## Chapter I

# PLEADINGS GENERALLY

Pleadings are statements in writing drawn up and filed by each party to a case, stating what his contentions will be at the trial[1] and giving all such details as his opponent needs to know in order to prepare his case in answer.

**GENERAL :** The drafting of pleadings is an art. It demands a high degree of professional skill and professional knowledge, expertise and experience. It is not a child's play as some young members of the Bar fancy. Various works on pleadings and the formats framed by the authors and the forms annexed to the Code of Civil Procedure and other enactments are only a guide and it is for the lawyer who owes a duty to both the profession and the court to see that the pleadings are properly framed. The function of pleadings is not simply for the benefit of the parties, but also and perhaps primarily for the assistance of the court by defining with precision the area beyond which, without the leave of the court and consequential amendment of the pleadings, the conflict must not be allowed to extend.[2] While a lawyer is entitled to set out the case of his client clearly and firmly he must not forget his duty to the profession to which he belongs and throw away the noble traditions of the Bar and use intemperate or vituperative epithets or make scandalous, frivolous or vexatious allegations against the opponents. Not infrequently such allegations land the counsel himself in trouble. The typical instance is the use of the word '*awara*' (vagabond) against the plaintiff's son in the written statement has led to series of litigations involving the counsel for the defendant.[3] Moderation in language is the hallmark of proper pleadings.

The court is not expected to be a mute spectator to the pleadings raised by the parties. It is the duty of the court to peruse the pleadings atleast at the time of framing of the issues and strike out matters which are unnecessary, scandalous, frivolous or vexatious, or which may tend to prejudice, embarrass or delay the fair trial of the suit or which is otherwise

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1 C.P.C. uses the word "hearing" for what in England is called "trial".

2 *Pinson* v. *Lloyds & National Provincial Foreign Bank Ltd.*, 1941 - 2K.B. 72

3 *Sumant Prasad* v. *Ram Sarap*, A 1946 All 204.

an abuse of the process of the court (O.6, R.16). At the same time the court should realise that the rules of the procedure of which pleadings form but a part are matters of mere machinery for rendering justice. Its approach should be pragmatic and not highly technical.[4]

It must be borne in mind that the rules of pleadings are intended to regulate the business and procedures of the court. They never create new legal rights where none exist, nor do they take away the existing rights. The Code of Civil Procedure is only an adjective law as opposed to substantive law, on the basis of which alone the rights of a party are to be determined. The primary duty of the lawyer is first to make himself familiar with the substantive law on the subject on hand, statutory, customary and judicial precedents up-to-date, to find out the correct position of law on the matter in question, to ascertain where his client stands and then shape the pleadings according to law to the best advantage of his client. This is much more important in the case of budding lawyers, many of whom have not even taken the apprentice course under seniors. A lawyer true to his profession must have the mental stamina and intellectual honesty to lay bare before his client the correct legal position, inform him in appropriate cases of the futility or frailty of his case and advise him accordingly. An honest lawyer who gives an honest opinion at the risk of losing his brief is bound, in the long run to earn the confidence of the litigant public.

It is the first and foremost duty of a lawyer briefed to file a suit to consider whether the subject matter of the suit is of a civil nature and is maintainable in the regular court of civil jurisdiction. Section 9 of the Code of Civil Procedure lays down that Courts shall subject to the provisions herein contained have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. If a civil court has no jurisdiction to try the case it goes to the very root of jurisdiction and it is a case of inherent lack of jurisdiction.[5]

We may classify pleadings under four broad heads:

I. Pleadings in a suit

4 *Prakash Chandra* v. *Commissioner & Secretary, Govt of India*, A 1986 SC 687; *CST* v. *Auriya Chamber of Commerce*, A 1986 SC 1556; *Sheik Abdul Satar* v. *Union of India*, A 1970 SC 479.

5 *Hiralal* v. *Kalinath*, A 1962 SC 199.

II. Pleadings in other civil proceedings before a court or tribunal.

III. Pleadings in writ proceedings.

IV. Pleadings in an election petition.

## I. Pleadings in a suit

**Plaint and written statement :** As a rule, there are only two pleadings in a suit, viz :

(*a*) A statement of claim, called the "Plaint", in which the plaintiff sets out his cause of action with all necessary particulars;

(*b*) A defence, called the "Written Statement", in which the defendant deals with every material fact alleged by the plaintiff in the plaint and states any new facts which tell in his favour, adding such legal objections as he wishes to take to the claim.

**Replication:** No pleading subsequent to the written statement of a defendant, other than by way of a defence to a set off or counter-claim can be presented except by leave of the court and upon such terms as the court thinks fit, but the court may at any time require a written statement or additional written statement from any of the parties.[6] Such leave is normally given to a party whose opponent has been permitted to amend his pleading. Such subsequent written statement is normally called, in the case of plaintiff, Replication or Rejoinder and in the case of a defendant, an Additional Written Statement. It is for this reason that "pleading" is shortly defined in the Code of Civil Procedure as meaning a plaint or a written statement.[7] In view of the language of O.8, R.9, the expression "written statement" comprises a Replication as well. Annexures to a plaint or written statement, referred to in some paragraphs of such pleading are deemed parts of the pleading.[8]

**Set-off and Counter-claim** : In his written statement the defendant is expected to put forward his defence to the plaintiff's claim and the grounds on which he wishes to defeat it. If he wants to put forward his own claims against the plaintiff, such claims can be of two kinds: those which strictly fall within the category of set-off provided for in O.8, R.6,

6 O.8, R.9.

7 O.6, R.1.

8 In re *Pandam Tea Co.*, 1972 Tax LR 1923 Cal, 45 Comp. Case 67.

and those which do not fall within that class. Claims of the former kind can be pleaded in the written statement and will be entertained by way of set-off. Claims of the latter kind are known as counter-claims. O.8, R.6A, as added by Central Act, 1976, now, makes a specific provision for counter-claim. Like set-off, counter-claim is not limited to money claims alone. A set off is essentially a ground of defence but a counter-claim could arise only if the defendant could have filed an independent suit in respect of the same.[9] In other words it is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action.[10]

**Pre-trial procedure, Oral Pleadings :** If, however, facts alleged in the written pleadings of one party are not, expressly or by necessary implication, admitted or denied by the other party, the judge is expected, at the first hearing of the suit (and before the settlement of issues), to ascertain from the latter whether he admits or denies them and to record such admissions or denials.[11] The statements so recorded may be called *oral pleadings*. This is all the more necessary when the defendant has not filed a written statement, and also, when some new facts are alleged in the written statement, in which case the issues cannot be settled unless it is ascertained whether the plaintiff admits or denies them. It is also necessary when the written pleadings are incomplete,vague, ambivalent or imprecise. An alert Judge is the answer to irresponsible or careless pleadings. The trial courts should insist imperatively on examining the party at the first hearing so that bogus claims and defences can be curtailed at the earliest stage.[12]

Pleadings, therefore, also include statements of parties or counsel, recorded before the framing of issues for clarification of the points in dispute.[13] These statements are in the nature of supplementary pleadings and no plea inconsistent with them can be raised at later stage, except,

9 *T.A.M. Subramaniam Chettiar* v. *K.M. Shaningham*, (1966) 1 MLJ 200.

10 *Saraswati Oil Mills* v. *State of Gujarat*, (1967) 18 STC 163 (SC) (citing Halsbury's Law of England on distinction between set-off and counter-claim).

11 O.10. R.1.

12 *T. Aruvindam* v. *T.V. Satyapal*, A 1977 SC 2421.

13 *Ganga Ram* v. *Gyan Singh & Co.*, A 1960 Punjab 209.

by way of amendment of pleadings.[14] Issues can be framed on such supplementary pleadings and the trial is not vitiated if no formal amendment is made in the written pleadings in the light of oral pleadings.[15] It is, however, desirable for the party concerned to seek leave of the court to amend its pleadings if the facts orally stated appear to be at variance with the pleadings or are so material as ought to have been mentioned in the pleadings, for such oral statements are no substitute for pleadings.[16] Statements made under O.10, R.1, being part of pleadings are binding on the party making it and cannot be rebutted by it. However, statements made under O.10, R.2 are not always conclusive and the court may in a suitable case allow the party making it to show that the admission was incorrect and was made under some misapprehension or inadvertence.[17]

Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted, except, as against a person under disability.[18] Likewise where the defendant has not filed a pleading, it shall be lawful for the court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability; but the court may, in its discretion, require any such fact to be proved.[19] Normally, a fact which is taken to be admitted need not be proved,[20] but the court has been given discretion in the interest of justice to require any fact so taken to be admitted, to be proved otherwise than by such admission[1] and in exercising this discretion it is required to have regard to the fact whether the defendant could have, or has, engaged a pleader.[2]

14 *Mohammad Yahya* v. *Rahem Ali*, 117 IC 813, A 1929 Lah 165.
15 *Firm of Suraj Singh* v. *Sardar*, 116 IC 884.
16 *Quazi Toufiqur Rehman* v. *Mst. Nurbanu Bibi*, A 1976 Gau 39.
17 *Balmiki Singh* v. *Mathura Prasad*, A 1968 All 259 (case law discussed); See also, *Kailash Chandra* v. *Ratan Prakash*, A 1974 All. 138.
18 O.8, R.5 (1)
19 O.8, R.5 (2).
20 *Jagannath Upadhya* v. *Amrendra Nath Banerjee*, A 1957 Cal 479.
1 O.8, R.5 (3), as amended by 104 Act of 1976.
2 The expression 'pleader' includes an advocate, a *vakil* or an attorney of a High Court, vide sec. 2 (15).

**Pleadings in India:** In our country pleadings used to be extremely lax and most inartistically drawn up. They were neither concise nor precise, and contained vague, irrelevant and general statements, from which it was difficult to ascertain the question actually in controversy. This was realised by the Legislature in 1908, and in the Code of Civil Procedure, enacted in that year, a few rules of pleadings were added, based on the English rules of pleading. These rules are contained in Order 6 and 8 of the Code. But, inspite of the fact that these rules have been on the statute book for so many years, there continues to be considerable scope for improvement in pleadings generally.[3]

**Object of Pleadings :** The whole object of pleading is to give fair notice to each party of what the opponent's case is,[4] and to ascertain, with precision, the points on which the parties agree and those on which they differ, and thus to bring the parties to a definite issue. The purpose of pleading is also to eradicate irrelevancy. In order to have a fair trial it is imperative that the party should state the essential facts so that other party may not be taken by surprise.[5] The parties thus themselves know what are matters left in dispute and what facts they have to prove at the trial and are thus given an opportunity to bring forward such evidence as may be appropriate.[6] They are saved the expense and trouble of calling evidence which may prove unnecessary in view of the admissions of the opposite party. And further, by knowing before hand, what points the opposite party will raise at the trial, they are prepared to meet them and are not taken by surprise as they would have been, had there been no rules of pleadings to compel the parties to lay bare their cases before the opposite party prior to the commencement of the actual trial.[7] The main object of

3 *Prabodh Verma* v. *State of U.P.*, (1984) 4 SCC 251 (para 38).

4 *Someshwar* v. *Tribhuwan*, A 1934 PC 130, 149 IC 480; *Ram Sarup Gupta* v. *Bishun Narain Inter College*, A 1987 SC 1242; *Narinder Nath* v. *Jaswant Singh*, A 1994 P & H 111; *Ganesh Trading Co.* v. *Mogi Ram*, A 1978 SC 484.

5 *Ram Sarup Gupta* v. *Bishun Narain Inter College*, A 1987 SC 1242; *K. Karunakarathnam* v. *A. Perumal*, A 1994 Mad 247 (DB); *Ram Kishan* v. *Mast Ram*, A 1986 P & H 61 (DB).

6 *Sayad Muhammad* v. *Fatteh Md.*, (1895) 22 IA 4, 22 C 324 (PC); *Lakshmi Narain* v. *State*, A 1977 Pat 73; *Elizabeth* v. *Saramma*, 1984 Kar LT 604.

7 *Sayad Muhammad* v. *Fatteh Md.*, (1895) 22 IA 4, 22 C 324 (PC); *Thorp* v. *Holdsworth*, (1876) 3 Ch D 637.

pleadings is to find out and narrow down the controversy between the parties.[8] Contentions which are not based on the pleadings cannot be permitted to be raised either at the trial stage or at the appellate stage.[9] It is also well-settled that notwithstanding the absence of pleading before a court or authority, still if an issue is framed and the parties were conscious of it and went to trial on that issue and adduced evidence or cross examined witnesses in relation to the said issue, no objection as to want of pleading can be permitted to be raised later.[10]

**Construction of Pleadings** : It is well settled that in the absence of pleadings, evidence if any produced by the parties cannot be considered and no party should be permitted to travel beyond its pleadings and all necessary and material facts should be pleaded by the party in support of the case set up by it.[11] Where a claim has never been made in the defence presented, no amount of evidence can be looked into upon a plea, which was never put forward.[12] No evidence can be led on a fact not pleaded.[13] It is also not open to the parties to give up the case set out in the pleadings and propound a new and different case.[14] Evidence on a matter which is not acutally in issue cannot be looked into. Where the parties go to trial knowing fully well what they are required to prove, adduce evidence and the court considers the same, the parties cannot have grouse that the evidence should not be looked into in the absence of proper pleading or issue for determination.[15]

8 *Kishan Lal Gupta* v. *Dujodwala Industries*, A 1977 Delhi 49, (1976) 78 PLR (Delhi) 227.

9 *D. Kedari* v. *Hazurabad Co-operative Marketing Society Ltd.*, 1994(2) ALT 539 AP (DB).

10 *Sardul Singh* v. *Pritam Singh*, 1999 (3) LW 466 SC.

11 *Ram Sarup Gupta* v. *Bishun Narain Inter College*, A 1987 SC 1242; *K. Kanukarathnam* v. *A. Perumal*, A 1994 Mad 247 (DB).

12 *Siddik Mohd. Shah* v. *Mt. Saran*, A 1939 PC 57; *Hari Chand* v. *Daulat Ram*, A 1987 SC 94; *Shri Venkataramana Devaru* v. *State of Mysore*, A 1958 SC 255; *S. Venkappa Devadiga* v. *Smt. R.S. Devadiga*, (1977) 3 SCC 532, A 1977 SC 890; *Shankar Chakravarti* v. *Britania Biscuits Co.*, A 1979 SC 1652, (1979) 3 SCC 371 (para 32); *Kupala Obul Reddy* v. *Narayana Reddy*, (1984) 3 SCC 447 (para 15) (also see Chapter VIII, *post*).

13 *Harichand* v. *Daulat Ram*, A 1987 SC 94.

14 *Vinod Kumar* v. *Surjit Kaur*, A 1987 SC 2179 at p.2183.

15 *Kali Prasad* v. *Bharat Cooking Coal Ltd.*, A 1989 SC 1530; *Kunju Kesavan* v.

However, a mere inaccuracy in stating the date of cause of action has been held not to justify dismissal of the suit.[16] In a case for damages for failure to take delivery by the buyer, want of clear averment in the plaint about the seller's readiness and willingness to deliver has not been considered fatal.[17] But in a suit for specific performance of a contract the averment of continuous readiness and willingness is essential[18] under section 16(c) of the Specific Relief Act, 1963. Such averment may not, however, be necessary in a case where the defendant had repudiated the contract.[19] Moreover, readiness and willingness cannot be treated as a strait jacket formula and these have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of party concerned.[20] The averment that the plaintiff has no objection to perform the contract in accordance with the decision of the court is a sufficient averment as contemplated in section16(c) of the Specific Relief Act.

In a motor accident claim case the court upheld the claim on the facts alleged and proved even though there was no clear plea of negligence, it was observed that pleadings have to be interpreted not with formalistic rigour but with latitude on awareness of low legal literacy of poor people.[1] When a person relies on a Will and pleads that the Will was executed by the testator, the pleading is to be construed that the Will was executed by the testator in a sound and disposing state of mind.[2]

Pleadings in the mofussil are not so strictly construed as pleadings in the High Court.[3] The Pleadings in mofussil Courts in India are loosely drafted

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*M.M. Philip*, A 1964 SC 164; *Rajbir Kaur* v. *S. Chokosiri & Co.*, A 1988 SC 1845; *Ram Sarup Gupta* v. *Bishun Narain Inter College*, A 1987 SC 1242.

16 *Abdul Shakur* v. *Rajendra*, A 1935 All 759, 155 IC 1092.

17 *Arjunsa* v. *Mohan Lal*, A 1937 Nag 345.

18 *Ardeshir* v. *Flora Sassoon*, A 1928 PC 208; *Prem Raj* v. *DLF Housing and Construction (Private) Ltd.*, A 1968 SC 1355; *Ouseph Verghese* v. *Joseph Aley*, (1969) 2 SCC 539; *Abdul Khader Rowther* v. *P.K. Sara Bai*, A 1990 SC 682.

19 *International Controls* v. *R.K. Suri*, A 1962 SC 77.

20 *Ramesh Chandra Chandick* v. *Chunni Lal Sabbarwal*, A 1971 SC 1238; *Buddhoo Teli* v. *R.S. Tewari*, 1980 All WC 716; *Krishnan Kesavan* v. *Kochukunju Karunakaran*, A 1988 Ker 107.

1 *Manjushi Raka* v. *B.L. Gupta*, A 1977 SC 1158, (1977) 2 SCC 174 .

2 *Chinnamal* v. *Kannagi*, A 1989 Mad 185.

3 *Badat & Co.* v. *East India Trading Co.*, A 1964 SC 538 (para 11) per *Subba Rao*, J.; *Ganesh Sahu* v. *Dwarika*, A 1991 Pat.

and as such a liberal construction has always to be given to such pleadings.[4] The courts would be disposed towards a construction which would permit rather than shut out, an adjudication of the real rights of the parties, when from the facts set out, such adjudication may be held to be justified, though not asked for in specific terms or in strict form.[5] The fairness of trial demands that the opposite party must know the case he has to meet and should not be taken by surprise, but the courts would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to other side. The primary, though not the only, consideration in the construction of pleadings is not so much what a careful draftsman would intend to express if he had used the words in question, nor what meaning the court or the opposite-party ought to have put on those words, but in what sense, as a matter of fact, the words were understood.[6] A liberal construction should, therefore, always be put on pleadings, and the intention of the party pleading should be looked to. The court should look to the substance rather than to the wording of a pleading. Rules of procedure are meant to subserve and not to govern the cause of justice. A document referred to and relied upon in pleadings may be considered to constitute a part of pleadings.[7]

If the substance of the essential material facts for grant of relief is stated in the pleadings, the court should not throw away the same on the ground of defective form or the deficiency in the pleadings.[8] A plaintiff's case should not be defeated merely on the ground of some technical

4 *Laxminarayan Deo-Vasti Temple* v. *Narayan F. Marathe*, 1995 (2) Bom CR 610 (Bom.)

5 *Mahendra Nath* v. *Surajmal*, 45 CWN 17.

6. *Bhagawati Prasad* v. *Chandramaul*, A 1966 SC 735; *Bhim Singh* v. *Kan Singh*, A 1980 SC 727, (1980) 3 SCC 73; *Madan Gopal* v. *Maniraj*, A 1976 SC 461, (1977) 1 SCC 669.

7 *Ram Sarup Gupta* v. *Bishun Narain Inter College*, A 1987 SC 1242; *Ganesh Sahu* v. *Dwarika Sao*, A 1991 Pat 1; *Archana Estate and Construction Pvt. Ltd.* v. *Roshan Lal*,(1995) I Punj LR 301 (P & H) (Technical Rules of Procedure should be applied to serve the ends of justice and should not be made tools of oppression); *Sharda Ram* v. *Malik Yashpal*, (1964) 66 Punj. LR 1126. But see *Niranjan Lal Ratan Kumar* v. *R.S.N. Co.*, A 1967 Assam 74 (contents of protest note referred to in W.S. treated as not pleaded).

8 *Kalawati Tripathi* v. *Damyanti Devi*, A 1993 Pat 1 (DB); *Sayed Ali* v. *Gyarsi Lal*, 1983 MPLJ 389 MP; *Bismilla* v. *Janeshwar Prasad*, A 1990 SC 540.

defect in his pleading, provided he succeeds on the real issues in the case.[9] The pleading has to be read as a whole to ascertain its true import and it is not permissible to pull out a sentence or a passage to read it out of the context, in isolation.[10] Therefore, an erroneous description of the claim is not fatal, and if a claim for money had and received is described as one for damages, the error is not fatal.[11] Similarly, when a plaintiff sued for possession as a proprietor he was given a decree on the finding that he was a service tenure holder.[12] In a suit for debts, a plea that the debts were not binding on the *mutt* property as they were not, and could not have been incurred by the deceased *matadhipati* for the benefit of the *mutt*, was held to include both the legitimacy of the purpose for which the debts were borrowed as well as the necessity to borrow the debts.[13] Relief may sometimes be founded on a plea not directly made but covered by implication. If the plea or ground of defence raises an issue arising out of what is alleged or admitted in the plaint, or is otherwise apparent from the plaint itself, no question of prejudice or surprise to the plaintiff arises.[14] It is necessary that the point was at issue and the parties knew that the plea was involved in the trial. Thus where the plaintiff fails to prove tenancy, a decree for ejectment may be passed on the ground of defendant's possession being by leave and licence.[15] Similarly, where the question is whether a person is sued in a representative capacity or in personal capacity, the mere fact that the cause title does not describe his representative capacity is immaterial, but the whole plaint should be read and the conduct of litigation looked at.[16]

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9 *Dharam Das* v. *Ranchhodji*, 64 IC 517, 23 Bom LR 1009; *Kishori Lal Nag* v. *Tinkari Chandra*, A 1980 Cal 204.

10 *Udhav Singh* v. *Madhav Rao Scindia*, 1977 (1) SCC 511, A 1976 SC 744; Syed *Dastagir* v. *P.R. Gopalakrishna Shetty*, 1966 (6) SCC 3773.

11 *Harpal* v. *Ram Sarup*, 34 IC 173 (All).

12 *Jokhan* v. *Mahesh*, 27 IC 720, 13 ALJ 160.

13 *Lakshmichand* v. *Vibhudapriya Thirtha*, 17 LW 274, 44 MLJ 187, A 1923 Mad 288 (DB).

14 *Udhav Singh* v. *Madhav Rao Scindia*, A 1976 SC 744.

15 *Bhagwati Pd.* v. *Chandra Mau*, A 1966 SC 735, (1966) 2 SCR 286; *Abdul Sami* v. *Md. Noor*, 1965 ALJ 339; *Ram Shanker* v. *Noor Mohd.*, A 1976 All 155; *Pannalal* v. *Sharafat Ali*, 1979 ARC 90; *Kashi* v. *Mujtaba Hasan*, 1982 BLJR 28.

16 *Sonachalam* v. *Kumaravelu*, 54 MLJ 587, A 1928 Mad 445 (DB).

The leniency of the courts in the construction should, however, be no encouragement to pleaders in disregarding rules of pleading.[17] If the rules of pleading which aim at making the trial easier, reasonable cost, and justice to both parties, are construed too strictly the pitfalls of pleading may prevent the merits of the issue from being discussed; if the rules are lightly disregarded, the result may be confused trials, unfair surprise, costly adjournments and many appeals. It is, therefore, necessary to maintain a delicate balance between technicality and regard for the practical issues. It is the right of a party to have the opponent's "case presented in an intelligible form so that he may not be embarrassed in meeting it." An unnecessary pleading "tends to prejudice, embarrass and delay the trial of the action".[18]

**Duty of Court :** "The responsibility of clearly perceiving and raising points, which arise upon the pleadings and evidence, and the proper adjudication of which is essential for the ends of justice, rests on the court as much as on the parties or their pleaders."[19] This duty is recognised by statute by the enactment of the provisions noticed above, namely, that, at the first hearing, the court shall ascertain from each party whether he admits or denies such allegations of facts as are not expressly or by necessary implication, admitted or denied by him,[1] and a further provision under which the court is empowered to examine the parties before settlement of issues to find out what the actual controversy between them is.[2] Such examination may be made by the court either *suo motu* or on the suggestions of the opposing counsel.[3] When the question is whether a party should be held bound by an admission in his pleadings, it is the duty of the court to look to the pleadings as a whole and not to dissect a fact out of the pleadings.[4] Moreover, the court should not record a concession on behalf

17 *London and Lancashire Co.* v. *Binoy*, A 1945 Cal 218; See also *Attorney General* v. *J.P. Bayly Ltd.*, A 1950 PC 73 (A case from Fiji in which the Privy Council set aside the decree based on a plea not contained in the pleadings but remanded the case to the court below to enable proper amendments being made).

18 *Knowles* v. *Roberts*, (1888) 38 Ch. D. 263 (Bowen, L.J.).

19 *Per* Westropp, C.J., in *Apaya* v. *Rama*, 3 B 210

1 O.10, R.1.

2 O.10, R.2.

3 O.10, R.2.

4 *Shiv Saran Rai* v. *Sukhdeo Rai*, 171 IC 317, A 1937 Pat 418; *Dular Singh* v. *Sitaram*, A 1937 Nag 184.

of a party loosely but should specify as to who made the concession and in what words.[5] Extensive powers have further been given to the courts to strike out pleadings or to order their amendment,[6] and to call for written statements or further written statements.[7] When the pleadings are vague, the court has power also to order further and better particulars.[8] The distinction between material facts and material particulars of facts stated ought not, however, be overlooked.[9] It is duty of the trial court to clarify the pleas contained in a written statement which were too vague and too general to indicate what was meant by the defendant even if no attempts are made by the plaintiff to seek such clarification. Unfortunately, courts do not make so free and extensive use of these powers as is necessary, and the result is that the issues are enlarged and irrelevant evidence is often introduced, the real issues being sometimes lost sight of. If these powers were carefully and extensively exercised, much of the evil effect of bad pleading could be avoided. In fact that is not merely a matter of discretion; it is the duty of the court to find out accurately the real points of controversy between the parties and to adjudicate upon them, and not to pass technical orders on technical points, for that means denial of substantial justice. In England these powers and also the rights of the parties to seek discovery, clarifications and admissions, which are contained in Orders 11 and 12 of our C.P.C., are so extensively and effectively exercised that ninety nine percent cases are settled even before reaching the trial stage.

Courts have no power to non-suit the plaintiff merely because the pleadings are not in proper form.[10] Again, relief is not to be refused merely because the relief claimed is wrongly described[11] or the wrong statute stated.[12] Where a party pleads and proves all necessary facts, it is for the court to draw the legal inferences from them.[13] A party need not plead

5 *Zila Parishad* v. *Ramesh Chandra*, 1978 ALJ 412.
6 O. 6, R.16 and 17.
7 O. 8, R.9.
8 O. 6, R.5.
9 *Moti* v. *Roshan*, A 1971 HP 5; *Mohan Singh* v. *Bhanwar Lal*, A 1964 SC 1366.
10 *Moor*, IA 383, 7 Suth WR 8.
11 *Babu Lal Roy* v. *Bindhyachal Rai*, A 1943 Pat 305.
12 *Muthuswami* v. *Ramalinga*, A 1958 M 366; *Trailakya Nath* v. *Bimala*, ILR (1953) 2 Cal 385.
13 *Somnath Singh* v. *Ambika Dube*, A 1950 All 121.

them. It is for the court itself to find out and examine all pleas of law that may apply to facts.[14] The court can, however, reject a plaint if it does not disclose a cause of action,[15] that is to say, if on the facts pleaded in the plaint no case is made out.

It is also the duty of the judges to see that the rules of pleadings are obeyed in their courts, and especially endeavour to save public time by not allowing counsel to travel "outside the record", that is to say, not to give evidence which goes beyond any of the particulars in the plaint or written statement. Thus, if a plaintiff has given in his particulars of fraud, three distinct grounds, it would be the manifest duty of the court to interpose and exclude any evidence of a fourth ground of which no mention is to be found in the plaint. The decision of a case cannot be based on grounds outside the plea of the parties and it is the case pleaded which has to be proved.[16]

**Settlements of Issues** : Order 14 deals with the settlement of issues and determination of a suit on issues of law or on issues agreed upon. It is here that the trial court has to take great care and caution. The trial court has to read the plaint and the written statement, if any, and after examination under R.2 of O.10 and after hearing the parties or their pleaders, ascertain the material propositions of fact or of law upon which the parties are at variance and shall then proceed to frame and record the issues. If the trial court spends some useful time while framing the issues, a good deal of unnecessary oral evidence and elaborate arguments may be shut out. Unfortunately, many trial courts never realise the importance of framing issues and very often draft issues furnished by the counsel on both sides are treated as issues framed by the court. This practice has to be deprecated in no uncertain terms.

**Duty of Pleader** : Though the courts do, for the sake of justice, apply liberal rules of construction to pleadings and though it is the duty of the courts to clear up ambiguous and obscure pleadings and to find out the real points at issue by exercising their various powers in this behalf, yet all

14 *Gulzar Ahmad* v. *Govt. of U.P.*, A 1950 All 212; *Kedarlal Seal* v. *Harilal Seal*, A 1952 SC 47.

15 O.7, R.11 (a).

16 *S. Venkappa Devadiga* v. *R.S. Devadiga*, A 1977 SC 890; *Trojan & Co. Ltd.* v. *Nagappa Chettiar*, A 1953 SC 235; *Raruhu Singh* v. *Achal Singh*, A 1961 SC 1097.

that does not absolve the pleaders from their initial responsibility of drafting clear and correct pleadings. A bad and careless pleading is often apt to spoil the case of a party beyond redemption, and even if the judge is inclined to stretch every point in his favour to rectify the mistake of the pleader, it certainly always involves the client in unnecessary expense, for no substantial amendment can be allowed except on strict terms as to costs or otherwise. It is, therefore, the duty of every pleader to take extreme care in drafting his pleadings. No doubt, he will gain much by experience, but a thorough understanding of the rules of pleading is essential to start with. He should, before proceeding to draft a plaint or a written statement, not only make himself acquainted with all the detailed facts of the case, but should also carefully and thoroughly study the law bearing on the subject, for it does not infrequently happen that, due to want of accurate knowledge of the law, a pleader pleads matters which are wholly unnecessary and thus involves his client in the expense and trouble of proving them, or omits matters which are the essentials of his claim or defence, thus very often making his client lose the case without any fault of his own. The bar will also do well to make increasing resort to the provisions of Orders 11 and 12, for discovery, inspection, etc., with a view to curtailing the area of controversy. These provisions, like those of Order 10, form part of the pre-trial procedure and have not yet been widely used in our country.

**Fundamental Rules of Pleadings (summing up)** The fundamental rules of pleadings are four, viz.

1. Every pleading must state facts and not law.

2. It must state all the material facts, and material facts only, (O. 6, R.2).

3. It must state only the facts on which the party pleading relies, and not the evidence by which they are to be proved; and,

4. It must state such facts concisely but with precision and certainty.

Each of these rules is so important that is deserves a separate chapter for discussion.

## II. Pleadings in other civil proceedings

Because of the proverbial delays in civil suits, Parliament and State Legislatures have been creating special courts and tribunals for speedier disposal of cases of various types. For instance, cases of ejectment in

respect of urban buildings between the landlord and tenant are now dealt with by special tribunals created under various State Legislations. Railway accidents claims are decided by Railway Claim Tribunals. Claims by industrial workmen for payment of wages are entrusted to prescribed authorities. So is the case with the workman's compensation claims. In some states such as U.P. and Rajasthan, Public Services Tribunals have been created for adjudication of cases of public servants in disputes arising out of their employment, including dismissal, termination of service, etc. In such cases normally the party aggrieved is expected to approach such special tribunals and the jurisdiction of the civil court under section 9 C.P.C. is barred. These are only a few of the numerous tribunals so far created by the Legislature. Such tribunals are likely to multiply in future. These tribunals are given various powers of a civil court while trying a suit under C.P.C. though they are not regular civil courts. Very often the presiding officers of these tribunals are presiding officers of regular civil courts, though not necessarily always. The provisions of the C.P.C. do not as such necessarily apply to proceedings before these tribunals although proceedings are civil in nature. To what extent provisions of the C.P.C. are applied to a particular civil proceeding depends on the statute under which the tribunal is created. The fundamental rules of pleadings mentioned above are broadly applicable even to these civil proceedings, though because of the relatively summary nature of those proceedings the same rules may not apply in their full rigour. In many cases the proceedings are commenced not through a "plaint" but through an "application" or a "claim petition" and so forth.

Even though the fundamental rules stated above should apply *mutatis mutandis* even to an application, claim petition, etc., in such proceedings, yet it is necessary for the pleader to study the statutory provisions carefully so that a blind adherence to the provisions of C.P.C. may not land him in difficulty. For instance O.30, R.1 permits a partnership firm to sue or to be sued in the name of the firm. If the C.P.C. has been applied as a whole to such civil proceedings, then, of course, O.30, R.1 would also apply. But if the statute is silent on this point, then it would be necessary for all the partners of the firm to sue or to be sued jointly in their individual names, instead of in the name of the firm. Likewise, in respect of a claim petition before a Services Tribunal it may be necessary to implead

the appointing authority of the public servant claimant. In a suit before the civil court it is the Union of India or the State concerned which is required to be sued vide Article 300 of the Constitution of India. The appointing authority may be an authority subordinate to the Government but in a civil court it is not necessary or proper to implead such an authority as defendant. These points of difference should be noted while drafting pleadings in such civil proceedings.

### III. Pleadings in writ proceedings

As the subject of writ jurisdiction is very wide, Part III has been completely devoted to it. While the fundamental rules about precision and certainty and conciseness which apply to pleadings in civil suit apply to writ petitions and to returns filed in answer to the writ petitions, there are some differences also. Unlike a plaint or written statement in a civil suit, a writ petition or its reply is always on affidavit. The writ petition is accompanied by an affidavit in which the paragraphs or parts thereof in which factual averments are made, and sworn or solemnly affirmed to be true by the party or its agent or other person familiar with the facts deposed to. There is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter affidavit filed in a writ petition. While in a pleading that is a plaint or a written statement, the facts and not evidence are required to be pleaded , in a writ petition or as in the counter- affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.[17] Secondly, a writ petition is not entirely similar to a plaint but partakes to some extent the character of a plaint and partly of a memorandum of appeal. The reason is that through a writ petition the validity of a judgment or order of an inferior tribunal or of some executive authority or quasi judicial body subject to the writ jurisdiction of the High Court or of the Supreme Court is assailed. While challenging the validity of such action or order it is necessary to point out the legal flaws therein. Thus a reference to legal provisions is not frowned upon in a writ petition or in counter affidavit or rejoinder to a counter affidavit filed in writ proceedings.

In writ proceedings, moreover, special and local Acts and Rules, Regulations or executive orders made thereunder come up for interpretation

17 *Bharat Singh* v. *State of Haryana*, A 1988 SC 2181.

and not merely the substantive civil law of the land as in a civil suit. Such laws are often subject to frequent change and it is sometimes difficult both for pleaders and for the courts to lay their hands on the up-to-date form in which such "law", using the expression in its widest sense as given in Article 13(3)(a) of the Constitution, exists at a particular time. It is, therefore, usual to quote in writ petition or to annex therewith detailed relevant provisions of such law, though it is not required in pleadings in a civil suit.

So far as *habeas corpus* petitions are concerned, where the party in custody is not able to engage a pleader or file a properly drafted petition, the courts allow considerable latitude and even entertain informal communications to them and treat them as writ petitions.[18]

Courts of late have adopted a liberal attitude in respect of *locus standi* as well so far as "public interest litigation" is concerned.[19] Even where the petitioner is not directly affected by the State action or inaction challenged by him, he may be allowed to approach the court through a writ petition if the matter is clearly in the public interest, particularly where the fundamental rights of the weaker sections of the people are involved.[20]

In the array of parties, again there are points of difference between a pleading in a civil suit and in a writ petition. In the case of weaker sections of the people, where fundamental rights are involved, even an unregistered association has been allowed to maintain a writ petition, though such an association, will have no right to file a suit. Again while in a civil suit it is the Union of India or the State concerned which has to be sued as the defendant, and an official of a Government can only be sued in his own name, in his personal capacity and not by his designation (unless the official is a Corporation Sole or a Corporation Aggregate), in a writ petition, however, any officer or authority who or which passed the impugned order

18 *Icchu Devi Choraria* v. *Union of India*, (1980) 4 SCC 531.

19 *Akhil Bharatiya S.K. Sangh* v. *Union of India*, A 1981 SC 298; *Peoples Union for Democratic Rights* v. *Union of India*, A 1982 SC 1473; *Janata Dal* v. *H.S. Chowdhary*, A 1993 SC 892; *Sub-Committee of Judicial Accountability* v. *Union of India*, A 1992 SC 320; *Bangalore Medical Trust* v. *B.S. Mudadappa*, A 1991 SC 192; *Subhash Kumar* v. *State of Bihar*, A 1991 SC 420; *Bandhua Mukti Morcha* v. *Union of India*, A 1984 SC 802.

20 *See post* "Public Interest Litigations" in Chapter XVIII.

can be impleaded as an opposite-party. Even an informal tribunal or court is required to be impleaded in its official name if a writ of Prohibition or of Certiorari is sought against it. If in the event of success of the writ petition pecuniary liability is likely to fall on the Government, then it is necessary to implead not only the competent authority whose order is in question but also the Union of India or the State concerned.

### IV. Pleadings in an election petition

So far as the elections to Parliament and State Legislature are concerned, petitions to challenge them are governed by Part VI (Sec. 79 to 122) of the Representation of the Peoples Act, 1951. Section 87 lays down that subject to the provisions of this Act and of the Rules made thereunder every election petition shall be tried as nearly as may be in accordance with the procedure applicable under the C.P.C. to the trial of suits. Thus the fundamental rules of pleadings mentioned in this chapter govern an election petition as well. An election petition is, indeed, construed even more strictly than a plaint in a civil suit. The reason for the greater strictness in these proceedings is that the right to file an election petition is not a common-law right but a statutory right. Secondly, the respondent of such a case is a person who has been declared to have the confidence of the electorate and the courts are slow to interfere with the verdict of the electorate except when a clear case is made out. Thirdly, where corrupt practices are alleged by the petitioner and the petition succeeds, the respondent may not only be unseated but even becomes subject to disqualifications for future. The ingredients of corrupt practices are such that they are quasi-criminal in nature, and may be compared with matrimonial offences in so far as this aspect of the matter is concerned. The courts, therefore, insist on greater precision in regard to such petitions. They would also not allow an amendment to an election petition which may have the effect of permitting the petitioner to plead a new corrupt practice after the expiration of limitation for filing an election petition.

## Chapter II

# FACTS, NOT LAW

**First rule of pleading :** The first fundamental rule of pleading is that neither provisions of law nor conclusions of law be alleged in a pleading.[1] A plea on a mixed question of fact and law should be specifically taken, [2] but mere conclusions of mixed law and fact should not be alleged. The pleadings should be confined to facts only, and it is for the judge to draw such inferences from those facts as are permissible under the law, of which he is bound to take judicial notice.[3] A judge is bound to apply the correct law and draw correct legal inferences from facts even if the party has been foolish enough to make a wrong statement about the law applicable to those facts. It is a mistake to think that the judge is not bound to consider, or rather is bound, not to consider, any view of the law in respect of the facts before him except such as laid in before him formally by the parties.[4] If a plaintiff asserts a right in himself without showing on what facts his claim of rights is founded, or asserts that defendant is indebted to him or owes him a duty, without alleging the facts out of which such indebtedness or duty arises, his pleading is bad. On the other hand it is not necessary to specify in the plaint the provision under which the suit is being filed. Accordingly, the mention of a wrong provision will not prevent the court from granting relief under the correct provision.[5]

It is common to plead that the plaintiff is the legal heir of the deceased. This is an inference of law. What the plaintiff should show is how he is connected with the deceased. He should also account for other relations who were nearer to the deceased than the plaintiff. It is bad pleading to allege that the plaintiff is entitled to get certain money from the

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1 *Purshottam* v. *D. Ghee Co.*, A 1961 AP 143.

2 *Ram Prasad* v. *State of M.P.*, A 1970 SC 1818.

3 *Kedar Lal* v. *Hari Lal*, A 1952 SC 47.

4 *Guara* v. *Sri Ram*, A 1926 Nag 265; *Narayandin* v. *Mahesh Singh*, A 1926 Nag 313, 93 IC 103; *Somnath Singh* v. *Ambika Prasad Dube*, A 1950 All 121; *Maharashtra State Electricity Board* v. *Madhusudandas*, 67 Bom LR 919, A 1966 Bom 160; *R.M. Seshadri* v. *G. Vasantha Pai*, A 1969 SC 692.

5 *Pater Buchanan Lal & Macharg* v. *Mc Vey*, 1955 LAC 520; *Trailakaga Nath* v. *Bimala*, ILR (1953) 2 C 385.

defendant. Facts from which title to the money can be inferred should be alleged, e.g., that the plaintiff had lent the money to the defendant, or that the plaintiff had sold his goods to the defendant and the latter had promised to pay him the price on a certain date but had not paid it. It is equally bad to say that the defendant was bound to render accounts to the plaintiff. Facts making the defendant an accounting party should be clearly alleged, e.g., that the defendant was the agent of the plaintiff for purchase and sale of grain or that the defendant was a co-sharer or partner who was managing the joint property or business.

It is not sufficient to say that the plaintiff is entitled to a right of way over the defendant's land; he should show how he is entitled to that right, whether by grant, prescription, or an easement of necessity, or otherwise. Even that would not be sufficient; he should set out the facts upon which he relies as entitling him to the particular kind of easement.[6] He must, for example, state that the defendant's deceased father had in consideration of Rs. 2,500/-, granted to him, by a deed, dated January 5, 1965, a right to pass over the land; or that the plaintiff has been passing over the land in going from his house to the public road for more than 20 years before the suit, as of right and without interruption; or that the plaintiff and defendant were joint owners of the land in suit, that at a partition held in 1970, that land was allotted to the defendant, that the way of the plaintiff always lay across the land and that there is no other possible way through which the plaintiff can go from his house to the highway.

It is not sufficient to allege that the defendant was guilty of negligence.[7] Facts on which the defendant's duty, neglect of which is pleaded, is based, as also the facts which constitute, in the plaintiff's opinion, a breach of that duty should be alleged, and it should be left to the court to infer from them that the defendant has been guilty of negligence. It is not sufficient to plead that plaintiff is entitled to the property under a sale-deed from A. He should allege that A was the owner of the property,

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6 *Farrel* v. *Coogan*, 12 LR Ir 14; *Numia Mal* v. *Mahadeo*, A 1962 Punj 299, relying on *Harins* v. *Jenkins*, (1882) 22 Ch D 481 and *Spedding* v. *Fitzpatrick*, (1888) 38 Ch D 410.

7 *Gautrat* v. *Egerton*, (1867) 2 CP 371, 36 LJCP 191; *West Rand Gold Mining Co.* v. *Rex*, (1905) 3 KB 291, 74 LJKB 753.

and that he sold it to the plaintiff by executing a registered sale-deed in respect of it on such and such date.

In a case of defamation, the publication of defamatory statement should be alleged and it should be stated that the words were published or spoken to some named individuals and the actual words should be set out and the time and place, when and where they were published should also be specified in the plaint.[8]

Similarly it will not be sufficient to say that Abu Muhammad made a gift of his property to the plaintiff. The plaintiff should allege how the gift was made, how it was accepted, and how possession was delivered, because these are the facts which constitute a valid gift under the Muhammadan Law. Merely to allege the gift would be to state a conclusion of law from facts which are not stated. It is also insufficient to allege that there was *donatio mortis causa*[9] (gift in prospect of death). The relevant circumstances leading to this inference should be stated.

If facts are not stated in the plaint, it shall be held to be bad inspite of allegations of inferences of law which the plaintiff draws from those facts, e.g., even if it is alleged that the particular act complained of was done "unlawfully" "wrongfully" "improperly" or "without any justification therefor or right to do so", that would not be sufficient unless facts are alleged from which the plaintiff draws the inference that the act was unlawful, wrongful, improper or unjustified.[10] The plea that the "suit is misconceived" is bad, as facts should be pleaded from which the defendant claims to draw this inference of law.[11] A plea of maintainability of the suit is one of law and need not be specifically raised.[12] Where substance of the section is disclosed in the pleadings, omission to plead that particular section specifically is immaterial.[13]

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8 *Subbrayudh* v. *Ramakrishna Rao*, (1968) 2 Andh LT 101.

9 *Townsend* v. *Parton*, (1882) 45 LT 755, 30 WR (Eng.) 287.

10 *Gautrat* v. *Egerton*, (1867) 2 CP 371; *Day* v. *Brownrigg*, (1878) 48 LJ Ch 173, 10 Ch D 294 at 302 (such "epithets of abuse" are "useless and redundant").

11 *Shripada* v. *Divitia*, A 1948 Bom 20; *Gulzar Ahmad Zafri* v. *Govt. of U.P.*, A 1950 All 212.

12 *State of Rajasthan* v. *Rao Raja Kalyan Singh*, A 1971 SC 2018.

13 *Haji Abdulla H.A.S. Dharmasthapanam* v. *T.V. Hameed*, A 1985 Ker 93 (DB).

Similarly, the defendant is not, in a suit for price of goods sold to him, entitled to plead that he is not liable. He should allege either that he did not purchase the goods, or that they were never delivered to him, or that they were not of the quality ordered, or that they were sold on credit which has not yet expired. In a suit for damages for an alleged libel, it is not sufficient to plead that the defendant published the libel on a privileged occasion. He must set out the facts and circumstances on which he relied as creating the privilege.[14] So, a defence that section 41, Transfer of Property Act, protects the defendant is not good. The defendant should plead that he had taken the property for consideration from a person who was the ostensible owner of it, and that he, in good faith, believed him to be the owner. In a case relating to short delivery it should be specifically pleaded that the consignment was booked at railway risk rate because otherwise it would be presumed that it was booked at owner's risk rate.[15]

**Instances of Bad Pleading** : The following are some of the other instances of pleadings, offending against this rule, which do not ordinarily strike many pleaders as being wrong:

(*a*) The plaintiff *is the heir* of the mortgagor and the defendant *is the heir* of the mortgagee, hence the *plaintiff is entitled to redeem* the mortgage, and the defendant *has no legal right in the property but to take his mortgage money*. (The family connection of both should be shown.)

(*b*) The mortgage was made for a *legal necessity* and *is binding* on the son of the mortgagor. (The exact necessity should be specified. The latter part of the sentence is mere inference of law.)

(*c*) The defendant has been in possession of the mortgaged property and *is liable to render account of the income and expenditure*. (The liability, being statutory need not be pleaded.)

(*d*) The plaintiff *being a reversioner* is not legally bound by the transfers made by the Hindu widow in favour of the defendant. (A proposition of law.) How he is reversioner should be disclosed.

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14 Simmonds Dunne, (1871) Ir R 5 CL 358; *Elkington* v. *London Association for the Protection of Trade*, (1911) 27 TLR 329.

15 *Firm Mahadeolal Bhagirathmal* v. *Union of India*, A 1968 Pat 440.

(*e*) The mortgaged property *belonged to a joint Hindu family*, and the second defendant had no right to transfer the family property to the first defendant without the plaintiff's consent. (A proposition of law.)

(*f*) For the above reasons, the plaintiff's suit *is liable to be dismissed.* (An inference of law.)

(*g*) The mortgage-deed in suit *is void and is of no effect in law.* (Facts making it void and ineffectual should be pleaded).

(*h*) The property is the *stridhan* of AB (This is a conclusion of law; facts making the property the *stridhan* of AB should be stated.)

**Tolerable Pleadings :** But, while the strict rule of pleading requires that such legal inferences need not be pleaded, still sometimes in addition to the facts which are clearly pleaded, the inference is also pleaded, either for the sake of clearness or for convenience, as that sometimes makes the statements of facts more intelligible and shows their connection with each other. This has been tolerated even in England, as such pleading is, at the most, unnecessary, and does not affect or in any way embarrass the other party. For example, in a suit on hypothecation bond, if the defendant pleads that the bond was not attested by two witnesses, and *does not therefore amount to a mortgage*, the latter pleading may strictly be against rules, yet it may be tolerated.

**Pleading Foreign Law and Custom :** The rule against pleading law is restricted to that law only of which a court is bound to take judicial notice. As the court does not take judicial notice of foreign law, or of particular customs or usages of trade, they should be pleaded like any other fact, if a party wants to rely on them.[16] If a party relies on a usage at variance with the Contract Act [17] or with other general law [18] he should plead the usage with particulars about its incidents and details. If it is not pleaded no evidence to prove it will be admitted.[19] A custom which has

16 *Vishwanath* v. *Ram Narain*, A 1940 All 405, 190 IC 109; *Iqbal Hasan* v. *Sunni Central Board*, A 1972 All 123; *G. Annapurnayya v. A.Appalanarasimhamurthy*, 1994(3) ALT 49I (AP).

17 *Sital Prasad* v. *Ranjit Singh*, 1931 ALJ 390, A 1931 All 583.

18 *Kochan Kani Kunjuraman* v. *Metheran*, A 1971 SC 1398, (1971) 2 SCC 345; *Bhagat Singh* v. *Jaswant Singh*, A 1966 SC 1821.

19 *Thakur Gokul Chand* v. *Parvin Kumari*, A 1952 SC 231, 1952 SCJ 331.

repeatedly been brought before the courts, and has been recognised by them regularly and has thus acquired the force of law, need not be pleaded.[20] For instance, the custom amongst Jains in India, except in Madras and Punjab, authorising widows to adopt without husband's authority is presumed and need not be pleaded.[1]

**Legal Pleas :** This rule should not be considered as excluding legal pleas to suit, or pleas denying the legal right claimed by the opposite party. If a plaintiff claims as an heir on the ground of certain relationship, the defendant may take a legal plea that the plaintiff is not an heir, even assuming the alleged relationship to be correct. In a suit by a landlord for arrears of rent if a defendant denies the plaintiff's title, the plaintiff may plead an estoppel under Sec. 116, Evidence Act, against the defendant's plea. Similarly, pleas in bar of suit, e.g., of *limitation, resjudicata,* etc., may be raised. Such pleas are "objections in point of law" and raise what are called "Issues of Law".

**Reference to Rules and Orders :** In certain cases, a little relaxation of the rule discussed under this chapter will be advisable. Of late legislative amendments have been too frequent. Moreover, "law" means not merely a provision in an Act of Legislature or Ordinance but also comprises any order, bye-law, rule, regulation or notification having the force of law.[2] In view of the frequency of amendments in all such laws it is often difficult for pleaders and judges to keep abreast of them. It is, therefore, convenient if the latest position of such laws is set out in pleadings. Such a reference need not be regarded as violation of the rules of pleading. In any case the courts will do well to tolerate it in the interest of justice as this sometimes also serves to apprise the other party better, of the case he has to meet.

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20 *Banarsi Das* v. *Sumat Prasad*, 164 IC 1047, 1936 ALJ 1237, 1936 AWR 857, A 1936 All 641; *Dashrathlal* v. *Bai Dhondubai*, A 1941 Bom 262, 195 IC 464; *Rasool* v. *Ramzan*, A 1954 All 270 (custom of privacy); *Ballu* v. *Thakur Dan Singh*, 1950 ALJ 234, (1951) 2 All 559 (Custom of pre-emption in Kumaun); *Ujagar Singh* v. *Mst. Jeo*, A 1959 SC 1041.

1 *Manghibai* v. *Sugan Chand*, A 1948 PC 177, 1948 ALJ 255 (Under Hindu Adoption and Maintenance Act, such authority is now not required in respect of any Hindu, Buddhist, Sikh or Jain).

2 See, for instance, Articles 13 (3) (a) and 366 of the Constitution.

## Chapter III

# MATERIAL FACTS

**Second rule of Pleading :** The second fundamental rule of pleading is that every pleading shall contain, and contain only, a statement of the material facts on which the party pleading relies for his claim or defence.[1] The rule requires:

(1) that the party pleading must plead *all* material facts on which he intends to rely; and

(2) that he must plead *material facts only*, and no fact which is immaterial should be pleaded nor the evidence.

Their Lordships of the Privy Council have pointed out that the rule that all material facts should be pleaded is not mere technicality and that an omission to observe it may increase the difficulty of the court's task of ascertaining the rights of the parties.[2] The word, "material" meant necessary for the purpose of formulating a complete cause of action, and if any one material statement is omitted the statement of claim is bad."[3] If all the material facts constituting the cause of action are not averred in the plaint the suit has to fail.[4]

The plaintiff had alleged that he was "entitled to get free supply of water for wet crops raised" on the land "irrespective of the nature of the crops", but the facts on which he relied as the foundation of his right were not set out in the plaint. It is submitted that this pleading was bad also because an inference of law was pleaded. The legal inference should be left to be drawn by the courts.[5]

**What are material facts :** The first question is what facts are material. Every fact is material for the pleading of a party, which he is bound to prove at the trial (unless admitted by the other party) before he

1 O.6. R.2; *Manphul Singh* v. *Surinder Singh*, A 1973 SC 2158; *R.M. Seshadri* v. *Vasantha*, A 1969 SC 692, 699, 2 SCR 1019.

2 *Gopala Krishnayya* v. Madras Province, A 1947 PC 132.

3 *Bruce* v. *Odhams*, 1936 All ER 294.

4 *Vashisshta* v. *Glaxo Laboratories*, A 1979 SC 134.

5 *Gouridutt Ganeshi Lal* v. *Madho Prasad*, A 1943 PC 147; *State of Rajasthan* v. *Rao Raja Kalyan Singh*, A 1971 SC 2018.

can succeed in his claim or defence.[6] Material facts are those facts which a plaintiff must allege in order to show a right to sue or a defendant might allege in order to constitute his defence.[7] Facts which are not necessary to establish either a claim or a defence are not material. It is, therefore, obvious that the question whether a particular fact is or is not material depends mainly on the circumstances of the case. It is a question not always easy to answer.

There is a thin line of distinction between a material fact required to be given under O.6, R.2 and the particulars required to be given under O.6, R.4 & 6 as pointed out in chapter VI of this book. All the same a distinction exists. Before giving particulars the specific act of the other party constituting the material fact must be alleged. For example in a suit for specific performance of contract the plaintiff must allege that he was ready and willing and is still willing to perform his part of the contract. The failure to do so may result in dismissal of his claim.[8] In a suit for infringement of patent right it is necessary to allege, besides giving particulars of the said infringement, that the plaintiff had a patent right under Patent No.... A condition precedent whether imposed by law or agreement must be specifically pleaded though not its performance.

Before drafting his pleading, it is necessary for the pleader to master the law relating to the case in all its details and then he must apply his knowledge of the law, and his own common sense, to the facts of the case as narrated to him by his client, and decide which of the facts are material and must be pleaded and which are immaterial and must be omitted. If he is in reasonable doubt about a particular fact, it would perhaps be better for him to plead it than to omit it, for, if afterwards, it turns out that the fact was material he cannot be allowed to prove it, unless he can obtain leave

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6 *Bankey Ram* v. *Sarasti Devi*, 1977 RCJ 332 (FB); *Udhav Singh* v. *Madhav Rao Scindia*, A 1976 SC 744.

7 *Tika Khawas* v. *Pasupati Nath*, A 1986 Sikkim 6; *Sivananda Roy* v. *Janaki Balla* v. *Pattnaik*, A 1985 Ori 197.

8 *Abdul Khader Rowther* v. *P.K. Sara Bai*, A 1990 SC 682; *Mohd. Shakoor* v. *Cheddi Koeri*, 1995 RD 28, 1995 (4) CCC 409 (All); *Krishnan Kesavan* v. *Kochukunju Karunakaran*, A 1988 Ker 107; *Sabira Khatun* v. *Sayeda Fatima Khatoon*, A 1995 Gau 104; *Sanga Thevar* v. *Thanukedi Ammal*, A 1954 Mad 116; *Devi Sahai Premraj Mahajan* v. *Govindrao Balwantrao*, A 1965 MP 275.

to amend his pleading, which may either not be granted or be granted on strict terms as to costs.

**Test to be applied** : After the pleader has made up his mind what facts he has to plead, he should put them together and inquire whether, if all those facts were proved, his client would be entitled to a decree. If he can return an answer in the affirmative, he should then take up each fact and inquire whether, if he failed to prove that fact, his client could still succeed. If he could succeed, even without proving that fact, the fact should be eliminated, and what facts remain after such elimination would be the material facts which the pleader is bound to plead. If he finds that the facts he intends to plead would not, even if all of them were proved, result in the success of his client, and any further fact has to be proved, that further fact should also be pleaded.

**Instances of immaterial facts :** The pleadings in the lower courts are often found to be full of allegations of immaterial facts which should not be pleaded. For instance, in a suit for money due on a promissory note payable on demand, it is not necessary to allege that the plaintiff demanded the money and the defendant refused to pay it, because the money is payable immediately and no demand is necessary before suit.[9] In an eviction petition on the ground of bonafide requirement, it is not necessary to plead that no other accommodation is available in the city/town.[10] In a suit for ejectment against a trespasser it is unnecessary to allege that the defendant was asked to vacate the house but he refused to do so. In a claim for money lent, it is unnecessary to plead that the money was lent at the request of the defendant, or because the plaintiff had implicit confidence in the honesty of the defendant, or because the defendant was in straitened circumstances and had been recommended to the plaintiff by common friends. In a suit for price of goods sold to the defendant, it is not necessary to allege that the goods belonged to the plaintiff. In a suit for arrears of rent against a tenant, it is not necessary to plead the plaintiff's title to the property, for the defendant cannot deny it.

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9 *Meghraj* v. *Johnson*, 11 NLR 189; *Sk. Jammu* v. *Mohd. Ibrahim*, A 1926 Nag 194; *Secretary of State* v. *Prasad Bapuli*, 46 M 259.

10 *Sunder Singh* v. *Rajaram*, A 1991 MP 59.

The allegations of hostility between the parties or collusion between the opposite party and the enemities of the party pleading are not material. A plea that the evidence in support of the other parties' case is unreliable need not be taken in pleadings.[11] It is unnecessary to state that the defendant has trespassed on plaintiff's land at the instigation of plaintiff's enemies, or because the defendant owes a grudge and wants to tease the plaintiff. It is sometimes alleged that the defendant has not paid *in spite of his ability to pay*. The ability or inability to pay is not a material fact. In a suit for damages for assault, it is not material to allege the conviction of the defendant for the offence by the criminal court. In a suit for damages for a trespass on the plaintiff's property, it is not material to allege similar acts of trespass committed by the defendant before. It is also not material to allege that the defendant is a man of great influence in the village and the plaintiff is a poor and helpless cultivator. In an action by a creditor against a surety, there is no need to allege that the creditor gave the surety notice that the principal debtor had not paid. Sometimes it is also alleged in the plaint that the plaintiff files the *hundi* or pronote or copy of an account with the plaint. It is not necessary to allege that in the plaint.

Where a contract or transaction is illegal, there need be no pleadings of the parties raising the issue of illegality and the court is bound to take judicial notice of it.[12] Where substance of the section is disclosed in the pleadings omission to plead the particular section specifically is immaterial.[13]

A defendant need not plead to the prayer in the plaint nor to any matter which merely affects costs.[14] A defendant need not repeat those facts in written statement which are admitted or relied upon by the plaintiff in the plaint.[15]

**Instances of material facts :** On the other hand, in a suit for injunction, it is material to allege that the defendant "threatens and intends" to repeat the illegal act.[16] Where words of praise are spoken ironically so

11 *Girje Nandini Devi* v. *Brijendra Narain Chaudhary*, A 1976 SC 1124.

12 *Surasaibalini* v. *Phanindia Mohan*, A 1965 SC 1364; *Kamla Bai* v. *Arjun Singh*, A 1991 MP 275.

13 *Haji Abdulla H.A.S. Dharmasthapanam* v. *T.V. Hameed*, A 1985 Ker 93 (DB).

14 Odgers' Pleading p. 121 (9th Ed.).

15 *Lakshmi Narain Ram Narain* v. *State of Bihar*, A 1977 Patna 73.

16 *Stannard* v. *Vestry of St. Giles*, (1882) 20 Ch D 195, 47 LT 243.

as to convey a defamatory meaning, it must be alleged that they were so intended and understood. In an action for libel, the defamatory words must be clearly set out in the plaint. When the defamatory sense is not apparent, the 'innuendo' must be set out in specific terms.[17] When collusion is alleged between A and B, the fact that A knew the improper motives which actuated B is material.[18]

Where a suit is brought under a particular statute, all facts necessary to bring it under that statute must be alleged. When the rule of law applicable to a case has an exception to it, all facts are material which tend to take the case out of the rule or out of the exception. Where a party claims the benefit of a special rule of a particular school of Hindu or Muhammedan law, he should plead facts which would cause those rules to apply. For instance, where a Muslim dies leaving three grandsons by one son and two by the other son, then, all the five grandsons are his heirs. Under the Sunni school of Islamic Law, all the five grandsons would take one-fifth share each i.e., *per capita*. Under the Shia school, the principle of representation is applied and the grandsons take *per stirpes*. The grandsons of one branch will have to divide into three of their father's half share, while the grandsons of the other branch have to divide in half. Hence it is necessary to plead whether the deceased Muslim was a Sunni or a Shia as the case may be.

A plaint in Bank suit must specifically disclose (*a*) the rates of interest charged from time to time from the date of loan to date of suit, (*b*) the rates of interest permissible as per circulars/directives of Reserve Bank of India for the corresponding period, and (*c*) an averment that in the statement of Accounts, the debts regarding interest and other charges are in accordance with the terms of contract and Reserve Bank of India directions.[19] If proper particulars are given in the plaint, supported by corresponding documents, the scope of disputes will considerably be narrowed.

**Effect of document :** Whenever the contents of a document are material, it shall be sufficient in any pleading to state the effect thereof, as

17 *Hay* v. *Ashwini*, A 1958 Cal 269.

18 *British* v. *Britannica*, 59 LT 888.

19 *Vijaya Bank* v. *S. Bhathija*, A 1994 Kant 123.

briefly as possible, without setting out the whole or any part thereof, unless any precise words are material.[20] For instance, if a plaintiff, bases his claim on a sale deed, it is sufficient to say that A has sold the property to him by a deed, dated such and such. He need not state the words of the deed which amount to a transfer of the title. At the same time, it is not enough to say that he is entitled to the property under a deed dated, because this does not state the *effect* the document.[1]

If a person, not party to a deed which purports to be a sale deed, is entitled to show that the real intention of the parties to the deed was to create a mortgage, he should plead such intention and it will not be sufficient merely to plead that the plaintiff is only a mortgagee.[2] This, it is submitted, is too strict a view and the defendant, on his pleading that plaintiff was a mortgagee, should have been allowed to show how under a deed which was a sale the plaintiff was only a mortgagee.

**Damages :** How far allegation of damages sustained and other facts affecting damages are material and should be alleged in the pleading is another question for consideration. Damages are of two kinds: (1) General damages and (2) Special damages. *General damages* are such a loss as the law will presume to be the natural or probable consequence of the defendant's act. They need not be proved by evidence, e.g. in an action for trespass or libel or slander by words actionable *per se*, damages are allowed without any proof. Such general words as "whereby the plaintiff has been injured in his credit and reputation" or "whereby the plaintiff has suffered damage" are sufficient. But, strictly speaking, even these general words are not necessary. In such a suit, the plaintiff might only allege facts and end with the prayer for award of damages. In a case of road accident also it was held that no specific pleading is required for general damages.[3]

*Special damages* are such a loss as the law will not presume to be the consequence of the defendant's act, but which depends, in part at least, on the special circumstance of the case. It must always be proved at

20 O.6, R.9.

1 *Philips* v. *Philips*, (1878), 4 QBD 127.

2 *Rangubai* v. *Govind*, A 1949 Nag 243.

3 *Minor Veeran* v. *Krishnamoorthy*, A 1966 Ker 172.

the trial that the loss was incurred, and also that it was the direct result of the defendant's conduct. In many cases, proof of special damages is essential to sustain an action, e.g. a person has no right of action in respect of a public nuisance unless he can show some special injury to himself, which is over and above what is common to others.

It will, therefore, be readily seen that special damages must always be alleged in the pleadings as any other material fact. It is material because it is required to be proved by evidence, and no decree can be passed for it unless it is proved or admitted. Facts, with necessary particulars, must be mentioned to show what special damages the plaintiff suffered, and that they were the direct consequence of the defendant's act. In a suit for damages for incorrect valuation of answer-books, the special damages must be alleged and proved.[4]

In cases when general and special damages are both claimed, the latter should be specifically pleaded, with particulars; for instance in a suit for malicious prosecution, in which both the general damages for loss of reputation and mental and bodily pain as well as special damages, e.g. cost of defence, loss of professional business, etc., are claimed. But in either case it is not necessary for the defendant to plead to damages.[5] The question of damages shall be put in issue and considered in all cases without any pleading by the defendant. If, however, facts are alleged in the plaint which are material only as proof of the special damages claimed, and the defendant means to deny those facts, he had better do so, as that would at once give notice to the plaintiff of what the defendant means to challenge, but as the defendant is not legally bound to do so, his omission to deny any such fact would not amount to an admission by implication under O.8, R.5.

**Facts in aggravation of damages :** In order to ascertain the nature and extent of the injury done by the act for which the plaintiff claims general damages, it is often material to consider the circumstances under which the wrongful act was committed. Thus, in an action for trespass, the fact that the defendant entered the plaintiff's house with a false charge that plaintiff had got stolen property therein, is material as increasing the amount

4 *Subrat Ghosh* v. *Council of Higher Secondary Education*, A 1993 Ori 139 (DB).
5 O.8, R.3

of damages; so also in a suit for damages for breach of contract to marry, is the fact that plaintiff allowed herself to be seduced on the faith of the promise. Such facts are called "*matters in aggravation of damages*". Similarly, facts which tend to decrease the amount of damages are known as "*matters in mitigation of damages*". These facts are not, strictly speaking, material to the cause of action or to the defendant's defence, but are allowed to be proved only as affecting the amount of damages.

Under O.6, R.2, all material facts on which a party relies for his claim or defence should be pleaded in his pleading. It is true that O.7, R.1, requires the plaint merely to contain "the facts constituting the cause of action". Even though facts in aggravation of damages cannot strictly be said to constitute the cause of action for a suit, but it must be remembered that this rule is not prohibitive. It does not say what a plaint should not contain, but only lays down what it must. That does not necessarily imply that facts other than those mentioned in the rule should not be stated in the plaint, and when O.6, R.2, definitely provides that a pleading should contain all the material facts on which the party pleading relies they should be stated (whether they constitute the cause of action or not).

**Facts in mitigation of damages :** As to *facts in mitigation of damages*, they should be governed by the same rule as facts in aggravation of damages, because there is no reason why, if the latter are allowed to be pleaded, the former should not. Just as the latter are material facts on which the plaintiff relies for his claim, the former are also material facts on which the defendant relies for his defence. Under the general provision of O.6, R.2, therefore, they should also be stated in the defence, notwithstanding the provision in O.8, R.3, noted earlier. Neither Rule 3, nor any other rule, lays down that a defendant should not, or need not, state in his written statement the additional facts on which he relies in mitigation of the damages claimed from him. The fact that a defendant does not plead facts in mitigation of damages will not, however, bar the court from considering them when assessing damages.[6]

**Facts not material at the present stage :** Having seen what facts are material, it must further be remembered that no fact should be alleged in the pleading which is not material at the present stage of the action,

6 *Jansa* v. *S.K. Banoo*, 161 IC 593, A 1936 Nag 70.

although it may become material at a later stage, e.g, in view of the objections of the other party. It is not necessary to anticipate the answer of your opponent and to state what you would have to state in answer to it. A plaintiff cannot be expected to plead the facts on the strength of which he could meet the defence or falsify the claim of the defendants.[7] For instance, in a suit on a contract it is unnecessary to plead that the defendant was of full age when he entered into it. In an action for libel it would be a bad pleading for the plaintiff to allege in his plaint that the defendant *will* contend that the words are part of a fair and accurate report of judicial proceedings but it is not so.

It is also not necessary in a suit for trespass to allege in the plaint that the defendant committed the trespass under colour of a sale-deed alleged to have been executed by the plaintiff but that the said deed had never been registered and is otherwise void. But if you know for certain that the cover under which the defendant has committed the trespass and the defendant has, prior to your suit, asserted his right under that cover, there is no harm in pleading facts showing that the defendant's act under that cover was not justified. For instance, if a person takes a lease of joint family land from a junior member of the family and takes possession of the land expressly under that lease and gets his name recorded in the village records on the basis of that lease, the head of the family can sue him for ejectment and allege facts showing that the lessor had no authority to grant the lease, and that it is not binding on the other members.

**Exceptions to the general rule :** The general rule, that all material facts, and material facts only, should be pleaded, is subject to the following three exceptions :

**(i) Condition precedent :** The performance or occurrence of any condition precedent need not be alleged as its averment shall be implied in the pleading. If, however, the other party means to contest the performance or occurrence of such condition, he is bound to set up the plea distinctly in his pleading.[8] For instance, A agrees to build a house for B at certain rates. It is a condition of the contract that payment should only be made

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7 *Laxminarayan Deo Vasti Temple* v. *Narayan F Marathe*, 1995 (2) Bom C.R. 610.
8 O.6, R.6.

upon a certificate of B's architect that so much is due. In a suit for money due to A, the obtaining of architect's certificate is a condition precedent to A's right of action. In this case it is not necessary for A to allege that he has obtained the certificate. If B intends to contest the fulfilment of this condition, he should distinctly plead it. Under section 54 of the Cess Act (Bengal Act IX of 1880), a notice is a condition precedent to the liability to pay cess. A suit was brought for recovery of the cess but no allegation of the notice having been issued was made in the pleading nor was any plea raised in the written statement. The defendant was not allowed in appeal to plead that no notice was served upon him, and O.6, R.6, was applied.[9] Similarly, notices required to be given under the several Acts before institution of suits, need not be alleged in the pleadings, except, of course, where the law itself has provided to the contrary. For instance, the giving of a notice under section 80, C.P.C., before commencing a suit against the government or any public officer is a condition precedent, but it must be pleaded, as section 80 lays down that the plaint shall contain a statement that such notice has been delivered, but it is not necessary that the word "delivered" should be used so long as the plaint indicates that the notice has been delivered, e.g., if it is stated that a notice under section 80 has been given to Secretary to government by registered post, and that registration receipt of acknowledgment due are put on the record.[10]

Notice under section 80 was formerly necessary also in suits for injunction against the government,[11] but now a suit to obtain an urgent and immediate relief against the government or a public officer may be instituted, with the leave of the court without such notice.[12] Even though the provisions of section 80 have been held to be mandatory they are construed with due regard to commonsense and to the object underlying the section; thus the terms of the notice are not scrutinised in a pedantic manner. Substantial compliance with the section is sufficient.[13] As for the defendant it is insufficient to plead that notice under section 80 was illegal.

9 *Murlimanohar* v. *Raja Nand Singh*, 72 IC 1, A 1924 Pat 205.

10 *Mohammad Faruq* v. *Governor-General*, A 1949 Pat 93.

11 *Bhagchand* v. *Secretary of State*, A 1927 PC 176; *State of Madras* v. *Chitturi Venkata*, A 1957 AP 675.

12 Sec. 80 (2), C.P.C. as inserted by Act No. 104 of 1976.

13 *See*, Sec. 80 (3), as amended by Act 104 of 1976; also *Dhan Singh Sobha Singh* v. *Union of India*, A 1958 SC 274; *Ghanshayam Dass* v. *Dominion of India*,

A notice to the Railway Administration under the Indian Railways Act need not be pleaded in the plaint, nor a notice under section 10 of the Carriers Act.[14] In a suit by a firm of partners it is not necessary to allege that the firm is registered as required by section 69 of Partnership Act. It will be for the defendant to raise the plea that the suit was bad for non-compliance with that provision.[15] Where the plaintiff intends to sue in a representative character, the law required certain steps to be taken by him to enable him to institute the suit, e.g., obtaining letters of administration. This is a condition precedent, but O.7, R.4, requires that this fact should be mentioned, inspite of the general rule to the contrary.

Where, however, a plaintiff is conscious that he has not performed a condition, and has good excuse for such non-performance, he may, in his plaint, state the condition, the non-performance and the facts which afford him the excuse, e.g. that the defendant prevented or discouraged him from performing it.

This rule is not, strictly speaking, an exception to the general rule, as a "condition precedent" cannot be called a fact material for the cause of action of the plaintiff; it is only a condition superimposed on what otherwise would have been valid. Where, however, what appears to be a condition precedent is not really so but is really a part of the cause of action of the plaintiff for the suit, the rule will not apply and the performance of such condition must be alleged as any other material fact constituting the cause of action, for example, dishonour or notice of dishonour in a suit on a negotiable instrument, or the readiness and willingness of the plaintiff in a suit for specific performance[16] or the service of a notice to quit in the case of a suit for ejectment of a tenant at will, a tenant from month to month or a tenant from year to year. In a suit for ejectment of a tenant on the ground of forfeiture under section 111, Transfer of Property Act, it is necessary to allege the giving of notice required by that section, not because it is a condition precedent but because it is a part of the cause of action.

**(ii) Matters of legal presumption :** Neither party need, in any

(1984) 3 SCC 46, A 1984 SC 1004; *Sha Jetmal* v. *General Manager, Southern Railways*, A 1995 Kant 219.

14 *Le Ba Fin* v. *Tun On*, A 1938 Rang 437.

15 *Cheman Ram* v. *Ganga Saha*, A 1961 Orissa 94.

16 *Bhaurao Shamrao Bhame* v. *Modhorao Raghu Yelekar*, A 1979 Bom 208.

pleading, allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies on the other side, unless the same has first been specifically denied.[17] For instance, a plaintiff in a suit on a promissory note or other negotiable instrument need not allege the consideration, as section 118 of the Negotiable Instruments Act, raises presumption in his favour. It is sufficient to allege the execution of the pronote by the defendant unless, of course, consideration is made a substantive ground of claim in the alternative. It is not necessary to allege in the plaint that the defendant executed the bond in plaintiff's favour without fraud, intimidation or coercion and of his own free will, because the burden of proving any fact invailidating the bond is upon the defendant. When defendant admits his thumb mark on the pronote, though he is illiterate, the burden of disproving the consideration for it does not shift from him.[17] But when a suit is brought on the bond of a *pardanashin* lady, it should be alleged in the plaint that the bond had been read out and explained to her, and she executed it of her own free will, after having independent advice, as it is for the plaintiff to prove these facts.[18] But if, say, in a suit for cancellation of a promissory note, the plaintiff alleges that it was without consideration, the defendant may plead that it was for consideration.

Presumptions referred to in this exception are those which a court is bound to make. In other words, only those facts need not be pleaded which a court "shall presume" within the meaning of the Indian Evidence Act; but facts which a court "may presume" should be pleaded.

**(iii) Matters of inducement :** It is sometimes desirable to commence a plaint with some introductory allegations stating who the parties are, what business they carry on, how they are related or connected, and other surrounding circumstances leading up to the dispute. These are not material facts, but they are allowed in England because they explain what follows. They are called "matters of inducement". On the analogy of English practice, they may be tolerated in India also, but a good pleader always reduces such prefactory statements to the minimum.

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17 O.6, R.13.

18 *Radha Raman* v. *Bhoji Ram*, 1979 ALJ 237.

## Chapter IV

# FACTS, NOT EVIDENCE

**Third rule of pleading:** The third fundamental rule of pleading is that every pleading must contain a statement of the material facts, but not the evidence by which they are to be proved.[1] The material facts on which a party relies are *Facta probanda* (i.e. the facts to be proved), and they should be stated in the pleadings. The evidence or the facts by means of which they are to be proved are *Facta probantia,* and they are not to be stated. They are not the facts in issue, but only relevant facts which will be proved at the trial in order to establish the facts in issue. In some cases the two kinds of facts are so mixed up as to be almost indistinguishable, e.g. in cases of custom based on village administration paper (*Wajib-ul-arz* in U.P.), which is often the basis of the claim and its sole proof. In such cases the record has to be pleaded. So also, where the whole case is based on entries in account books. But such cases are rare. Ordinarily, the distinction between the two kinds of facts is so clear and sharp as to be easily discernible and must be remembered when drawing up a pleading. It has been held that in Punjab, *Wajib-ul-arz, Rewaj-i-am* and Manual of Customary Law which record customs are only evidence of custom and it is not necessary to refer to them in the plaint but the plaintiff who alleges custom is entitled to rely on them; therefore, if he has referred to *Wajib-ul-arz* in his plaint, he cannot be precluded from relying on *Rewaj-i-am.*[2] The question of appreciation of evidence is not to be pleaded, instead it is the duty of the court to consider whether the documents produced by the parties prove the facts in issue.[3]

An excellent illustration of the principle just enunciated is contained in an action on a policy of life insurance.[4] One of the terms of the policy was that it would become void if the policy holder "died by his own hand", and the defendant insurance company wanted to defend the claim on that ground. It was alleged in defence that the policy holder had, for weeks,

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1 O.6, R.2; *Mohan Lal* v. *Kurkut Utpadak Sahkari*, A 1989 Raj 102.
2 *Jwala Singh* v. *Province of Punjab*, A 1948 East Punjab 59.
3 *Birad Mal Singhvi* v. *Anand Purohit*, A 1988 SC 1796 (para 12).
4 *Borradaile* v. *Hunter*, (1843) 5 Mau. & G 639.

been in a moody miserable state, that he had brought a pistol the day before his death, and that on him was found a letter to his wife stating that he intended to kill himself. It was held that all these facts were merely evidentiary facts and should not be alleged in the pleading, but it was sufficient to say that the assured "died by his own hand". If the facts of this case are thoroughly understood, it would act as a guide in very many cases and tend to simplify and shorten pleadings. Many a pleader would, in similar set of circumstances, would be tempted to set out a long history of the man's previous mental condition and of all his actions leading up to the commission of the fatal act. This case shows that all this would be unnecessary on the ground that they are *Facta probantia* and not *Facta probanda.*

Another interesting illustration is of the case in which the defendant had pleaded all kinds of evidence to show that he was an Earl, and had been received as an Earl and had voted as an Earl, etc.,but there was no distinct allegation that the defendant was the Earl of Stirling. The result was that the whole plea was struck out.[5] When the main question to be raised in the pleading is that A had express authority to enter into a contract on behalf of the defendant, it may be pleaded that "the defendant had employed A as his agent to make the contract", or "that A was the *Mukhtar-aam* of the defendant, having under the *Mukhtar-nama* full authority to make the contract on behalf of the defendant", but it should not be alleged that " when A made the contract he represented that he was the defendant's agent", or that "A has all along been regarded by all the constituents of the defendant as having that authority". These averments need be made only when a case of implied authority or holding out is intended to be made out.

In a suit for damage resulting from defendant's wrongful act, the facts establishing the connection between the alleged damage and the wrongful act should not be pleaded. It is sufficient to allege the wrongful act, that the defendant caused it, and that the plaintiff suffered damage thereby. In cases where time was not the essence of a contract, it is sufficient to allege that the work was done "within a reasonable time in that behalf". It should not be alleged that the weather was bad, that the men had struck

5 *Digby* v. *Alexander*, 8 Bing. 416, 430.

work or that there was any other reason why it took so long; that is the evidence by which it has to be proved that the time in fact occupied was reasonable.

**Admissions :** The most common instance of pleading evidence is that of setting up previous admissions of the opposite party. Admissions are certainly the best evidence of the facts admitted but they should find no place in a pleading.[6] Previous statements of the party pleading, corroborating the allegations about material facts are also very often alleged in the pleadings. For instance, in a suit for damages for assault, it is often alleged that the plaintiff had made a report of the fact at the police station, or had filed a criminal complaint against the defendant the same day. In a suit on lost bond, the fact that the plaintiff had made a report of the loss to the police at the time the loss had occurred is also often wrongly alleged in the plaint.

In a suit for recovery of the price of articles purchased by the defendant from time to time, or for recovery of the balance due from the defendant on account of money borrowed by him from time to time, what are necessary to be pleaded are the various transactions of the defendant. If the transactions are entered in a *bahikhata,* the entries need not be referred to in the pleadings. If, as often happens, balances have been struck and signed by the defendant, they are not to be pleaded as they are mere admissions of the correctness of the previous items and therefore mere evidence, unless—(1) they are set up as acknowledgements to save limitation, or (2) they were coupled with fresh promises to pay, and are themselves made the basis of the suit. In the latter case, the original items are not to be stated in the pleadings. Both should be stated only when the suit is based alternatively on the balance on the account stated and the original contract. Similarly, alleging the fact that notices had been exchanged between the parties, and in the plaintiff's notice he did not claim the amount now sued upon, would be bad pleading on the part of the defendant.

It is most common for the defendant, in a suit for money lent, to plead that the plaintiff is himself indebted and is not in a position to lend money to others, or that the defendant is himself a well-to-do man and had no necessity to borrow money from others. All these are pieces of circumstantial evidence and should never be pleaded.

6 *Banumal* v. *Newandmal*, A 1921 Sind 159, 83 IC 860.

**Three practical applications of the rule :** The following rules enacted in the Code of Civil Procedure are no more than practical applications of the general rule that facts, and not evidence, should be pleaded, and must be regarded only as its illustrations :

**(1) Condition of mind :** Whenever it is material to allege malice, fraudulent intention,[7] knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting out the circumstance from which the same is to be inferred,[8] for the circumstances would be no more than evidence of the fact. In a suit for malicious prosecution, the plaintiff should only allege in the plaint that the defendant was actuated by malice in prosecuting him. He should not allege that he had previously given evidence against the defendant and the defendant had vowed to take revenge, though he can give evidence to prove these facts. In a suit against a defendant, on whose representation of A's solvency, the plaintiff sold goods on credit to A, it is sufficient to allege that "the said representation was false, and was then known by the defendant to be so, and was made by him with intent to deceive and defraud or injure the plaintiff.[9] No facts or circumstances from which the plaintiff has drawn this conclusion need be pleaded. But this does not mean that full particulars of the fraud should not be given. It will not be sufficient to say that the defendant committed a fraud [10] or undue influence.[11] Particulars as to the nature of the fraud and how it was committed must be alleged, but not the evidence by which it is intended to be proved. In cases of misrepresentation, fraud, undue influence, breach of trust, willful default and coercion, full particulars must be set forth and there can be no departure from them in evidence.[12] Moreover, undue influence and

7 Intention is a question of fact and must be specifically pleaded, *Purna Nand Puri* v. *Kamala Sinha*, A 1965 Pat 39

8 O.6, R.10.

9 Vide C.P.C. Appendix A, Pleading No. 22.

10 O.6, R.4.

11 *Afsar Sheikh* v. *Soleman Bibi*, (1976) 2 SCC 142.

12 *Bishundeo* v. *Segoeni Rai*, A 1951 SC 280; *Raja Srinivas* v. *S.D.O. Mirzapur*, A 1962 All 590; *Mashkurul Hassan* v. *Union of India*, A 1967 All 565; *Fatema Bi Ammal* v. *A.A. Mehomed Mohideen*, (1971) 2 MLJ 451; *Bakshi Lochan Singh* v. *Jattedar Santokh Singh*, A 1971 Delhi 277; *Musei Puhan* v. *Ambica Bewa*, 1972 (1) CWR 338; *Bishnu Priya Dei* v. *Brusabhanu Maharaja*, A 1976 Orissa 163; *Kunhamina Umma* v. *Special Tahsildar*, A 1977 Ker 41.

coercion should be specifically pleaded. Even though they may overlap in part in some cases they are separate categories in law.[13] In a suit filed against the government restraining it from taking any proceedings against the plaintiff under Foreigners Act, plaintiff alleged coercion but did not give particulars thereof. It was held that allegations of coercion cannot be taken notice of.[14] The distinciton between a condition of mind as fraudulent intention and fraud should be carefully understood. The former is a fact and can therfore be alleged as such. The latter is an inference from facts and cannot be alleged without the facts from which the inference is drawn. Even in case of negligence which is not correlated to state of mind, it is necessary to give particulars in the plaint.[15] All particulars of negligence must be given so that the opponent may be in a position to meet the case.[16]

In a case for damages for having been bitten by the defendant's dog, it is sufficient to plead that the defendant knew that the dog was of a ferocious and mischievous nature. It need not be alleged that, on a former occasion also, the dog had bitten another man in the defendant's presence, or that another man had warned the defendant of the nature of the animal, for all these facts would be mere evidence of knowledge.

**(2) Notice :** Whenever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.[17]

There are many cases in which notice has to be alleged as a material fact, e.g., in a suit to recover trust property from a person to whom a trustee has given it in breach of the trust, or, in a suit where priority for subsequent transfer is claimed or where marshalling is set up, or, where a prior mortgagee claims to tack subsequent advance in pursuance of contract in the mortgage-deed. In all such cases, it is enough to plead that the defendant had notice of the plaintiff's contract or of the trust, etc.

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13 *Bishundeo* v. *Seogoeni Rai*, A 1951 SC 280 (para 34).

14 *Mahiva* v. *Union of India*, A 1971 Cal 507, relying upon *Bishundeo*, supra.

15 *Vanaspati Traders* v. *Union of India*, ILR (1965) 2 All 127, A 1966 All 333.

16 *Punjab National Bank Ltd.* v. *Firm Ishwar Bhai Lalbhai Patel & Co.*, A 1971 Bom 348; *Gaeutret* v. *Egerton*, A 1922 Pat 17.

17 O. 6, R. 11.

The circumstances from which the notice is to be inferred need not be narrated, e.g., it need not be alleged that the defendant was an attesting witness to the plaintiff's deed, or that the plaintiff had himself told him of his contract, or that the defendant's son was present at the time of the contract and must have informed the defendant of it.

Sometimes the form is, or the precise terms of the notice are, material and, in that case, the same should be alleged. For example, when the plaintiff claims to have determined a monthly tenancy by a 30 days' notice to quit the pleading should be like this: "On November 16, 1977 the plaintiff served upon the defendant a written notice *calling upon him to vacate the house and deliver up possession to him on the expiry of December 15, 1977.*"

**(3) Implied contract :** Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if, in such a case, the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.[18] The reason of the rule is that what is really material is the effect of the letters, etc., and the letters etc., are only evidence of that effect. The most common example of implied contract is a carrier's contract to carry goods, which is implied from the fact that their clerk or agent accepts the goods and gives a receipt therefor. Similarly, a contract of tenancy may be implied from payment and acceptance of rent. A contract of indemnity may be implied where one who is only secondarily liable performs, under compulsion of law, an obligation for which another person is primarily liable. In all such cases, the conversation, conduct or circumstances, from which the contract is to be implied should be referred to in the pleading, with an allegation of the contract to be implied. But though the letters, conduct, etc., need not be set out in detail, sufficient particulars should be given to specify the same. For instance, if payment of rent is referred to, it should be alleged when, by whom, and to whom was the payment made, and

18 O.6, R.12.

of what amount. If letters are referred to, their dates must be given. If conversation is referred to, it must be alleged between whom it took place, when and where. Thus, "there was a contract to pay commission at the rate of 75 paise per cent, interest at 50 paise and charity at 6 paise per cent, which is to be implied from the conversation which took place between the plaintiff and Mulraj, the *Munim* of the defendant, at the plaintiff's shop on *Basakh Badi* 2 when the transactions between the parties commenced". Or, "an agreement authorising the plaintiff to sell the said grain pits on the defendant's failure to comply with the plaintiff's demand for more earnest money is to be implied from the correspondence which passed between the parties in the month of *Baisakh* 1979". It must, however, be remembered that no amount of evidence can be looked into for a plea which was never put forward.[19] (On this, see further, Chapter VIII, *post*).

Whenever a party wants to rely upon a plea of estoppel whether as an intentional inducement like the one u/s 115, Indian Evidence Act or a promissory estoppel or an unintentional inducement envisaged by section 41, Transfer of Property Act or any other provision of procedural law or substantive law, facts relating to the same must be clearly stated.Otherwise the other party will not be precluded from contesting the claim and the courts may ultimately find the plea unsustainable.[20] In an adoption case where facts relating to estoppel were not alleged in the plaint, the High Court did not allow such a plea to be raised at later stage. It observed that the plaintiff must have set up such a plea specifically in the plaint making the necessary averments for sustaining such a plea.[1] Similarly, where the petitioners did not raise the plea of promissory estoppel before the High Court, neither the plea emerged from the petition nor from the affidavits filed before the Court, the Supreme Court held that the petitioners were not entitled to invoke the doctrine of promissory estoppel.[2]

19 *Siddik Mahomed Shah* v. *Mst. Saran*, A 1930 PC 57; *Hemchand* v. *Pearey Lal*, A 1942 PC 64; *Punit Rai* v. *Mohd. Majid*, A 1964 Pat 348; *State of West Bengal* v. *Fakir Mohammad*, A 1977 Cal 29; *Hera Singh* v. *4th Addl. District Judge*, 1979 ALJ 586; *Kanagarathiam* v. *Perumal*, A 1994 Mad 247 (DB).

20 *Milak Brothers* v. *Union of India*, A 1990 SC 2256;

1 *Sohanadri Rao, in Re.*, A 1933 Mad 42.

2 *Shri Bakul Oil Industries* v. *State of Gujrat*, A 1987 SC 142

## Chapter V

# FORM OF PLEADINGS

**Fourth rule of pleading**: The fourth rule of pleading is that the material facts should be stated in the pleading "in a concise form"[1] but with precision and certainty. The pleading shall, when necessary, be divided into paragraphs, numbered consecutively.[2] Dates, sums and numbers shall be expressed in figures, as well as in words to ensure that the parties do not at a later stage take the plea that wrong dates, sums and numbers had been mentioned due to accidental, clerical or typographical error.[3]

But it must be remembered that, while the pleadings should be concise, they should never be obscure. They should be both concise as well as precise.[4] If the facts are lengthy they should certainly be given in all their particulars and prolixity alone will not justify the striking out of pleadings, if the facts stated are all material.[5] The aim of the pleader should be to state all his material facts with precision, but as briefly as he can. A specimen of bad pleading on the part of a defendant in a suit for recovery of debt is the following:

"The defendant does not know the plaintiff; he has never in his life been to the plaintiff's house and has not borrowed the money from him." The pleading is defective because it is neither concise nor precise. It should be something like this "The defendant did not borrow the money alleged in the plaint or any money from the plaintiff".

**Brevity :** Each party should state his whole case with brevity. *Brevity* can be attained—(1) by omitting all unnecessary facts, (2) omitting all unnecessary details when alleging material facts, and (3) by giving proper attention to the language used in alleging material facts.

We have already seen what are the unnecessary facts which should be omitted from a pleading. They are, matters of law, matters of evidence, matters not alleged in the opponent's pleading, matters presumed by law,

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1 O.6, R.2 (1)
2 O.6, R.2 (2)
3 O.6, R.2 (3), Introduced by Act 104 of 1976.
4 *L. and L. Insurance Co. Ltd.* v. *Binoy Kumar*, A 1945 Cal 218.
5 *Davy* v. *Garett*, (1878) 7 Ch D 473; *Geap* v. *Marris*, 2 QBD 630.

the performance of conditions precedent, the words of documents, matters affecting costs only, and matters not material to the case. The defendant need not plead to the prayer of the plaintiff or to the damages claimed or their amount.

As to details, only unnecessary ones are to be omitted. Those that are necessary should in all cases be given. O.6, R.4, requires that necessary particulars should be given. This matter will be dealt with more fully in the next chapter.

The language used should be precise, and a mastery of the vocabulary and grammar of the language in which pleadings are drafted is essential.

**Precision :** The other quality of good pleading, is *precision*, which can be attained by remembering the following rules of guidance:

(*a*) Names of persons and places should be accurately given and correctly spelt; in any case, the spelling adopted at one place should be adhered to throughout.

(*b*) Avoid pronouns, such as "he", "she", "this", or "that", unless the antecedent is mentioned so close by, that there can be no mistake as to the person or thing to whom the pronoun refers.

(*c*) As far as possible, do not refer to the plaintiff or defendant by their names only. Call them "the plaintiff" or "the said defendant", or if more than one, "the plaintiff No. 1", "the defendant No. 2", or "the plaintiff *Ram Chandra*", or "the defendant *Ahmed Hasan*", but, in whatever way you refer to a man at one place, refer to him in the same way throughout.

(*d*) Things should be called by their correct names and, in any event, the same thing should be described by the same name. It is bad pleading to call the same property "land with trees" at one place, "grove" at another, "trees with the land under them" at a third place in the same pleading; or "document, dated the November 24, 1974" at one place, "*hibanama*" at another, and "*dan patra*" at the third.

(*e*) If you are suing on a document, or on the basis of an Act, use the language of the document or the Act itself and do not invent your own language, however correct it may be. For instance, if a policy becomes void "if the assured shall die by his own hand", do not plead that "the assured killed himself" or that "he committed suicide", plead that "the

assured died by his own hand". If a mortgage deed contains covenant that "if the mortgagee is dispossessed by the mortgagor, the former will be entitled, etc.", plead that "the mortgagee was dispossessed by the mortgagor" and not that "the mortgagor has wrongfully ejected the mortgagee".

(*f*) Allege your facts boldly and plainly, without beating about the bush. "Ifs" and "buts" should be avoided as far as possible.

(*g*) Avoid the habit of describing facts in passive voice, omitting the nominative, e.g. the defendant's money was paid up. Say instead that "the plaintiff paid up defendant's money".

(*h*) Avoid complex sentences. Instead of using one complex sentence, it is better to divide the matter into several simple sentences. The following is a bad form of pleading: "The defendant, as the son of A, is liable to the plaintiff in damages for breach of a contract to sell his house made by the said A in favour of the plaintiff by an agreement dated December 10, 1974." Instead of this, say—

"1. By an agreement dated December 10, 1974, A agreed to sell his house to the plaintiff.

2. A did not perform the said contract during his lifetime.

3. A died on——, and the defendant is his son and representative.

4. The plaintiff called upon the defendant to perform the contract entered into by his father, but he refused to do so.

5. The plaintiff claims damages."

(*i*) Divide your pleadings into separate paragraphs, and state, as far as possible, only one fact in one paragraph.

(*j*) Avoid repetition.

(*k*) All necessary particulars should be embodied in the pleadings. *This rule requires a long discussion and explanation, therefore the whole of the next chapter has been devoted to it, and it should be read as a supplement to this chapter.*

**Forms :** In order that there should be no error in pleading the Legislature has prescribed a few forms of pleading which are to be found in Appendix A of the Code, and it is required that, when applicable, these forms, and when they are not applicable, forms of like character, as nearly

as may be, shall be used for all pleadings.[6] They are to be taken only as the standard of requisite brevity and as specimen of the character of pleadings required but are not to be adhered to slavishly.[7]

**Signature :** The law further requires that every pleading shall be signed by the party and his pleader (if any).[8] The object of this rule is to prevent disputes as to whether the suit was instituted with, or without, the plaintiff's knowledge and authority. If there are several plaintiffs, the plaint should be signed by every one of them, though it cannot be said that a person cannot be treated as a plaintiff *until* he has signed the plaint.[9] It is sufficient if one of the plaintiffs signs the plaint with knowledge and authority of other plaintiffs.[10] It is also sufficient if one of the two plaintiffs signs the plaint and both sign the *vakalatnama* accompanying the plaint.[11] Under the General Clauses Act,[12] "sign" includes "mark" also, in case of a person who is unable to sign. The thumb mark or pen mark of a person not able to sign his name is therefore as valid as a signature.[13] The Code of Civil Procedure further provides that the word "signed" also includes stamped.[14] It is not, however, necessary for a perosn affixing his name stamp to a pleading that he should be unable to write his name.[15] But mere initials of a person who can write his name should be avoided. It should also be noted that a pleading should be in existence before it is signed, and therefore, signing a blank sheet of paper before the pleading is drawn up is not in order, and the pleading written out subsequently upon such sheet of paper would be defective.[16] If pleading is not signed by a party his subsequent signature thereon cannot date back to the date of pleading.[17] It is not necessary that every page of the pleadings

6 O.6, R.3.
7 *Ram Prasad* v. *Hazarimall*, 134 IC 538, 58 C 418, A 1931 Cal 458.
8 O.6, R.14; *Basdeo* v. *Smidt*, 22 A 55.
9 O.6, R.14.
10 *Bibi Asghari* v. *M. Kasim*, A 1951 Pat 323; *Sirju* v. *Badri*, A 1939 Nag 242.
11 *Ram Charan Singh* v. *Board of Revenue U.P.*, 1968 ALJ 59.
12 Sec. 3 (56)
13 *Mohani* v. *Bungsi*, 17 C 580.
14 Section 2 (20) C.P.C.
15 *Maharaja of Banaras* v. *Debi Dayal*, 3 A 575.
16 *Girdhari* v. *Kanhaya* 15 A 59
17 *Kehar Singh* v. *Mahant Avtar Singh*, 69 Punj LR 238.

must be signed by all the parties to it.[18]

**Proviso to the General Rule :** O.6, R.14, which requires a party to sign a pleading is subject to a proviso to the effect that where the party is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same, or to sue or defend on his behalf. The words, "duly authorised" need not be restricted to mean authorised by proper written authority or by power of attorney but may even be oral.[19]

It is only when the party is unable to sign the pleading that his agent can do so. Mere absence is not sufficient; the absence should be of such a kind which makes signature impossible. The words "other good cause" are of wide importance and leave the matter in the discretion of the court.[20] The court should be satisfied, by affidavit or otherwise, that there is a sufficient reason for dispensing with the signature of the party, and that the person who proposes to sign the pleading on his behalf is an authorised person. A formal application should generally be made in such cases and a formal order should be recorded by the court, but no notice of any such application is necessary to be served on the other party. Though such a formal application is nowhere mentioned in the Code, yet it becomes necessary in order to explain the reason for the party not signing himself and to obtain a finding from the court that the reason is sufficient. This can also be stated in the pleading in a separate para or in a note at the end.[1] It is not necessary that the person authorised should be authorised specifically to sign the pleading. A general authority to sue or defend on behalf of the party is sufficient.[2] But a pleader cannot sign on behalf of the party.[3] Where, however, the manager of a Bank gave power of attorney to one of the directors, who was also a pleader to institute a suit, a plaint signed and verified by the pleader was held to be regular.[4] In a suit for recovery of money due on accounts, the plaint was not signed and verified

18 *R.P. Nautiyal* v. *Chandra Mohan*, A 1985 All 118.

19 *All India & Co* v. *Ram*, A 1961 Bom 252; *Subbiah* v. *Sankare*, A 1948 Mad 396; *Sarju* v. *Badri*, A 1936 Nag 242; *Bengal Jute Mills* v. *Jeewraj*, A 1943 Cal 13.

20 *Chandra* v. *Ganpat*, 4 NLR 117.

1 *Madan Lal* v. *Union of India*, A 1955 Bhopal 18.

2 *Kastalino* v. *Rustomji*, 4 B 468.

3 *Leakat* v. *Biseswar*, 16 IC 255, 16 CLJ 578.

4 *Narthu Ram* v. *The Lyalpur Bank*, 69 IC 422 Lah.

by plaintiff but by the manager of plaintiff. Power of attorney was produced at the time of trial. It was held that the principal having ratified the act of manager, the defect stood cured.[5]

The way in which authority is obtained is immaterial, so long as the authority is there, e.g. if a power of attorney is obtained from a prisoner in jail in contravention of jail regulations, i.e., not through the Superintendent of Jail, the authority is not invalid.[6] It has been held that an agent, authorised to enter appearance, can sign an amended plaint, if the suit was instituted with the plaintiff's approval.[7] Even authority given after the institution of a suit to a servant who has signed the plaint originally without a formal authority was held to be sufficient.[8] It has even been held that where a suit was duly authorised by a person the question whether his signature was made by him or by somebody on his behalf becomes immaterial.[9] The court should not make a fetish of rule 14 but apply it according to reason and common sense.[10] The court can also allow properly authorised person to sign plaint after holding that it had been signed by a person lacking proper authority.[11] It is not obligatory to file the authorisation along with the pleading.[12]

**Verification:** In addition to being signed, a pleading has also to be verified by the party, or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.[13] The object of verification is to fix responsibility for the statement made.[14]

The distinction between the requirements of signature and verification should be noted. While the pleading should be signed only by the party (all the parties) or, in special cases only, by his authorised agent, a

5 *M.C.S. Rajan* v. *National Nail Industries*, (1975) 2 MLJ 490.
6 *Bisheswar Nath* v. *Emperor*, 16 ALJ 64, 44 IC 28, 40 A 147.
7 *Palaniappa* v. *Firm*, 25 IC 136.
8 *W. Johnston* v. *Sir Rameshwar Singh*, 104 IC 747 Pat.
9 *Sarju Prasad* v. *Badri Prasad*, A 1939 Nag 242.
10 *B.R. Sharma* v. *Nanak Chand*, A 1967 All 487.
11 *Mohd. Islam* v. *Delhi Waqf Board, Delhi*, ILR (1966) 1 Punj 324.
12 *K.A. Mangatayaramma*, (1984) 2 An WR 292.
13 O.6, R.15.
14 *Devi* v. *Chairman Election Tribunal*, A 1956 All 19; *J.B.Ross* v. *C.R.Seriven*, A 1917 Cal 269, 34 IC 235 (DB).

verification may be made by any one person, either the party, or any one of the parties, or *any* other person, acquainted with the facts. The laxity in the latter case is due to the fact that, while signatures are necessary to show that the pleading has been filed with the knowledge and approval of the party, the object of verification is only to fix the responsibility for the statements made therein upon some one,[15] before the court proceeds to adjudicate upon them. As false verification is an offence punishable under the Indian Penal Code,[16] the responsibility of verification is very great and should always be realised.

In the case of verification, it is not necessary that there should be some good cause before a party can be relieved of the duty of verifying his pleading, or that the person verifying is authorised to do so. All that is necessary is that if any other person does that work, he should satisfy the court, by affidavit or otherwise, that he is acquainted with the facts of the case. It is not necessary to make formal application for permission to make the verification. Affidavits will not generally be required in cases where the person verifying are persons in charge of the business to which the pleading relates or are recognised agents of the parties.[17] If, however, the rules of any High Court require that the fitness of the person verifying should be proved by affidavit, such affidavit becomes indispensable, and it has been held that the rule is mandatory and gives no discretion to the Judge to make exceptions.[18] But no one (except a party) should be allowed to verify a pleading unless he is able to verify the main allegations on personal knowledge, for otherwise, he cannot strictly be said to be acquainted with the facts. It is true that "acquainted" is a wide word and may also mean "acquainted on the authority of information received from others",[19] but, having the proper object of verification in view, courts will do well if, in case the man verifying is not able to verify the main allegations on his personal knowledge, they refuse to regard such a man as one acquainted with the facts of the case. Of course, about minor facts or matters of detail, the verification may be on information received. But a

15 *Basdeo* v. *Smidt*, 22 A 55; *J.B.Ross* v. *C.R.Seriven*, A 1917 Cal 269, 43 C 1001.
16 Section 199 I.P.C.
17 *Kastalino v. Rustomji*, 4 B 468.
18 *Manindra Chandra* v. *Velji Mulji*, 105 IC 564, 31 CWN 1031, A 1927 Cal 773.
19 *Port Canning Co.* v. *Dharnidhar*, 9 CWN 608.

court has always general power to require the party himself to verify his pleading,[20] and this power should always be exercised when the statements made are of scandalous nature,[1] or where a party alleges gross fraud based on facts known to him.[2]

The verification is not required to be made in the presence of the court, but it has been held in Bombay that it is desirable that verification by persons other than parties should be made before the court, unless there are sufficient reasons for dispensing with the attendance of the person verifying.[3]

**Pleading by Banks, Corporations, Firms, Government, by whom Signed and Verified :** The above rules about the person who should sign and verify a pleading are subject to this modification that in cases where a corporation is a party, pleading may be signed and verified, on behalf of the corporation, by the Secretary or by any Director or other principal officer of the Corporation who is able to depose to the facts of the case.[4] This rule is, however, only permissive and not mandatory so as to exclude the application of general rule in O.6, R.14, which applies to companies as well as to individuals. A company can, therefore, authorise some other person to sign on its behalf.[5] But signature of an attorney of the Secretary or Director would not be sufficient.[6] When as per the Articles of Association of a company a suit on behalf of the company has to be filed with the consent of Directors of the company but it was filed by the Secretary who had a general power of attorney from the Directors, the suit was held maintainable as the action taken by the secretary was approved by the Directors subsequently.[7] The person verifying a pleading on behalf

20 *Raja of Tomkuhi* v. *Braidwood*, 9 A 505.

1 *Barjeshwar* v. *Budhanuddi*, 6 C 268.

2 *Jardine Skinner* v. *Maharani Surnomyee*, 24 WR 215; *Pratap Chandra* v. *Kristo*, 8 C 885.

3 *Kastalino* v. *Rustomji*, 4 B 468.

4 O.29, R.1; *United Bank of India* v. *Naresh Kumar*, A 1997 SC 3.

5 *Bundi Portland Cement Co.* v. *Abdul Husain*, A 1936 Bom 418; *Calico Printers Association* v. *A.A. Karim*, 128 IC 557, 32 Bom LR 1305, A 1930 Bom 566; *South India Corporation* v. *State Trading Corporation of India Ltd. Cochin*, A 1970 Ker 138; *Judhister Prusty* v. *Koshal Transport Trading Co.*, (1971) 37 CLT 108.

6 *Osborne Garret & Co.* v. *Raisi*, 100 IC 450 (Sind); *Delhi and London Bank* v. *Oldham*, 21 C 60.

7 *Turner Morrison & Co. Ltd.* v. *Hungerford Investment Trust Ltd.*, (1972) 1 SCRW 887, A 1972 SC 1311.

of corporation must prove by affidavit his fitness to verify even though upon information or belief.[8] But there is nothing in the Code which makes it obligatory to state in the body of the plaint or by affidavit that the person signing or verifying is an officer able to depose to the facts of the case.[9] Where a plaint was signed and verified by the secretary who was empowered by the Articles of Association to do so and an averment to that effect was made in the plaint, a separate affidavit was held not necessary.[10]

This rule does not apply to unregistered companies as they can sue only in the names of their members, but it does apply to foreign corporations.[11] In case of partnership firms the pleading may be signed and verified by any one of the partners,[12] or as provided in O.6, R.14 or 15 by any other person in the circumstances stated above.

In a suit by or against the government the pleading shall be signed by such person as the government may, by general or special order, appoint in that behalf, and shall be verified by any person whom the government may so appoint and who is acquainted with the facts of the case.[13] In a suit by or against a Bank represented by the concerned Branch Manager, the pleadings may be signed and verified by the Branch Manager.[14]

**Mode of Verification :** The proper mode of verification is that the person verifying shall specify, at the foot of the pleading, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge, and what he verifies upon information received and believed to be true. The verification shall be signed by the person making it and shall state the date on which, and the place at which it was signed.[15] Where the number of the plaintiffs exceeds more than one, any one of them can

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8 *International C.C.Co.* v. *Mehta & Co.*, 105 IC 568, 31 CWN 1030, A 1927 Cal 786; *Port Canning Co.* v. *Dharnidhar*, 9 CWN 608.

9 *Bundi Portland Cement Co.* v. *Abul Hussain*, A 1936 Bom 418.

10 *Gopalganj L. Bhandar Ltd.* v. *Purna Chandra*, 40 CWN 930.

11 *Singer Manufacturing Co.* v. *Baij Nath*, 30 C 103.

12 O.30, R.1 (2); *V.O. Devassy* v. *Periyar Credits*, A 1994 Ker 405.

13 O.27, R.1.

14 *Umesh Chandra* v. *State Bank of India*, A 1987 Orissa 67; *State Bank of India* v. *Kashmir Art Printing Press*, A 1981 P & H 188, (1981) 83 PLR 300.

15 O.6, R.15.

verify the plaint.[16] The names of the person from whom information is received, may or may not be disclosed.[17] A verification in the following words was held to be bad: "To the extent of my knowledge, the purport of this is true",[18] "contents of paras 1-11 above are true to the best of my knowledge and instructions".[19] A verification to the effect that "the contents are substantially true" is not sufficient.[20]

**Defects of Signature or Verification :** Want of signature or verification or any defect in either will not make the pleading void, and a suit cannot be dismissed nor can a defence be struck out simply for want of, or a defect in the signature or verification of the plaint or written statement,[1] as these are matters of procedure only.[2] It has been treated to be a mere irregularity and curable by amendment.[3] The defect may be cured by amendment, at any stage of the suit,[4] and when it is cured by amendment, the plaint must be taken to have been presented on the date on which it was originally presented, and not on the date on which it was

16 *R.P. Nautiyal* v. *Chandra Mohan*, A 1985 All 118; *Bibi Asghari* v. *Md. Kasim*, A 1951 Pat 323.

17 *Rivers Steam Navigation Co.* v. *Khaita*, 38 CWN 551, 34 C 632, 53 CLJ 391.

18 *Girdhari* v. *Kanhaya Lal*, 15 A 59.

19 *Mt. Sobhag Kunwar* v. *Jugraj*, A 1949 Ajmer 37.

20 *Waggoner* v. *Brown*, 8 How Pr. 212.

1 *Chandra Sekhar Rai* v. *State*, A 1984 Pat 167; *Arunachellum* v. *Prahhaya*, 1912 MWN 1207; *Basdeo* v. *Smidt*, 22 A 55; *Nandlal* v. *Sarkoni*, 165 PWR 1911; *Rajit* v. *Katesar*, 18 A 396; *Rustom* v. *Tara*, 11 CWN 871; *Fateh Chand* v. *Mansab*, 20 A 442; *Mt.Sobhag Kunwar* v. *Jugraj*, A 1949 Ajmer 37; *All India Reporter* v. *Ramachandra*, A 1961 Bom 292; *Karan Singh* v. *Ram Rachpal Singh*, A 1977 HP 28; *Scindia Potteries Ltd* v. *Srichand*, 1996 AIHC 5005 Delhi.

2 *Wali Md.* v. *Ishakali*, 1931 ALJ 772, A 1931 All 507, 134 IC 26; *E.A. Zippel* v. *K.D. Kapur*, 1932 Sind 9, 139 IC 114.

3 *Makhu Lal* v. *Bachcha Pathak*, A 1992 All 358; relied on *Muraka Radhey Shyam Ram Kumar* v. *Roop Singh Rathore*, A 1964 SC 1545; *I.T.C. Ltd.* v. *Phurba Lama*, A 1992 Sikkim 34; *Nand Kishore* v. *Bhagi Kuer*, A 1958 All 329; *Gauri Kumari* v. *Commissioner I. Tax*, A 1960 Pat 270; *Purusho Hamidwallah Bhai & Co.* v. *Manilal & Sons*, A 1961 SC 325; *Karan Singh* v. *Ram Rachpal Singh*, A 1977 HP 28; *Kailash Singh* v. *Hiralal*, A 1994 Gau 12.

4 *Basdeo* v. *Smidt*, 22 A 55; *Nandlal* v. *Sarkoni*, 165 PWR 1911; *W Johnston* v. *Sir Rameshwar Singh*, 104 IC 747 Pat; *Shibdeo* v. *Ram Prasad*, 46 A 637, 22 ALJ 690; *Subbiah* v. *Sankarapandious*, A 1948 Mad 369, 1948 MWN 190, 1948 MLJ 227; *Dinbandhu* v. *Jadumoni*, A 1954 SC 411.

amended.[5] If the defect is discovered in appeal, the Appellate Court may, if it thinks fit, have the defect removed, but where the defect is such that it does not affect the merits of the case, no notice of it need be taken.[6]

When an objection to such defect is taken, the court should not frame an issue on the point, but should get the defect at once removed. Where, however, it is shown that the suit was not filed with the knowledge of the so called plaintiff, it should be dismissed and the mere fact that a pleader, having general power of attorney to sign plaints for him, has signed the plaint will not make it a valid document.[7]

An objection that a plaint has been signed by an incompetent person, if not raised before the trial court cannot be allowed to be raised before the appellate Court.[8] Where the plaint was not signed and verified properly, but the plaintiff in the witness box proved his case, it was held that the plaint could not be rejected on account of want of signatures and proper verification.[9]

While construing the various procedural provisions the courts should always bear in mind that"as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities".[10] As aptly observed by Justice Vivian Bose dealing with the Code of Civil Procedure:

"It is something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should, therefore, be guarded against (provided always that justice is done to *both sides*), lest the very means designed for the furtherance of justice be used to frustrate it."[11]

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5 *Ram Gopal* v. *Dhirendra*, 101 IC 573, 31 CWN 397; but see, *Kehar Singh* v. *Mahant Avtar Singh*, 69 Punj LR 238;

6 Section 99, C.P.C.; also see, *B.R. Sharma* v. *Nanank Chand*, A 1967 All 487; *Subbiah* v. *Sankara*, A 1948 Mad 369.

7 *Mahabir* v. *Shah Wahid Alam*, 11 AWN 152.

8 *Clara Auroio de Branganca* v. *Sylvia Angela Alvares*, A 1985 Bom 373.

9 *Kailash Singh* v. *Hira Lal Dey*, A 1994 Gau 12.

10 *Ghanshyamdas* v. *Dom. of India*, (1984) 3 SCC 46 (para 18).

11 *Sangram Singh* v. *Election Tribunal*, A 1955 SC 425.

## Chapter VI

# PARTICULARS

**Particulars and their Importance :** In every pleading a certain amount of detail is necessary to ensure clearness and to prevent the other party from being taken by surprise. The term "Particulars" has not been defined in any enactment. As observed in the election case of *Hari Das* "shortly stated, *'Particulars' may be described as the details of the case set up by the party.*"[1] No precise rules about the degree of particularity required in any case can be laid down, but as much certainty and particularity should be insisted on as is reasonable; and a party is entitled to a fair outline of the case of his opponent, and to have any and every particular that will enable him to know his opponent's case and to prepare himself accordingly,[2] though he is not entitled to disclosure of the evidence of his opponent.[3] It would however, be no excuse for withholding particulars that they will also disclose some portion of the evidence.[4] For instance, in suit for infringement of a trade mark on the allegation that the use of the trade mark by the defendant had in fact induced "diverse persons" to purchase defendant's goods as the plaintiff's goods, the plaintiff is bound to disclose the names of such persons.[5] The object of giving particulars is to narrow down issues, by limiting the inquiry at the trial to matters set out in them, and a party is not entitled to go into any matters not included in his particulars.[6] It is, therefore, the duty of every pleader to apply for further particulars of the pleadings of his opponent, where no particulars are given or they are not given in sufficient detail, even though he can make a shrewd guess as to what is really meant, because he will thereby be able not only to prepare himself with his defence, but also to pin down his adversary to

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1 *Hari Das* v. *Hira Lal*, 4 ELR 466.

2 *Thorp* v. *Holdsworth*, (1876) 3 Ch D 637; *Philipps* v. *Philipps*, (1878) 4 QBD 117; *Saunders* v. *Jones*, (1877) 7 Ch D 113; *Gauri Shanker* v. *Manki Kunwar*, 21 ALJ 571, 45 A 624, 74 IC 466, A 1924 All 17 (DB).

3 *Creet* v. *Gangaraj*. 17 IC 214, A 1937 Cal 129.

4 *Marriott* v. *Chamberlain*, (1886) 17 QBD 154; *Zierenberg* v. *Labouchere*, (1893) 2 QB 183; *Bishop* v. *Bishop*, (1901) 70 LJ 93.

5 *Humphries Co.* v. *The Taylor Drug Co.*, (1888) 39 Ch D 693.

6 *Wooly* v. *Broad*, (1892) 2 QB 317.

a definite case.[7] He is entitled to do this under O.6, R.5. If particulars are not given, and neither the opposite party applies for them nor does the court insist on their being set out in the pleading, the party pleading would be entitled to give evidence of all and any facts which support his allegation.[8]

It is the duty of the court to insist that full particulars should be given in the pleading. In the absence of proper pleadings under Sec. 70, Contract Act, the plaint should not be entertained.[9] In a case in which only general allegation of immorality were made without giving sufficient particulars, the High Court held that it was the duty of the Judge to have the whole general paragraph struck out.[10] But neither the right of the defendant nor the duty of the court to call for particulars, if necessary, can be any excuse for a plaintiff not giving full particulars in his plaint. In a suit for public right when the plaintiff had not given details of the special damage suffered, the Calcutta High Court refused to listen to the argument that the defendant could have got the information if he had applied for particulars.[11] Where the defendant merely pleads that the donor never executed gift-deed in favour of the plaintiff, but does not plead that because of either physical or mental disability or because of illiteracy, the donor did not have any knowledge about the execution of the gift-deed, there is total absence of pleading of fraud, undue influence and/or misrepresentation, and in the absence of the pleadings it is not open to the court to allow any evidence on that score.[12]

*(As to when particulars should be ordered and when refused see also chapter VIII, post)*

How far it is necessary to set out details of time, place, account, etc., in the pleadings, is a matter which a pleader should carefully consider.

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7 *Nathu Ram* v. *Kalu*, 171 IC 121 Nag.

8 *Hewson* v. *Cleeve*, (1904) 2 Ir. T 536.

9 *Union of India* v. *Sitaram Jaiswal*, A 1977 SC 329; *Devi Sahai Palliwal* v. *Union of India*, A 1977 SC 2082; see also, *Bal Gangadhar Tilak* v. *Sri Srinivas Pandit*, 39 B 441, 22 CLJ 1, 19 CWN 729, 13 ALJ 570, 29 MLJ 34; *Gauri Shankar* v. *Manki Kunwar*, 21 ALJ 571, 45 A 624, 74 IC 466.

10 *Jagdish* v. *Hazarilal*, 140 IC 585, 1932 ALJ 671.

11 *Raj Chandra* v. *Mahim Chandra*, A 1936 Cal 549, 91 IC 728; see also, *Sitaram* v. *Hari Ram*, 165 IC 24, 40 CWN 913.

12 *Santanu Kumar Das* v. *Bairagi Charan Das*, A 1995 Ori 300.

Experience and common sense, more than any hard and fast rules of law, can best teach him this. In the Code of Civil Procedure, it is laid down that particulars must be stated when fraud, breach of trust, wilful default or undue influence is pleaded. In other cases, when more particulars than are exemplified in the Forms in Appendix A are necessary, they are to be stated.[13]

It must be clearly understood that under 'particulars' only such facts as are the details of the facts stated in the pleading can be set out, and no new material altogether based on an entirely different cause of action can be introduced, as that would not be permissible under O.6, R.7.[14] The distinction between *particulars of material fact* and *material fact itself* is fine one, but is very important and should not be lost sight of. "Material Fact" is an essential element of the cause of action and if any material fact is omitted, the plaint is bad and can be rejected under O.7, R.11 (a). Particulars are the details of material fact which are necessary for the other party to know to prevent him from being taken by surprise and to narrow the issues. An omission to give such particulars does not necessarily entail rejection of the plaint but the court may make an order for submission of necessary particulars. But there are certain particulars without which an allegation of material fact does not amount to a good averment of that fact at all, e.g. an allegation of fraud. The omission of necessary particulars will make the averment of a material fact like fraud bad and liable to be struck out altogether. These particulars are different from those required to narrow the issues or prevent surprise, absence of which does not entail rejection of the pleading but gives the other party a right to ask the court to order particulars.

The rule relating to particulars has assumed greater importance in election cases. Sec.123 of Representation of Peoples Act, describes various corrupt practices and under the law particulars of even corrupt practices alleged have to be given in the election petition. An election petition is, however, construed strictly and unless material facts have already been stated in the petition the same cannot be allowed to be introduced subsequently, *i.e.*, after the expiry of the period of limitation

13 O.6, R.4.

14 *Mehnga* v. *Maya Singh*, A 1937 Lah 795.

for filing a petition in the garb of furnishing particulars. However, if material facts are already there the particulars can be allowed or required to be furnished later.[15] The Supreme Court while discussing the importance of particulars observed :

"There can be no reasonable doubt that the requirement of full particulars is one that has to be complied with, with sufficient fullness and clarification so as to enable the opposite party to meet them fairly and they must be such as not to turn the inquiry before the tribunal into a rambling and roving inquisition".[16]

**Certainty as to Time :** Dates where necessary should always be given, e.g. date of notice, date of rent or debt falling due, date of default or breach where the cause of action is based on it, date of execution of bond or promissory note, date of sale of each consignment of goods in suit for price of goods supplied.

**Places :** Places should be definitely mentioned, so that they can be properly indentified. Particulars of the property about which a claim is made should be clearly specified, so that there may be no mistake about its identity and no difficulty may be experienced at the time of execution of the decree. If it is a house, it should be described by its number, name of the street, or by the boundaries or by numbers in the *Khasra* or other village record. If it is an agricultural field, full specification of it as given in the village records(e.g. number of *Khatauni* or *Khasra*, etc.,) should be given.[17] When area of property is mentioned the area according to the notations used in the record of settlement or survey should be stated,with or without, at the option of the party, the same in terms of the local measures.

**Account :** In a suit for money, particulars of the account by which the amount claimed has been arrived at, should be given. For instance, if

15 *Samant N. Balkrishna* v. *George Fernandes*, A 1969 SC 1201; *Hardwari Lal* v. *Kanwal Singh*, A 1972 SC 515; *Udhav Singh* v. *Madhav Rao Scindia*, A 1976 SC 744; *Manubhai* v. *P.M.Joshi*, A 1969 SC 734; *Ziauddin Bukhari* v. *B.R. Mehra*, A 1975 SC 1788; *Balwant Singh* v. *Prakash Chand*, A 1976 SC 1187; *Vatal Nagaraj* v. *R.D. Sagar*, A 1975 SC 349; *Zeliang* v. *Aju Newmni*, A 1981 SC 8; *Dhartipakar* v. *Rajiv Gandhi*, A 1987 SC 1577; *Ram Charan* v. *Bhola Shanker*, A 1987 All. 134; *Subhash Desai* v. *Sharad J.Rao*, A 1994 SC 1733; see also *Manohar Joshi* v. *N.P.Patil*, A 1996 SC 796.

16 *A. Bhikaji Keshao Joshi* v. *Brijlal Nandlal Biyani*, 10 ELR 357 SC.

17 O.7,R.3.

the suit is for the total of several items advanced at different times, each item with the date and amount should be specified. If a principal sum is claimed with a further sum as interest, full account of the calculation of interest should be given. If payments by defendant are credited the plaintiff must not merely name a lump sum, but must state the dates and items of the amounts credited. A mortgagee in possession admitting receipt of certain sums on account must give particulars of all sums received. But if a general account is claimed and the court agree that such an account must be taken, then no such particulars need be given.

**Adultery:** In the case of adultery, which is a charge of a very serious nature, the pleading should be specific, the particulars of the time, the date, the place of commission of acts of adultery must be specific so that the opponent can defend the case.

The charge of adultery is a serious charge and casts aspersion on the character of the spouse which affects the reputation of the spouse in the society. It is to be established beyond doubt though it may be difficult to find direct evidence for establishing it. The spouse against whom the charge is made should be aware of the precise allegation so as to be able to effectively answer the same. In case the charge is vaguely made, without furnishing the particulars, it would not be possible for the spouse to do so.[18]

**Misconduct : General** : Misconduct consists of various things such as fraud, undue influence, coercion, collusion, misrepresentation, mistake, negligence, breach of trust, etc. Although most of these are cognate vices and may in part overlap in some cases, they are, in law, distinct categories and are in view of O.6, R.4 read with O.6, R.2 required to be separately pleaded with specificity, particularity and precision.[19] It is no excuse for the omission to say that the opponent must himself be aware of that fact. Your opponent is entitled to know the outlines of the case and to bind you to a definite story so that he may be able to meet it. Their Lordships of the Privy Council have enjoined all judges to compel a litigant who pleads fraud and such other misconduct on the part of the other party to place on

18 *Paravati* v. *Shiv Ram*, A 1989 HP 29.

19 *Afsar Sheik* v. *Soleman*, A 1976 SC 163; *Bishnu Dev Narain* v. *Seogeni Rai*, A 1951 SC 280; *Kanagarathinam* v. *Perumal*, A 1994 Mad 247.

record precise and specific details of those charges and observed that cases of such type would be simplified if this practice is strictly observed and insisted upon by courts, even if no objection is taken by the opposite party.[20]

O.6, R.4 requires that particulars of items, if necessary, should be stated in the pleadings. This will bring about precision in pleading; prevent surprise to the other party and ensure a fair trial. A bare denial of contract is not denial of the legality or sufficiency in law (O.6, R.8). It is not permissible to introduce by way of particulars a plea of misconduct other than that raised in the pleadings.[1] Some acts of misconduct relate merely to the state of mind of the person charged and some to specific acts of commission or omission. In the case of the former, particulars of the state of mind may not be necessary to be pleaded because it is impossible to probe into the mind of the person. O.6, R.10 lays down that wherever it is material to allege malice, fraudulent intention, knowledge or other conditions of mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred. But in the case of the latter, it is necessary to state particulars of the misconduct on the part of the other party. There are many cases in which actions of public bodies or officers are challenged on the ground of *mala fides*. General and broad allegations of lack of *bona fide* are not sufficient.[2] Something more specific, more direct and more precise is necessary to sustain such a plea. It is also well settled that it is not permissible to introduce by way of particulars a plea of misconduct other than that raised in the pleadings.

**Fraud:** Fraud should be pleaded with the greatest possible care and party pleading it must fully realise his responsibility for doing so. Counsel should preferably refuse to plead fraud without having full and definite instructions in writing from their clients, and even then they should warn their clients before-hand of the risk the latter runs by pleading such a

20 *Bharat Dharm Syndicate Ltd.* v. *Harishchandra*, 41 CWN 476, A 1937 PC 146.

1 *Brijendranath Srivastava* v. *Mayank Srivastava*, A 1994 SC 2562; *Union of India* v. *Pandurang Kashinath More*, A 1962 SC 630; *Swarnalatha Devi* v. *Krishna Iron Industries and Metal Works (P) Ltd.*, A 1974 Cal 393.

2 *Kosaraja Venkatta* v. *Govt. of Andhra Pradesh*, A 1965 AP 425; *Kedarnath Bahal* v. *State of Punjab*, (1978) 4 SCC 336.

grave charge. A charge of fraud is a serious thing to bring against a man and it cannot be easily maintained in any court.[3] In our country, fraud and other allied charges are often very lightly pleaded. The words "fraudulently", "dishonestly", "wrongfully", "cunningly", etc., are frequently used to qualify the acts and conduct of the opposite party, without fully realising the exact and legal meaning of those words. A pleader must insist on full particulars and details of the alleged fraud being given, and should never plead that charge unless a clear case of fraud is made out from the facts supplied to him. Mere suspicion is not enough, there should be circumstances incompatible with honest dealing.[4]

Where fraud is alleged as a matter of an objective fact, O.6, R.4, applies and particulars must be given. But where a mental condition is alleged, such as fraudulent intention. O.6, R.10, will apply and no particulars need be given. Thus the question of bonafides is one of mental condition and is covered by O.6, R.10.[5]

Before drafting a plea of fraud, the definition of that word in the Contract Act (section 17) should be carefully read and it should be seen whether the facts to be alleged fall within that definition. If they do, and if it is decided to plead fraud, it should not be pleaded generally, for there is a well known rule of pleading expressed in the frequently quoted language of Lord Selbourne that "with regard to fraud, if there is any principle which is perfectly well settled, it is that general allegations, however strong the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court can take notice".[6] Specific allegations, with full particulars as to what the fraud was, how, by whom,

3 *Le Lievre* v. *Gould*, (1893) 1 QB 491.

4 *Hansraj* v. *Dehra Dun Mussoorie Electric Tram Co.*, A 1940 PC 98, 187 IC 787; *K.Kanakarathnam* v. *A. Perumal*, A 1994 Mad 247; *Padmini Mishra* v. *Ramesh Chandra Mishra*, A 1991 Orissa 263; *Rakhal Chandra* v. *Prosad Chandra*, A 1926 Cal 73, 90 IC 2263 (DB).

5 *Dinbai Dinshaw Petit* v. *Dominion of India*, A 1951 Bom 72.

6 *Wallingford* v. *Mutual Society*, (1880) 5 App Cas 685; *Raj Narain* v. *Majlis Sahay*, 104 IC 821 Pat; *C.D. Lincoln* v. *Sheikh Noor Elahi*, A 1943 Oudh 192; *Bishundeo* v. *Sheogeni*, A 1951 SC 280; *Bharat Dharma Syndicate* v. *Harish Chandra*, 64 IA 143 (147); *Union of India* v. *Pandurang Kashinath More*, A 1962 SC 630; *Raja Srinivas* v. *S.D.O.,Mirzapur*, A 1962 All 590; *Kasturi Laxmileayamma* v. *Sabvitres Venkoba Rao*, A 1970 AP 440.

and when was it committed, should be given,[7] and if such details are not given in the plaint, in a case founded solely on fraud, it is liable to be rejected.[8] Where fraud is alleged, particulars thereof should be given and the allegations constituting fraud must be clear, definite and specific.[9] No oral evidence is admissible unless a specific pleading of fraud is made in the plaint.[10] Particulars have to be furnished of the plea of fraud in accordance with O. 6, R. 2 and it is not permissible to introduce by way of particulars a plea of fraud or misconduct other than that raised in the pleadings.[11] The same rule applies where fraud is relied upon as a defence in the written statement.[12]

The proper way of pleading fraud is to set out all the acts and representations alleged to be fraudulent in their full details and then to state that those acts were done with a malafide intention of committing fraud. It should be mentioned whether the representations were oral or in writing. If oral, the substance of such representations should be given, alleging the date and place when and where they were made, and the name of the person making them, and that of the person to whom they were made. If they were in writing, the document or documents containing them should be clearly identified in the particulars.[13] For instance, in a suit for declaration of title to certain property entered in the record of rights as that of the plaintiff's guardian, the bare allegation that the entry was brought about by the guardian fraudulently was held not sufficient to raise a question of fraud, and it was pointed out that it must be alleged who committed the

7 *Annada* v. *Atul*, 23 CWN 1045, 54 IC 197, 31 CLJ 73; *D. Weston* v. *Peary Mohum Das*, 40 C 898, 23 IC 25, 18 CWN 185; *Rajkumar* v. *Gobind*, 14 IC 53, 17 CWN 524; *Lachmi Narayan* v. *Kishan Kishore*, 38 A 126, 14 ALJ 25, 33 IC 913; *Ghaman* v. *Kanhiya*, 15 PWR 1915, 26 IC 426, 121 PLR 1915; *Punjab Commercial Syndicate* v. *Punjab Cooperative Bank*, A 1926 Lahore 96, 6 Lah 512, 92 IC 322 (DB); *Lloyds Bank* v. *J.E. Guzder*, 56 C 868; *Rattanasabapathy* v. *Ammakannammal*, 57 MLJ 609; *Maung Hla* v. *M.N.S. Chattyor*, 145 IC 118, A 1933 Rang 153; *Mate Nande* v. *Dal Chand*, A 1948 Nag 170; *Union of India* v. *Motilal*, A 1962 Pat 384.

8 *Ganga Ram* v. *Tiluckram*, 15 C 533 (PC).

9 *Padmini Mishra* v. *Ramesh Chandra Mishra*, A 1991 Orissa 263; *Dr. Lakhi Prasad Agarwal* v. *Nathmal Dokania*, A 1969 SC 583 referred to.

10 *Raghunath Tiwary* v. *Ramakant Tiwary*, A 1991 Pat 145.

11 *Brijendra Nath Srivastava* v. *Mayank Srivastava*, A 1994 SC 2562.

12 *Sheik Nasiruddin* v. *Ahmad Husain*, A 1926 PC 109.

13 *Gauri Shankar* v. *Manki*, 21 ALJ 571, 45 A 624.

fraud, that what was done by the guardian was done with fraudulent intention of defeating the plaintiff's rights, and that the Settlement Officer was misled by her act and was induced thereby to make an incorrect entry in the record.[14]

The plaintiff alleged that exparte decree was fraudulently obtained by the defendant by practising fraud upon the court. This was not considered sufficient and it was held that it is the duty of the plaintiff to specify the particulars of fraud in the plaint.[15] So, when the defendant is charged with making false entries in the account-books, the entries charged to be false and the nature of the plaintiff's objection to each of them should be specified.[16]

Unless fraud is thus clearly and specifically alleged it cannot be put in issue,[17] and it will not be considered enough that there are allegations in the pleading from which such a plea can be spun out.[18] But where the transactions speak for themselves and furnish evidence of a well thought out design, the plaintiff's omission to set forth the particulars and details of the conspiracy does not matter.[19] In a suit for possession of property purchased at an auction sale the only fraud the defendant pleaded was that there was collusion between the decree holder and the purchaser and that they had agreed to purchase the property at a low price but the Subordinate Judge framed an issue whether the purchaser had deliberately misrepresented the amount of a prior charge. The Bombay High Court held that the Subordinate Judge was not justified in raising this new case of fraud for the defendant.[20] An allegation of fraud should be made in the pleading and cannot be allowed to be made at a later stage of the suit,[1]

14 *Hare Kishna* v. *Umesh*, 2 Pat LT 528, 62 IC 373, A 1921 Pat 209, 6 PLJ 373 (FB).

15 *Quazi Talifiquo Rahman* v. *Sital Prasad Das*, A 1977 Gauhati 25.

16 *Newport Dry Dock Co.* v. *Paynter*, (1886) 34 Ch D 88.

17 *Khirode* v. *Janki*, 20 IC 753; *Manak Chand* v. *Girdhari*, 46 IC 342; *Narain Singh* v. *Sri Ram*, 108 IC 383 Cal; *Namdev Digamber* v. *Vijay Kumar Ram Chandra*, A 1963 Bom 244; *Julum Dhari Rai* v. *Debi Rai*, A 1965 Pat 279.

18 *Sankuni* v. *Nallappah*, 29 IC 482 (Mad).

19 *Nanhoo Beg* v. *Gulam Husain*, A 1950 Nag 50; *Subbamma* v. *Mohd. Abdul Hafiz*, A 1950 Hyd 55; *Ramji Mawji* v. *Valji Harji*, A 1950 Kutch 67; *Bishun Deo Narain* v. *Seogini Rai*, A 1951 SC 280.

20 *Dodasappa* v. *Pradhanappa*, A 1926 Bom 33, 91 IC 426, 22 Bom LR 1318 (DB).

1 *Govindaswami* v. *Ethirajammal*, 34 IC 1, 1916 MWN 180.

unless the party pleading it was not aware of the fraud, in which case he can set it up when he becomes aware of it.[2] Where, however, omission to refer to fraud in the plaint was due to mere oversight, the court allowed amendment of the plaint.[3]

The charges of fraud must be substantially proved as laid and when one kind of fraud is charged; another kind of fraud cannot, upon failure of its proof, be substituted for it,[4] nor is it proper for an Appellate Court to entertain a case of fraud other than the one specifically alleged in the pleading.[5] Mere suspicion is not enough.[6] For example, when a lady suing for cancellation of a sale deed executed by her, alleged that the defendants, who were her agents, got the deed executed by her without making her aware of the contents thereof, and that she did not get any independent legal advice and did not get any consideration, but proved that she had put her signature on blank sheets of paper, subsequently filled up without her knowledge and turned into a conveyance, it was held that she could not succeed.[7]

The general rule that fraud must be specifically pleaded would not, however, apply when the party aggrieved raises no objection and fights out the case as though the pleadings were in proper form.[8] Similarly, where there is an allegation of fraud, a specific allegation of undue influence based on the same facts is unnecessary.[9]

**Undue Influence :** This being a species of fraud should be pleaded with precision and unless a case of undue influence is made out in the pleadings, it cannot be investigated by courts.[10] This rule has been evolved

2 *Radha Kishan* v. *Wajib Ali Khan*, 3 OLJ 501, 36 IC 746, 19 OC 334.

3 *Muniswami* v. *Raja Gopala*, A 1928 Mad 759, 118 IC 763, 54 MLJ 644.

4 *Abdul Hasan* v. *Turner*, 11 B 620, 14 IA 111; *Ganga Ram* v. *Dwarka*, 14 AWN 6; *Nagendra* v. *Parbati*, 35 IC 339, 20 CWN 819; *Bansi Ram* v. *Secretary of State*, 35 IC 284, 20 CWN 638; *Satish Chandra* v. *Kalidasi*, 34 CLJ 529, 68 IC 577, 26 CWN 177, A 1922 Cal 203 (DB); *Mohd. Baksh* v. *Rawalpindi Club*, A 1955 Lah 222.

5 *Mt. Mira* v. *Sarvasi*, 23 M 227.

6 *Union of India* v. *Chaturbhai Patel*, A 1976 SC 712.

7 *Bansi Ram* v. *Secretary of State*, 35 IC 284, 20 CWN 638.

8 *Beni Madho* v. *Basanto Kunbi*, 35 IC 252 All.

9 *Narayan Bhat* v. *Akkerbai*, 33 IC 576, 18 Bom LR 27.

10 *Inder Chand* v. *Bidyadhar*, 60 IC 282, A 1921 Pat 45 (DB); *Ladli Prasad Jiwal* v. *Karnal Distillery*, A 1963 SC 1279; *Gouri Shankar* v. *Fakir Mohan*, A 1989

with a view to narrow the issue and protect a party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve the dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleadings; if the particulars stated in the pleadings are not sufficient and specific, the Court should, before proceeding with the trial of the suit insist upon the particulars which give adequate notice to the other side of the case intended to be set up.[11]

The essential ingredients covering the three different stages for a plea of undue influence have to find place in the pleading. It must be stated how the person alleged to have exercised undue influence was in a position to dominate the will of, and exercise his influence over the party pleading, and that in fact he did influence the latter,[12] and thereby obtained an undue advantage. All the necessary and material facts of undue influence should be pleaded in support of the case set up.[13]

A general allegation, it was held, in the plaint that the plaintiff was a simple old man of 90 who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court would take notice.[14] It is not sufficient merely to allege that the relations of the parties were such that one relied upon the other and the other was in a position to dominate the will of the first. It should further be alleged that such other person used his position to obtain an undue advantage.[15] Mere averment that opposite party exercised undue influence in the absence of precise facts, namely the nature of such influence,

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Orissa 201; *Syed Sultan Pai* v. *Syed Bikhu Sahib*, A 1986 AP 342; *Andmmal* v. *Rajeswari Vedachalam*, A 1985 Mad 321 (DB); *Kallanchil Padunhakkara Abdul Rahman* v. *Kunhi Muhammad*, A 1975 Ker 150; *Chirongi Lal* v. *Shanker Lal*, 1979 MPLJ 591.

11 *Ladli Parshad Jiwal* v. *Karnal Distillery Co. Ltd.*, A 1963 SC 1279; *Subhas Chandra Das* v. *Ganga Prasad*, A 1967 SC 878.

12 *Premnarayan* v. *Kunwarji*, A 1993 MP 162; relied on *Subhash Chandra* v. *Ganga Prasad*, A 1967 SC 878; *Shiddubai* v. *Nilapagauda*, 83 IC 616 (Bom); *KunhaminaUmma* v. *Special Tehsildar*, A 1977 Ker 41.

13 *K. Kanakarathnam* v. *A. Perumal*, A 1994 Mad 247.

14 *Afsar Sheikh* v. *Soleman Bibi*, A 1976 SC 163.

15 *Gouri Shankar* v. *Fakir Mohan*, A 1989 Orissa 201; *Poosathurai* v. *Kamriappa*, 55 IC 447, 43 M 546, 18 ALJ 343, 22 Bom LR 538 (PC); *Sanwal Dass* v. *Kuremal*, 10 Lah LJ 27, A 1928 Lah 224, 9 Lah 470, 109 IC 779 (DB).

the persons on whom it was exercised and the time and place of it, the pleadings fall short of the requirements in law.[16] In a case for setting aside a deed of gift on the ground of fraudulent representation, where the plaintiff in order to show that defendant could commit the fraud, alleged how he was in a position to exercise undue influence over the plaintiff, it was held by the Privy Council that no substantial case of undue influence was raised and the allegations in the plaint were only ancillary to the main charge of fraudulent misrepresentation.[17] Detailed facts on which the plaintiff relies should be given and it is not sufficient merely to raise an atmosphere of suspicion.[18]

The plea of undue influence should be clearly stated in sufficient detail. The allegation that P lived with D who was managing his affairs is not sufficient to infer that D was in a position to dominate the will of P.[19] The Supreme Court has held that the courts must scrutinise the pleading to find out that a plea has been made out and full particulars given before examining any case of undue influence.[20] As in the case of fraud, so in the case of undue influence, a party must be strictly confined to the statement of facts alleged by him as particulars and cannot make out another kind of undue influence.[1]

**Coercion :** Coercion is defined under section 15 of the Indian Contract Act as committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. In order to find a person guilty of committing coercion, full particulars must be furnished; when a Court is asked to find that a person was threatened with death, it is necessary to give particulars as to the nature of the threat, the circumstances, the date, time and place in which it was administered and the name of the person threatening.[2] A mere suspicion or probability will

16 *Lalit Kishore Chaturvedi* v. *Jagdish Prasad Thada*, A 1990 SC 1731.
17 *Someshwer* v. *Tirbhuwan*, A 1934 PC 130, 149 IC 480.
18 *Chandravathi* v. *Janti Prasad*, 40 PLR 146, A 1938 Lah 333.
19 *Talengala Narayana Bhatta* v. *Narasimha*, A 1965 Ker 189.
20 *Subhas Chander* v. *Gavraya Pd.*, A 1961 SC 878.
1 *Suraj Baksh* v. *Ajudhia Singh*, A 1928 Oudh 330, 110 IC 91 (DB).
2 *Bishundeo Narain* v. *Seogeni Rai*, A 1951 SC 280.

not be sufficient to prove coercion as held by Privy Council.[3] The word "coercion" used in the general and ordinary sense is not controlled by the definition of the word in section 15 of the Indian Contract Act.[4]

**Collusion :** Collusion is a deceitful agreement or contract between two or more persons to do some act in order to prejudice a third person or for some improper purpose. It is undoubtedly a secret arrangement for which it is indeed difficult to get direct evidence. The charge of collusion, though easy to make, is difficult to substantiate. However, a general allegation of collusion implying some kind of fraud is not enough without particulars.[5]

**Misrepresentation :** In a suit for false and fraudulent misrepresentation, the plaint should state whether the alleged misrepresentation was oral or in writing, and when and where each of them was made. If in writing the relevant documents must be identified and disclosed. If oral, the substance of each and every part of the representation should be given stating as regards each one, the date, when and the place where and the person by whom the said representation was made.[6]

**Mistake :** A mutual mistake such as would render a contract void within the meaning of section 20 of the Indian Contract Act, depends upon the facts and particulars pleaded and proved and where the plea is not made out it cannot be allowed.[7] Clear evidence of mistake, common to both the parties, must be alleged and proved.[8]

**Negligence :** In an action for negligence, the plaintiff must give full particulars of the negligence complained of and of the damages he has sustained.[9] Without a pleading and proof, negligence cannot be

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3 *Motilal Upathya* v. *Jaggurnath*, 1836 - 5 WRPO 25.

4 *Kanhyalal* v. *National Bank of India*, ILR 40 Cal 598 (PC), 40 IA 56.

5 *Varanasaya Sanskrit Vishwavidyalaya* v. *Dr. Rajkishore Tripathi*, A 1977 SC 615.

6 *Gowrisankar* v. *Monkey Kamwar*, ILR 45 All 624; *Padma* v. *Kripasindhu*, A 1986 Orissa 97.

7 *Jothi Prasad Singh* v. *Samuel Henri Seddon*, A 1940 Pat 516.

8 *Takar* v. *Bennett*, 1887-38 Ch D 109.

9 *Fowler* v. *Lanning*, 1959 (2) WLR 24; *Prafulla Ranjan Sarkar* v. *Hindustan Building Society Ltd.*, A 1960 Cal 214.

countenanced and the decree for damages cannot be awarded.[10] The plaint must clearly allege the duty enjoined on the defendant with the breach of which he is charged.[11] In a case of collision, the plaintiff must state when and where the accident took place and the particular act of negligence and give details of the loss and expenses incurred.[12] In cases in which negligence is pleaded, full details must be given of the acts which constitute negligence[13] or from which negligence may be presumed on the application of the doctrine of *res ipsa loquitor*.[14] The *maxim res ipsa loquitor* is a principle which aids the court in deciding as to the stage at which the onus shifts from one side to the other.[15] Where negligence arises out of breach of contract or duty, it is necessary to state the nature of contract broken, the circumstances in which the performance of the contract by one party or the other was expected, the degree of care and attention which, in the ordinary course, was expected to be shown by the parties, the circumstances under which and the reasons for which the failure to show due diligence occurred, are all material particulars which would be relevant before a judicial finding could be given on the plea of negligence.[16] It is not open to the plaintiff to allege and seek to prove one kind of negligence and then ask the court of appeal to find negligence of another kind.[17] Again in cases where a statutory notice such as one under section 80 of the Code of Civil Procedure is mandatory in order to sustain a cause of action for liability on the Railway administration, it is necessary to give in the statutory notice itself all the necessary particulars before a charge of negligence can be effectively maintained and thus enable the defendants to decide whether the claim should be accepted or not.[18]

10 *Balak Glass Emporium* v. *Union of India*, A 1993 Ker 342; See also *Trojen* v. *Nagappan Chettiar*, A 1953 SC 235; *Govind Prasad* v. *Bari Dutt Sastri*, A 1977 SC 1005.

11 *Gautret* v. *Egerton*, 1867 (2) CP 371.

12 *Watson* v. *North Metropolitan Tramways Co.*, 1886-3 TLR 273; *Martin* v. *Teggart*, 1906 (2) Ir.R. 120.

13 *Gautret* v. *Egerton*, 1867 (2) CP 371.

14 *Pushpabai Parshottam Udeshi* v. *Ranjeeth Ginning and Pressing Company*, A 1977 SC 1735; *Basthi Kasim Sahib* v. *Mysore SRT Corporation*, A 1991 SC 487; *Jaghir Kaun* v. *State of Punjab*, (1995) 2 Punj LR 343 P&H.

15 *Sayed Akbar* v. *State of Karnataka*, 1980 ACH 38 (SC).

16 *New Marine Company Pvt. Ltd* v. *Union of India*, A 1964 SC 152.

17 *Raymond Lincoln* v. *Alice Paupinal*, A 1932 PC 95.

18 *Sahi Vanaspati Traders* v. *Union of India*, A 1966 All 333.

**Medical Negligence :** Medical negligence is a tortious act which is actionable and aggrieved party can avail the alternative remedy under Consumer Protection Act 1986.[19] The medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient but as long as the doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor guilty of negligence.[20] A towel was left inside a woman's peritonial cavity while she was operated for sterilisation in a Government Hospital causing peritonitis which resulted in her death and the conclusion of negligence was drawn against the doctors by applying the principle of *res ipsa loquitor* and the Government was held vicariously liable.[1]

**Breach of Trust** : In case of breach of trust, facts showing how the opposite party came to hold the position of trust, what were the terms of that trust, what acts he did which amounted to breach of trust, must be pleaded. In an action for breach of trust, the acts complained of are to be particularised to a point at which the defendant knows not merely generally but in detail what he has to meet.[2] It is not sufficient to allege that the defendant had in various ways misapplied the rents and profits of leasehold which he had received on behalf of the plaintiff and has committed breach of trust.[3] As a matter of procedure, acts of breach of trust, both positive and negative (wilful default) must be pleaded at the outset unless the plaintiff is deprived of access of the accounts of the Trust. If the trustee refuses to show the accounts, a beneficiary has a right to sue for an account and be allowed to formulate his charges after inspection of his accounts; otherwise, he must set out the charges at the outset or at any rate before the issues are framed.[4]

**Miscellaneous Acts of Misconduct or Improper Conduct :** The word 'misconduct' literally means wrongful conduct or improper conduct.[5]

19 *Indian Medical Association* v. *V.P. Shantha*, A 1996 SC 550.

20 *Dr. Laxman* v. *Dr. Trimbak*, A 1969 SC 128; *A.S. Mittal* v. *State*, A 1989 SC 1570; *Poonam Verma* v. *Ashwin Patel*, A 1996 SC 2111.

1 *Achut Rao Maribhau Khodwa* v. *State of Maharashtra*, A 1996 SC 2377.

2 *Rathnasabapathi* v. *Amma Kannammal*, ILR 1930 Mad 783.

3 In re *Austich*, 33 WLR 557.

4 *Shirimbai Dinshaw* v. *Navroji Pestonji*, A 1936 Bom 30.

5 *N.M. Roshan Kumar Karrin* v. *M & S.M. Railway*, ILR 59 Mad 789, A 1936 Mad 508.

Misconduct is something more than mere negligence and intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be.[6] A mere clerical error would not possibly amount to misconduct which implies some degree of *mens rea* on the part of the person concerned or at any rate at a very grave degree of negligence or serious failure to carryout instructions or comply with regulations.[7] If an Advocate is guilty of conduct which is not becoming on the part of the Advocate, he is, to that extent, guilty of professional misconduct. When an Advocate spoke across the table to another Advocate when arguments were going on and that too about the Magistrate himself, it is not consonant with the high tradition of professional conduct.[8]

Misconduct in office may be defined as unlawful behaviour or neglect by a public officer by which the rights of a party have been affected. Gross or habitual negligence in the performance of duty may not involve *mens rea* but may still constitute misconduct for disciplinary proceeding.[9] Misconduct of promoters or directors as understood in the Companies Act means not misconduct of every kind but such as produces pecuniary loss to the company by misapplication of its assets or other acts.[10] In pleadings, a general allegation of misconduct is not sufficient. Where the defendant justified his action in dismissing the plaintiff from service on the ground of misconduct, specific acts of misconduct should be averred and proved.[11] However, where specific evidence on the point in dispute is exclusively in the hands of one party, it is not reasonable to insist upon the other party giving definite particulars of misconduct which an examination of that evidence alone would disclose.[12] Where an improper conduct is alleged, it must be set out with full particulars. A plaintiff cannot however complain, if general allegations of improper conduct made by him in the

6 *Dominion of India* v. *Ado Shah Akhar Shah*, A 1957 Pat 219; *Shivnath Rai Ram* v. *Amirt Banaspathy Co.*, A 1965 SC 1666.

7 *Gordhandas* v. *Governor General in Council*, A 1957 Punj 196.

8 *Subba Reddy* v. *Ramappa*, A 1954 Mad 318.

9 *Union of India* v. *Ahamed*, A 1979 SC 1022.

10 *Barium Chemicals Ltd.* v. *Company Law Board*, A 1967 SC 295.

11 Saunders & Jones, 1877 – 7 Ch. Div. 435.

12 *Pervala Ramakrishnaiah* v. *Pandri Satyananandan*, A 1932 Mad 284.

plaint are answered by equally general allegations in the written statements.[13]

The following are instances of some other cases in which it is necessary to give particulars :

**I.** *Suit for Accounts :* Particulars should be given as to how the defendant is an accounting party, e.g., that he is a mortgagee in possession or an agent or managing co-sharer. It is not sufficient to say merely that the defendant is an accounting party. It should also be alleged how the particular position of the defendant as an accounting party arose, e.g., if he is an agent, when and how he was appointed agent, whether verbally or by a written agreement; if he is a mortgagee, the date of the mortgage-deed should be specified.

**II.** *Adoption :* It is not sufficient to say that A is the adopted son of B, but the party setting up an adoption should give particulars as to the person who adopted, to whom the adoption was made, the person adopted and his relationship with the adopter and the person who gave in adoption. It is not necessary to plead that all ceremonies necessary and essential were performed.[14] In the absence of consent of the living wife, adoption cannot be said to be a valid adoption.[15] If there is a written statement containing bare denial of adoption, it will be taken to imply a denial only of the fact of adoption and not its legal validity.[16] Where the validity of adoption is challenged, the grounds of such invalidity must be pleaded.[17]

**III.** *Adverse Possession :* It is not sufficient to plead that a party has been in adverse possession for over 12 years. It should be definitely alleged how and when adverse possession commenced. What was the nature of his possession and whether the fact of his adverse possession was known to the real owner.[18] As between co-owners or co-sharers: there must be a plea and evidence of open assertion of hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other. Once possession of a co-owner or a co-sharer has become adverse as a result of ouster, a

13 *Union of India* v. *Pandurang Kashinath More*, A 1962 SC 630.
14 *Sital Prasad* v. *Ram Prasad*, A 1943 Nag 321.
15 *Kashibai* v. *Parwati Bai*, (1995) 6 SCC 213, 1995(3) CCC 565 (SC).
16 *Maroti Bansi* v. *Radhabai*, A 1945 Nag 60.
17 *Madhavrao* v. *Netram*, A 1957 M..B. 179.
18 *R.M. Dawar* v. *Ganga Saran Sharma*, A 1993 Delhi 19; *Rosily Mathew* v. *Joseph*, A 1987 Ker 42.

mere assertion of joint title by dispossession of co-owner or a co-sharer would not interrupt running of adverse possession. He must actively and effectively break up the exclusive possession of his co-sharers or co-owners by re-entry upon the property or by resuming possession in such a way as it is possible to do.[19] Possession of one co-owner is not by itself adverse to the other co-owner. On the contrary, possession by one co-owner is presumed to be a possession of all the co-owners unless it is established that a possession of the co-owner is in denial of the title of the other co-owners and by excluding them. Ouster is an unequivocal act of assertion of title. There has to be open denial of title to the parties who are entitled to it.[20] Adverse possession has to be expressly pleaded and proved. It cannot be set out simply in the course of trial and cannot rest on mere surmises.[1] Where the party's claim is based on section 53-A of the Transfer of Property Act, it is evident that he admits by implication that his possession is lawful under the agreement and the plea of adverse possession would not be available to him.[2] No amount of proof can substitute pleadings which are the foundation of the claim of adverse possession of a litigating party.[3] Adverse possession must be pleaded, put in issue and evidence should be let in, opportunity to refute the case must be made out by the party and availed by the other party. It cannot be allowed to be flung as a surprise on an unsuspecting party for the first time in appeal.[4]

**IV.** *Agreement :* Dates and names of parties to, and consideration of, the agreement, and whether it was in writing or oral, should be mentioned. In case it was in writing, the document should be properly identified. If the agreement is implied, the conduct, acts, conversation, or letters from which it is to be inferred should be indicated with sufficient accuracy, though it is not necessary to set them out in detail.[5] In a suit for breach of an agreement the exact condition broken and the manner of breach should be clearly specified.[6]

**V.** *Antecedent debt:* Where a transfer of coparcenary property by

19 *Shambu Prasad Singh* v. *Mst. Toom Kumari*, A 1971 SC 1337.
20 *Syed Shah Gulam Mohamed* v. *Syed Ahmed Moideen*, (1971) 1 SCC 597.
1 *Karmega Kone* v. *Udayar Kone*, (1979) 1 MLJ 419.
2 *Mohan Lal* v. *Mira Abdul Gaffur*, A 1996 SC 910.
3 *Abubaker Abdul Inamdar* v. *Abdul Inamdar*, A 1996 SC 112.
4 *Ratnaswamy Mudaliar* v. *Rasu*, 2000 (2) LW 540.
5 O.6, R.12.
6 *Jamshed* v. *Kunji Lal*, 1938 NLJ 392, A 1938 Nag 530.

a Hindu father is sought to be justified on the ground that it was made in lieu of antecedent debt, it is not sufficient merely to say so, but full particulars of the antecedent debt must be given, viz., the amount and nature of the debt, the name of the creditors, the date on which the debt was taken and how it was secured.

**VI.** *Benami:* Facts showing how the party pleading or the opposite party came to be *benamidar*[7] should be pleaded, e.g., who supplied the consideration and obtained possession, the relationship between them or other motive, if any, for giving the transaction a *benami* character, the conduct of the parties in dealing with the property after the sale with whom the custody of title deeds remained.

Benami Transactions (Prohibition) Act 1988 (Act 45 of 1988) is a piece of prohibitory legislation and it prohibits transactions subject to certain exceptions; makes transactions punishable. The Act is not retrospective.[8] The prohibition does not apply to purchase of property by a person in the name of his wife or unmarried daughter.[9] The provisions of the Act are not applicable to a decree passed legally and validly prior to the coming into force of the Act.[10]

Where an agent employed to purchase property for the benefit of the principal, purchases the property in his own name, the property so purchased is for the benefit of the principal and the suit by the principal for declaration of his title and possession of property is not barred by section 4 of the Act.[11]

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7 On law relating to benami, see *Controller of E.D.* v. *Aloke Mitra*, (1981) 2 SCC 121 (paras 4 and 5); *Kankarathanammal* v. *Loganatha*, A 1965 SC 271; *Jayadayal* v. *Bibi Hazra*, A 1974 SC 171; *Krishnanand* v. *M.P.*, A 1977 SC 796; *Gapadibai* v. *State of M.P.*, (1980) 2 SCC 327 (para 3); *Gulam Mohd.* v. *Mst. Mariyam*, 1984 Raj LW 321; *Raj Ballav Das* v. *Haripada*, A 1985 Cal 2; *P. Narayana Menon* v. *Bhageerathi* A 1985 Ker 14 (No presumption of advancement in favour of wife resulting trust under section 82, Trust Act, created); *Urmila Dasi* v.*Probodh*, (1985) 89 CWN 465.

8 *Rajagopal Reddy* v. *Padmini Chandrasekharan*, 1995 (2) SCC 630 (*Mithilesh Kumari* v. *Prem Bihari Khare*, A 1989 SC 1247 overruled); *Probodh Chandra Ghosh* v. *Urmila Dassi*, A 2000 SC 2534, 2000 (6) SCC 526.

9 *Nand Kishore* v. *Sushila*, A 1995 SC 2145.

10 *Haridhan Banerjee* v. *Bhadrawati Goswami*, (1995) 3 GLR 212.

11 *P.V. Sankara Kurup* v. *Lelavathy*, A 1994 SC 2694; *C. Gangacharan* v. *C. Narayanan*, A 2000 SC 589, 2000 (1) SCC 459.

**VII.** *Breach of Contract:* The exact manner in which the contract was broken must be stated in the words of the contract itself. If only one of the conditions is broken, the condition should be specified. Material facts about terms and conditions of contract must be alleged and proved.[12]

**VIII.** *Breach of Duty:* The facts on which the duty is founded, that is, if it is founded on a contract the particulars of that contract, and if it is founded on statute a reference to that statute should be stated, as also the facts, which bring the case within the statute. Where the statutory provision is a part of a long Act of Legislature it is not sufficient to give the name of Act. The particular section or clause thereof should be stated. The manner in which the breach took place or the facts constituting the breach should also be alleged.

**IX.** *Custom :* Full particulars of the custom must be stated showing its incidents and details, particularly when it is at variance with the general law.[13] It should also be alleged that the custom is reasonable, certain and immemorial and has been followed without interruption.[14] Where a defendant pleaded that adoption of orphan is valid under Hindu law but did not specifically plead a custom in modification, but as soon as plaintiff's first witness was examined, he was asked questions in cross examination about the custom, it was held that the parties knew what defendant's case was and his bad pleading should not prejudice the defendant.[15]

**X.** *Cruelty :* Particulars of the acts alleged to amount to cruelty should be given, with reference to date, time and place. In matrimonial cases specific allegations in detail should be pleaded to make out a case of cruelty. Cruelty should be such as to cause a reasonable apprehension in the mind of wife that it will be harmful or injurious for her to live with the husband.[16] Pleading of cruelty should contain substantial matters of complaint and give the time and place of their occurrence. It is not enough to plead trivial incidents that are just the ordinary wear and tear of married

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12 *M.P. Laghu Udhog Maryadit* v. *Gwalior Steel Sales*, A 1992 MP 215.

13 *Sital Prasad* v. *Ranjit Singh*, 1931 ALJ 390, A 1931 All 583.

14 *Parbhawati Devi* v. *Mahendra Narain Singh*, A 1981 Pat 133.

15 *Pannalal* v. *Chimman Prakash*, A 1947 Lah 547.

16 *Parvati* v. *Shiv Ram*, A 1989 HP 29; *Om Prakash* v. *Smt. Rajni*, A 1988 Delhi 107; *Kusum Lata* v. *Kampta Prasad*, A 1965 All 280; *Tushar Kana* v. *Bhowani Prasad*, (1969) 73 CWN 143.

life or to make general allegations of cruelty or nagging.[17]

**XI.** *Desertion :* In its essence, desertion meant the intentional, permanent, forsaking and abandonment of one's spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligation of marriage. [18] Desertion is a matter of inference to be drawn from the facts and circumstances of each case which have to be set out in detail.[19] To prove desertion, two essential conditions must be satisfied, viz., 1) the fact of separation *(factum deserendi)*; and 2) the intention to bring cohabitation permanently to an end, *(animus deserendi)*. The burden is heavily upon the party who alleges desertion.[20]

**XII.** *Easement :* It is not sufficient to allege the right of easement generally but the nature of the particular easement and how it arose should be specified, as also the manner in which the right is claimed to have been acquired, e.g., by grant (actual or lost), or prescription, or under a statute.[1] If it was an easement acquired by prescription, it must be specifically alleged that the right was exercised for at least 20 years ending within two years of the suit, without interruption and *as of right*. If the easement is claimed against government, user for 30 years should be proved. As against a transferee of the government, claimant can base his claim upon user for a total period of 30 years against government and the transferee, or can ignore the prescription against government and base the claim on 20 year's user against the transferee. Where, the plaintiff had alleged the circumstance of the user by himself and his ancestors of land as pathway for 40 or 50 years, the plaint was taken to cover the plea of long user leading to an inference of lost grant.[2] It is very important that the right was enjoyed *as of right*, and as an easement, because user as owner will not support a claim to easement.[3] In case of a private right of way the course and the

17 *Thomson* v. *Thomson*, (1957) I All ER 161.

18 *Lakshman Uttamchand Kripalani* v. *Meera*, A 1964 SC 40; *Sanath Kumar Agarwal* v. *Nandini Agarwal*, A 1990 SC 594.

19 *Bipin Chandra* v. *Prabhavati*, A 1957 SC 176.

20 *Lakshman Uttamchand Kripalani* v. *Meera*, A 1964 SC 40.

1 *Manmath* v. *Rakhal*, A 1933 Cal 215, 142 IC 458; *Numia Mal* v. *Maha Dev*, A 1962 Punj 299.

2 *Manmath* v. *Rakhal*, A 1933 Cal 215, 142 IC 458.

3 *Lalit Kishore* v. *Ram Prasad*, A 1943 All 362, not followed in *Mahesh Paratap* v. *Rampal*, A 1953 All 591.

termination of the alleged way should be shown with reasonable precision[4] and also whether the right claimed is for walking or for cattle or for carts and vehicles, or for funeral or marriage processions,[5] etc. In pleading a public right of way, however, *termini* need not be set out. In pleading an easement on the basis of lost grant, the essential fact to aver is user or enjoyment for a sufficient length of time which might give rise to the presumption of such grant.[6] In case of easement of light, the purpose for which the dominant heritage has been used should be stated. If an extinction of the right of easement is pleaded, the way in which it was extinguished should be particularised.

**XIII.** *Immorality:* In a suit by a Hindu son for setting aside an alienation by his father, it is not sufficient simply to state that the debt was contracted for immoral or illegal purposes, but full particulars of those purposes should be given, i.e., it should be stated clearly how the debt was connected with the immoral pursuits of the borrower.[7] It will not be sufficient merely to explain the nature of the illegality but it should be alleged when and to whom the money was paid, and in what way it was applied to the illegal purpose. For instance it is not sufficient to say that the debt was taken to pay off gambling losses. Particulars of the gambling or wagering transactions on which the losses were incurred should also be given.

**XIV.** *Justification:* Where a wrongful act is claimed to be justified, particulars should be given, e.g., that the act was done with permission or in self-defence or was due to pure accident, or was done under orders of third person (in which case the name of that person should be disclosed and it should be shown that he had authority to give such order).[8] Where in a suit for libel, truth is pleaded as a justification and the libel consists of one specific charge, no further particulars are needed, except the particulars of the specific charge itself, e.g., if the charge is that A had illicit intercourse with B, the time and place, when and where he had the

4 *Haris* v. *Jenkins*, (1882) 22 Ch D 481; *Rammanohar* v. *Methilla Prasad*, 57 IC 151 Pat.

5 *Ganga Sahai* v. *Khacheru Singh*, 1964 ALJ 617.

6 *Mahendranath* v. *Surajmal*, 45 CWN 17.

7 *Tulshiram* v. *Bishnath*, 105 IC 885, 25 ALJ 753; *Jagdish Narain* v. *Hazarilal*, 140 IC 535, 32 ALJ 309; *Bal Rajaram* v. *Maneklal*, 1947 ALJ 752; *Shaukat Ali* v. *State*, 1956 ALJ 460.

8 *Thorne* v. *Tilbury*, (1858) 3 H&N 534; *Henderson* v. *Williams*, 1 QB 521.

intercourse must be stated. But where the charge is a general one, e.g., that the plaintiff is swindler, the defendant must give specific instances of conduct justifying such a description, with sufficient particularity to give notice to the plaintiff what the defendant means to prove to substantiate the truth of the alleged charge.[9] Where the defence was that the words complained of were fair comment upon facts which were matters of public interest, and that they were published on a privileged occasion, the defendant was ordered to give particulars of facts said to be matters of public interest, and of the circumstance of the occasion alleged to be privileged.[10]

**XV.** *Legal necessity :* Where a Hindu father's transfer is sought to be justified by legal necessity full particulars of the actual necessity with such further facts as go to make that necessity a legal necessity, should be stated.

**XVI.** *Representation:* Particulars should be given whether the representation was oral or in writing and when and where it was made. If in writing, the writing should be specified.

**XVII.** *Special Damages :* It is not sufficient to allege the amount of damages suffered, but full details of the damages sustained should be given. For instance it is not sufficient to claim Rs. 500 as "cost of defence" in a suit for malicious prosecution, but details of the expenses incurred in defence should be given. In case of breach of contract when plaintiff has suffered damages greater than those which ordinarily and usually arise from such breach, he must, if he wishes to recover the extraordinary damages, prove that at the time of making of the contract, he communicated the special circumstances to the other party and the latter entered into the contract with the knowledge of the special loss which would accrue to the plaintiff on a breach of that contract. Unless such notice is given, the damages are spoken of as too remote in law. An illustration of special damage of this character is the case of man wanting repair to machinery in sugar mill. It may be that, if the repairer exceeds the stipulated time, the owner of the mill might suffer a great loss by losing part of whole of the season's profits, but unless he has told the repairer exactly what the circumstances are and

9 *Gordon Summing* v. *Green*; 7 TLR 408.

10 *Subhas* v. *R. Knight*, 101 IC 565, 54 C 73, A 19927 Cal 297.

11 *See* notes under precedent (of plaints) No. 161 Part II.

the special loss which would accrue to him, he cannot recover that special loss. The fact that this notice was given and that the contractor undertook the work on the condition of being liable for special damages must, of course, be specifically pleaded.[11] In motor accident cases general damages are presumed by the court, but special damages are to be specified.[12]

**XVIII.** *Title to Property:* In cases when a party alleges himself to be the owner of land, he need not give any particulars of his title if he is in possession, but may simply allege his title, unless he admits the legal title of the other party and relies only on some equitable title in himself. For instance, a defendant in possession need not plead his own title but may plead that he is a *bona fide* transferee for value from an ostensible owner and may give particulars of that plea only. When a party is not in possession, he must give full particulars of the title he pleads, e.g., if he pleads title as heir, he must allege how he is the heir, if he pleads title by assignment he must show by what steps the estate became assigned to him. If a title, short of absolute proprietorship, is pleaded, e.g., as mortgagee, lessee, etc., full particulars of the mortgage, lease, etc., should be given, e.g., who granted the mortgage or lease, when, and for how long. The nature of the deeds and documents on which a party relies in deducing his title from the person under whom he claims, should be fully given. If title by adverse possession is pleaded, it should be clearly so alleged.[13] It has, however, been held in the undernoted case that if in the course of pleadings the plaintiff clearly claimed title by adverse possession in the alternative, the fact that he did not allege this specifically in plaint is immaterial.[14]

If both the parties are admittedly in joint possession, e.g., in a suit for partition of property, or for declaration of shares in a joint occupancy holding belonging to both the parties, particulars of the title to the share claimed should be given.[15]

In cases however, where the opposite party is estopped from

12 *Puspabai Parshottam Udeshi* v. *Ranjeet Ginning & Pressing Co Ltd.* A 1977 SC 1735, (1977) 2 SCC 745.

13 *Shiromani Gurdwara* v. *Premdas*, 140 IC 694; *Karimullah Khan* v. *Bhampratap Singh*, A 1949 Nag 65.

14 *Municipal Board, Lucknow* v. *Mt. Kallo*, A 1949 Oudh 32.

15 *Moti Lal* v. *Judister*, 31 IC 181, 20 CWN 310.

denying a title, e.g., by Sec.116 of the Evidence Act, such title need not be pleaded. In a case for rent against a lessee, the lessor need not show his title. It is sufficient for him to plead that he let the property to the defendant at a certain rent, and that the defendant entered into possession under the lease. But if the suit is brought by the lessor's heirs, the title of the lessor must be alleged to show that it was capable of passing by inheritance to the plaintiff. The lessor may himself have been a tenant for life and the defendant would not be estopped from saying that his lessor's title has been determined by death.

**XIX.** *Title of another person* : Similar particulars should be given when title is alleged in a third person, e.g., when a licensee of a third person claims right of possession as licensee, the title of his licensor should be pleaded with particularity. The reason is that a party, may be presumed to be ignorant of his adversary's title. But when title is pleaded in the opposite party with the object of making him liable, it is not necessary to allege title more precisely than is necessary to show his liability. For instance, in a suit for rent against the assignee of the lessee after several mesne assignments, it is sufficient to plead only that "all the rights and liabilities of the lessee have, by assignment, come to be vested in the defendant." So, in a suit for debt against the heir of the original debtor, particulars of the heirship of the defendant need not be pleaded with the same precision as would be necessary if the plaintiff claimed as heir of the original creditor.

*(What particulars are required in other kinds of suits will be indicated in the footnotes to the precedents of such suit in Part II of this book, post)*

**Mistakes in Particulars :** If the particulars are wrong, they can be corrected by an application for permission to amend them, and if they are not corrected and the mistake is likely to mislead the other party, the party giving the particulars must suffer the consequence. But if the error or mistake does not mislead the defendant and the particulars given are sufficient to make the defendant understand what the plaintiff means, the error is of no consequence. For instance, in a suit on a pronote, the date and parties of which are correctly described but the amount of loan and the rate of interest are wrongly given but there were circumstances showing that the defendant had no difficulty in identifying the pronote, the

defect was held not to be fatal.[16]

**Form of Particulars** : Particulars should always be given in the pleadings themselves.[17] When they are very short and can conveniently be stated alongwith the fact to which they relate, they should be so stated, but they should not be mixed up with the allegations of facts. Where they are long, they may be given in a separate paragraph following that in which the main fact is stated.

When, however, the particulars to be given are very long, e.g., account in a suit for money, or long specification of the property claimed in suit, it is more convenient to separate them from the text and to enter them at the foot of the pleading, shortly referring to them in the body of the pleading in some such way as :

"The defendant has borrowed money from the plaintiff from time to time, and has also made some payments on account, full particulars of which are given at the foot of the plaint," *or*

"As per account given at the foot of the plaint, the defendant owes the plaintiff the sum of Rs. 500 as balance", *or*

"The plaintiff's father was owner of several items of land and house property details of which are given in schedules A, B and C at the foot of the plaint."

When the particulars are too voluminous to be included in the plaint they may be annexed thereto or delivered separately and the fact stated in the plaint.[18]

When particulars are ordered under O.6, R.5 they may be delivered in the following form:

Particulars delivered in pursuance of the order of court dated——, passed on the application of the defendant :

1. The following are the particulars of the fraud alleged by the plaintiff in para 4 of his plaint :

*(State the particulars in paragraphs)*

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16 *Nama Giri* v. *Muthu*, 111 IC 887, A 1928 Mad 940 (DB).

17 O.6, R.4.

18 *Ram Prasad* v. *Hazarimall*, 58 C 418, 134 IC 538, A 1931 Cal 458.

2. The following are particulars of the damages claimed by the plaintiff:

*(State the particulars in paragraphs)*

3. The following are the particulars of (*here state the matters in respect of which particulars have been ordered*) delivered pursuant to the order of the ————————of————————.

*(Here set out the particulars ordered in paragraphs if necessary.)*

If particulars are delivered in pursuance of an order of the court they need not be stated in the form of an application, so that no court-fee stamp will be required.

If any particular form is prescribed by any High Court, particulars should be delivered in that form. The Madras High Court in the original side has prescribed that the particulars should be drawn up in the form prescribed for the written statement of a defendant and shall be endorsed with a reference to the order directing the same.

**Pleading to Particulars** : Particulars are part of the pleading when contained in it and must be deemed to be so even if separately delivered. The opposite party should, therefore, plead to particulars and where particulars are delivered after the pleading of the opposite party, the latter should ask for leave to file additional pleading in answer to the particulars.

*(As to when particulars should be ordered and when refused see Chapter VIII post.)*

*(For rules regarding giving and ordering further particulars; and consequence of not delivering them, see Chapter IX, post.)*