 IC 74).

5. Plaintiff No.1 is the *pujari* of the said Seth's temple at Jaunpur. and plaintiff No.2 is the manager of the Hindu orphanage at Varanasi and as such both have an interest in the said trust and have obtained the leave of the court for institution of the said suit.

The plaintiffs pray for a decree :

(1) Declaring that the sale of the said house in favour of defendant No.11 is null and void.

But if a declaration is involved in the other reliefs the same can be given, e.g., in a suit to which alienee of trust property is impleaded, a declaration that the alienation is void may be made alongwith the decree removing the trustees and appointing new one (*Lachman Prasad* v. *Munia*, A 1925 All 759 DB; *Mufti Ali Jaffir* v. *Fazal Hussain*, 20 ALJ 557), a declaration that the property is trust property can be granted against creditors of the trustees or transferees of the alleged trust properties claiming the property in their own right, though ordinarily no relief should be granted to third parties in a suit under section 92 (*Janki Pd.* v. *Kubber Singh*, A 1962 All 187). But a relief for ejectment of a lessee cannot be claimed (*Fayumessa* v. *Moulvi Assad*, 41 CWN 298). In a suit for settlement of a scheme for *dargah*, the *mutwali* in management is a necessary party and also a near relation of the founder of the trust eligible under the terms of the trust to be a trustee (*Lal Suresh Singh* v. *Legal Remembrancer to Govt. U.P.*, A 1937 Oudh 229, 167 IC 828). A suit for the removal of a self-constituted trustee on the ground of misconduct and misappropriation is one within section 92 (*Ramdas* v. *Kishan Prasad*, A 1940 Pat 425). A suit can also be brought under this section for removal of a *Mahant* both from trusteeship of property and also from spiritual duties, if the two duties, are inter-dependent and inseparable (*Satish Chandra* v. *Dharnidhar*, A 1940 PC 24). A suit to compel trustees to cease spending *waqf* income on secular objects and to apply entire income to religious purposes is within section 92 (*Haji Md. Nabi* v. *Province of Bengal*, A 1942 Cal 343). A suit for revision of a scheme sanctioned by a decree under this section must be brought under this section and not independently (*Baba Surajgir* v. *B.Brahma Narain*, A 1946 All 148).

The word " interest in the trust" in section 92 of the C.P.C. must be interpreted to mean some such interest as is affected by mismanagement so that the person is interested in having affairs of the trust set right by court (See case law in *P. Sivagurunatta Pillai* v. *P. Mani Pillai*, A 1984 Mad 128).

Where a Mohammedan makes a *waqf* known as *waqf-alal-aulad* with the ultimate benefit reserved for a public purpose even though the public may have no chance of being benefited while anyone in the family of the *waqf* is alive, it will be difficult to hold that the *waqf* is a private *waqf*. It would be a public trust in respect of which a suit could be filed under section 92, C.P.C. (*Farman Ali Khan* v. *Mohd. Raza Khan*, ILR 1950 All 985, 1949 ALJ 453; *Sugra Bibi* v. *Haji Kummu*, A 1969 SC 884). The Wakf Act applicable to the state concerned should also be

(2) Removing the defendants Nos.1 to 10 from the office of trustees.

(3) Appointing new trustees and vesting the trust property in them.

(4) Directing account to be taken from defendants Nos.1 to 10, of the income of the trust property and payment of the balance to the new trustees.

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consulted as many powers of courts have now been vested in the Wakf Boards (*Khalil Ahmed* v. *Siddiq Ahmad*, A 1974 All 382).

The essential feature of a public trust which is contemplated by section 92 C.P.C. is that the endowment must be for a public purpose of a charitable nature and that the beneficial interest in it must be vested in the public in general or in a considerable section of the public. Such endowments are meant to last for ever. In the case of private trusts, on the other hand, the beneficial interest would be vested in one or more ascertainable individual (*Dhirendra Singh* v. *Dhanai*, A 1983 All 216; see also *Ram Saroop Dasji* v. *S.P. Sahi*, A 1959 SC 951; *Devki Nandan* v. *Murlidhar*, A 1957 SC 133).

A place in order to be a Public temple, must be a public place for public religious worship used as such place and must be either dedicated to the community at large or any one thereof as a place of public religious worship. In case of private temple, the beneficiaries are specific individuals while in public temple, they are indeterminate or fluctuating general public or a class thereof (*Bala Shankar Maha Shankar Bhattjee* v. *Charity Commissioner*, 1995 Supp (1) SCC 485 at 496, A 1995 SC 167).

A suit under section 92, C.P.C. is a suit of special nature which pre-supposes the existence of a public trust of a religious or charitable character. Such a suit can proceed only on the allegation that there is a breach of such a trust or that directions from the court are necessary for the administration thereof and it must pray for one or other of the reliefs that are specifically mentioned in the section (*Gheevergheshe Koshy* v. *Chacko Thomas*, A 1963 Ker 191; *Sanat Kumar Mira* v. *Hem Chandra*, A 1961 Cal 411).

A scheme once settled by the court cannot be altered even by the court except only on substantial grounds (*Ahmad Adam* v. *M.E.M. Makhri*, A 1964 SC 107). It is true that changes in times and circumstances may *ex-debito justitii* require that alterations should be made in the scheme to carry out the objects of the endowment and to see that the scheme operates beneficially. No separate suit is necessary for making such alterations. The same can be made by an application where the scheme originally settled contains a clause to that effect (*Raje Anandrao* v. *Shamurao*, A 1961 SC 1206). The court is not powerless to modify the scheme even where the relevant clause has due to change in circumstances become unworkable (*Elias* v. *Elias* 1986 Ker LT 72; distinguished *Chemeli Bibi* v. *Kanhaiyalal*, A 1973 Cal 328, and dissenting from *Rangaswami* v. *Rajagopalayam*, A 1977 Mad

(5) Directing the new trustees to apply the income of the said property to the different objects of the trust according to the directions in the deed of trust.

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287). At the same time the court has always to exercise caution in this matter and to see that what has been done by the court is not disturbed except when there are substantial grounds for doing so and where satisfactory evidence to sustain those grounds is brought before the court. The paramount consideration must, of course, be the interest of the charity (*Shrinivas R Acharya v. Purshottam Chaturbhuj*, 55 BLR 497).

The trustees mentioned in section 92 need not be *de jure* trustees. *De facto* trustees will sufficiently attract the operation of the section and can be removed (*Ramesh Chandra v. Gulap Rai*, A 1980 All 283). Oridinarily, *de facto* trustees cannot claim any rights in respect of the trust, but if they had been in *bona fide* possession for sometime they could be allowed to preserve trust property from trespassers (*Vikramdas v. Daulat Ram*, 1956 ALJ 434 SC). Cost of the plaintiff in a suit under section 92 can be awarded out of the trust funds (*Waraes Ali v. Sheikh Samsuddin*, 63 CLJ 573).

A suit which falls under section 92 cannot be instituted except under that section or, in the case of a religious endowment of a public nature, under section 14, Religious Endowments Act, while one which does not so fall may be instituted in the ordinary way, e.g., a suit to enforce a private right. A worshipper at a temple has a right to bring a suit to restrain waste of, or encroachment upon the trust property by the trustees, the primary right of interested persons in such cases is to sue for removal of the trustees, but they may also be allowed to waive that right and to sue under O. 1, R. 8, for the removal of encroachment made by the trustees (*Dr Mukandlal v. Mohan Lal*, 101 IC 744).

A suit for the reliefs mentioned in section 92 without sanction cannot be cured by amendment and abandonment of such reliefs (*Gajramaji v. Som Nath*, A 1970 Bom 242 DB).

In a plaint under this section, **the nature of the trust, the plaintiff's interest in it, the breach of trust or other reason for the suit and the specific reliefs claimed should be clearly alleged.** Under section 92, C.P.C. it is not necessary that a person should have a direct interest to enable him to institute a suit but at the same time the right of suit is restricted to those persons who have a present and substantial interest and not a remote or fictitious or illusory interest (*Farman Ali Khan v. Md. Raza Khan*, 1949 ALJ 463). The suit cannot be brought by less than two persons, but on the death of one, may be carried on by the other (*Ram Gulam v. Shyam Sarup*, 50 A 687, 1933 ALJ 1393; *Bapiraju v. Ramchandra*, 146 IC 628, 1933 MWN 1286, 65 MLJ 690, A 1931 Mad 854). A relief not covered by the section should not be claimed, e.g., ejectment (*Brindaban v. Mt. Wanti*, 144 IC 168, A 1933 Lah 395); but if one is claimed the whole suit is not rendered bad (*Devi v. Alpati*, 106 IC 134, 1927 A Mad 1033). Such a suit should be instituted in the principal civil

No. 287—Suit by Beneficiaries for Ejectment of a Trespasser Impleading Trustee *(bb)*

1. There is in the village of Shamspur a mosque called the Sunehri Masjid to which certain shops and lands, which include the land specified at the foot of the plaint, are attached.

2. The said mosque, lands and shops are *waqf* property for the benefit of all Muslims and defendant No.2 is the *Mutwalli* of the said *waqf*.

3. The plaintiffs are Muslim residents of the village Shamspur and congregate, along with other Muslim residents of the village, in the said mosque for offering prayers.

4. Defendant No.1 has, on or about the 3rd February 1996 unlawfully taken possession of the land specified at the foot of the plaint and has built a wooden structure thereon and opened a tea shop.

5. The plaintiff served a notice on defendant No.2 requiring him to eject defendant No.1 and recover possession of the said land, and defendant No.2 has replied that the land is not *waqf* property but belongs to him and that he has let it out to defendant No.1.

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court of original jurisdiction (which is usually the court of District Judge) or any other court specially empowered by government to try such suits. To an appeal from an order under section 92, District Judge should not be joined as a respondent (*Sahdevachari* v. *District Judge, Benares*, A 1933 All 151, 144 IC 701 [1]). All persons interested in the relief claimed must be impleaded as defendants. The court should itself implead any such person omitted, e.g., an alienee of trust property denying the trust (*Anjaneya* v. *Kothandapani*, 164 IC 615, A 1936 Mad 449).

Limitation: Under section 10 Limitation Act there is no limitation for a suit for declaration that property in possession of *mutwalli* is *wakf* property (*Md. Shah* v. *Fasihuddin*, A 1956 SC 713).

(bb) Though ordinarily all suits for recovery of endowed property from trespassers must be instituted by the trustee or *mutwalli*, there is nothing to prevent any beneficiary, e.g. a worshipper at a temple or mosque from instituting any such suit when the trustee either sets up a hostile title or neglects or refuses to sue. The relief may be either declaration that the property is a trust property or injunction or ejectment and recovery of possession, as may be required (*Ettyat Ahmad* v. *Vayalkuth*, 173 IC 586, A 1937 Mad 819). When there is a trustee, it would be proper to implead him as a defendant, but the deity is not a necessary party (*Monindra Mohan* v. *Shamnagar Jute Factory*, 43 CWN 1056, A 1939 Cal 699, 186 IC 25). *De facto* manager or trustee *do son tort* can also sue for recovery of property on behalf

The plaintiff, therefore, claims:

(a) declaration that the land specified at the foot of the plaint is *waqf* property and not the private property of defendant No.2;

(b) ejectment of defendant No. 1 from the said land.

No. 288—Suit Under Section 14 Religious Endowments Act *(cc)*

1. The temple known as the temple of Sri Girdhar Gopal Ji in the town of Mathura was built about in the year 1950 by one Seth Kishorilal of Agra, who dedicated considerable movable property and jewellery to the deity and endowed considerable immovable property for the expenses and upkeep of the said temple, and by a deed of endowment, dated August 15, 1951, directed, among other things, that out of the income of

of the trust (*Gopal* v. *Mohd. Jaffar*, A 1954 SC 5; *Vikram Das* v. *Daulat Ram*, A 1956 SC 382; *Bishwanath* v. *Radha Ballabhji*, A 1967 SC 1044). Even a worshipper (*Vemaraddi* v. *Konduru*, A 1967 SC 436; *Bhagwati Prasad* v. *Laxminathji*, A 1985 All 228) or pujari (*Mahajan* v. *Gopinath*, A 1986 Pat 3) can maintain a suit to challenge an alienation made by a *shebait* against the interests of the deity. In case of a suit for recovery of trust property from a trespasser it is not necessary that actual possession should be given to the plaintiff. The court can, after making a declaration, direct that possession be delivered to the trustee as such and when there is no trustee the court can direct possession to be delivered to the plaintiff on behalf of the trust (*Rangaswami* v. *Krishnaswami*, 71 IC 463, A 1923 Mad 276, 1923 MWN 84 DB). Such a suit need not be a representative suit but may be instituted by any beneficiary without even impleading any other beneficiary (*Fabimol Haq* v. *Jagat*, 74 IC 403, A 1923 Pat 475 DB).

(cc) In respect of public religious establishments such as mosques and temples, section 14 of this Act provides an alternative remedy to that provided by section 92 C.P.C. Such a suit can be brought against the trustee, manager or superintendent of a religious establishment or against the members of any committee appointed under the Religious Endowments Act in respect of the trust vested or confided to them respectively (*Sarjoo* v. *Ajodhiya Prasad*, A 1979 All 74). There is no reason to restrict the applicability of sections 14 and 18 of Religious Endowments Act of 1863 only to endowments which were in existence on that date (*Bhagwan Das* v. *Moti Chand*, A 1949 All 612). The plaintiff should show in the plaint (1) that he is interested in the religious establishment or in the performance of the worship or service therof or in the trust relating thereto; (2) that the defendant has committed any misfeasance, breach of trust or neglect of duty in respect of the trust vested or confided to him; (3) the relief claimed, which may be specific performance of any act by the defendant, damages, or removal of the defendant from the

the endowed property, Rs.2,000 a month should be spent on the upkeep of a *pathshala* or a small school for religious teaching which had been opened by him in part of the said temple, and Rs.1,200 be spent on *rajbhog* for offering of food to the deity.

2. By the said deed of endowment, the said Seth Kishorilal appointed his son Raja Ram as sole trustee of the said temple and property and directed that after the said Raja Ram's death, his eldest son should be the trustee.

3. The defendant being the eldest son of the said Raja Ram has been the trustee and manager of the temple and the endowed property since 1980.

4. The defendant has been guilty of the following acts of misfeasance and breach of trust :

(a) He has disposed of or converted to his own use the article of jewellery mentioned in schedule A, attached to the plaint, which should be treated as part hereof, which had been dedicated by Seth Kishorilal for the use of the idol.

(b) During the time of Seth Kishorilal and Raja Ram's trusteeship two teachers were employed for the *pathshala* at Rs.500 and Rs.300 per month respectively, and 16 scholarships of Rs.50 were given to the students. The defendant has, within a year of his taking over charge, dismissed the senior teacher and since then only one teacher on Rs.300 per month has been employed and only 6 scholarships have been

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office of trustee or manager or superintendent, but not appointment of a new trustee (*Sada Shankar* v. *Hari Shanker*, 5 ALJ 191): or rendition of accounts of the trust property (*Ram Narain* v. *Jai Narain*, A 1961 All 125; *Chief Inspector of Stamps* v. *Ramesh Chandra Ghetak*, A 1956 All 189). For any other relief e.g., a suit for framing a scheme for the management of the temple a suit under section 92 C.P.C. will be necessary (*Sitharama Chettey* v. *Subramaniya Iyer*, 39 Mad 700). The trustee, manager or superitendent who can be sued, should according to the Allahabad High Court, be one appointed under the Act (*Sher Khan* v. *Bhura Shah*, A 1935 All 273); but the Calcutta High Court has in one case held that only hereditary trustees under section 4 can be sued under section 14 (*Bhima* v. *Dashrathi*, 40 Cal 323), while in other cases it has been held that sec. 14 applies to trustees, whether hereditary or selected (*Mohammed Athar* v. *Ramjan Khan*, 34 Cal 587; *Badar Rahim* v. *Badhshah Mia*, 62 Cal 125). The Madras High Court takes the latter view (*Mathur* v. *Ganathora*, 17 Mad 95).

given, with the result that the *pathshala* has become unpopular and attendance has fallen to less than half.

(c) The temple building was not properly repaired with the result that the roof of the big front hall used as a waiting hall for the visitors fell down 4 years ago and the hall was totally ruined 3 years ago.

5. The plaintiff is a Hindu resident of Mathura and is interested in the temple as a daily worshipper at it.

The plaintiff claims :

(1) That the defendant be removed from the office of the trustee;

Or

(a) that the defendant be directed to appoint a senior teacher for the *pathshala* on a pay of at least of Rs.500 per month and to allow at least 16 scholarships to the students; and

(b) that the defendant be directed to rebuild out of the trust funds the big front hall of the temple just as it was before its roof fell down.

For the interests which a plaintiff may have, so as to be entitled to sue, see section 15. The suit can be filed in the principal court of original civil jurisdiction in the district. A preliminary application for leave to institute the suit should be made to the court before institution of the suit (section 18). As in the application the plaintiff has to show sufficient *prima facie* ground for the suit, all the allegations which are to be made in the suit should be made in the application. It may be more convenient to attach a copy of the proposed plaint to the application, in which case it will not be necessary to detail all the facts over again in the application. The application requires to be verified (*Amdoo* v. *Muhammad Davud*, 24 M 685). but it is not necessary that notice of it should be given to the other side (*ibid*) or an inquiry be held before leave is granted (*Syed Husain* v. *Syed Hamid*, 1930 ALJ 1208).

What amounts to a public temple as distinguished from a private temple. (*Bala Shankar Maha Shankar Bhattjee* v. *Charity Commissioner*, A 1995 SC 167: *Jammi Raja Rao* v. *Shri Anjaneyaswami Temple Valu*, A 1992 SC 1110, (1992) 3 SCC 14; *T.V. Mahalinga Iyer* v. *State of Madras*, A 1980 SC 2036). The most important tests are whether the members of the public are entitlled to worship in the temple as of right, if the expenses of the temple are met from the contributions made by the public; whether the managament as well as devotees have been treating that temple as public temple and that *sevas* and *utsavs* conducted in the temple are those usually conducted in public temple. (*Goswami Shri Mahalaxmi Vahuji* v. *Shah Ranchodas*, A 1970 SC 2025). In the case of a private temple the beneficiaries are specific individuals, but in the case of a public temple the beneficiaries are indeter-

(2) A decree of Rs.1,55,673, being the value of the said jewellery, misappropriated or disposed of by the defendant, as damages for the defendant's said act of conversion, against the defendant personally.

(3) Costs of this suit against the defendant personally.

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minate or fluctuating general public or class thereof (*Bala Shankar Mahashankar Bhattjee* v. *Charity Commr., Gujarat*, A 1995 SC 167).

In a suit under section 5 (3) of Charitable and Religious Trusts Act, the deity ought to be impleaded: otherwise it will not be bound by the decree even though members of the Hindu public may be bound (*Narayan Bhagwantrao* v. *Gopal*, A 1960 SC 100).