(i) The name, description and place of residence of each plaintiff; and

(ii) The name, description and place of residence of each defendant.[2]

The word "description" includes the name of the father, age, and other particulars necessary to identify a person. There can be no hard and fast rule as to what description should be given. A plaint may be rejected for want of such particulars.[3]

If a defendant is not properly named or described, but the real person intended has been properly served with the summons and he does not appear to defend the suit, a judgment passed against him in such name will be as effective as if his true name and description had been given in the plaint, and the correct name and address can be substituted at any subsequent time when they are discovered, because after all names are meant only to identify persons.

When there are several plaintiffs or several defendants, each should be described properly and serial number should be given to each of them so that they may be easily referred to in the pleadings. It is convenient to mention them in the order in which they play their part in the story told in the plaint. For instance, in a suit on a mortgage to which the mortgagor, his two minor sons, and two subsequent transferees are impleaded as defendants, the mortgagor should be the first defendant, the sons, the second and third defendants, and the transferees, the fourth and fifth defendants in the order of the dates of their assignments. Defendants against whom no relief is claimed but who are added as a matter of form popularly known as proforma defendants, should figure last of all. Sometimes when there are several sets of defendants, each set interested in a portion of the claim only, it is better to describe the several sets as "defendants, first party", "defendants, second party", "defendants, third party", etc.

A minor or insane person cannot sue or be sued except through a next friend (in the case of a plaintiff) or a guardian *ad litem* (in the case of a defendant). Where any of the parties is a minor or a person of unsound mind, he should be so described[4] in the cause-title, and the name and

2 O.7, R. 1 (b).

3 *Somayajulu* v. *Suvayya*, 7 MLJ 81.

4 O.7, R.1 (d).

description of the person through whom he sues or is sued should also be stated, thus:

"AB, son of....., a minor, by CD, son of .....his next friend ..... plaintiff"

Versus

"EF, son of ....., a minor, through his guardian GH, son of ....., defendant."

or

"AB, son of ....., a person of unsound mind, by his next friend, CD, son of ....."

or

"AB, son of ....., a person adjudged by court to be a lunatic, by CD, son of ....., his curator, appointed by the court ....."

As a guardian *ad litem* of a defendant under disability has to be appointed by court, under the special procedure prescribed in O.32, and as it is not necessary that the person originally, proposed by the plaintiff should ultimately be appointed, it is permissible instead to leave a blank to be filled up later with the name of the person appointed by the court.

In some places it is the practice to file with the plaint in a suit on behalf of a minor, an affidavit showing the fitness of the next friend to act as such. On the original side of the High Courts in the Presidency towns this is made obligatory by the rules of procedure.

Though there is no provision in the Code to require that when a party sues or is sued in his representative character, he should indicate that fact in the cause-title of the plaint also, in addition to making a statement to that effect in the body of the plaint (as required by O.7, R.4)[5] yet that seems to be a convenient place to state it.[6] Such description should be in the following form :

"AB, son of ..... suing on behalf of himself and of all the Hindu residents of village....."

5 *Sonacholam* v. *Kumaravelu*, 109 IC 199, 45 MLJ 587, A 1928 Mad 445; *Bidhu* v. *Kulada Prasad*, 50 IC 525, 46 C 877.

6 *Kuarmani Singha* v. *Wasif Ali*,'28 IC 818, 19 CWN 1193; *Deolal* v. *Tularam*, A 1928 Nag 319, 109 IC 785.

or

"AB, and CD, managing trustees of the Arya Kanya Pathshala."

or

"AB, son of ....., as manager (Karta) of a joint Hindu family."

or

"AB, ..., as administrator of the estate of CD, deceased.

But want of this description would not render the plaint bad, provided the fact that the person sues or is sued in the representative capacity is stated in the body of the plaint.[7] Also, if a person is sued in two capacities it is not necessary that he should be named twice in the title but it would be sufficient if the two capacities are mentioned in the plaint.[8]

Part II—Body of the Plaint

The second part of a plaint is its body, which is the plaintiff's statement of his claim and of other matters which he is legally required to state. It is drawn up in the form of a narrative in the third person, and is divided into short paragraphs, each containing ordinarily one fact and one fact only. The statement is prefaced by words to the following effect :

"The above named plaintiff states as follows—"

It is composed of two portions" (1) the formal portion, and (2) the substantial portion.

The formal portion consists of the following particulars :

(i) A statement as to when the cause of action arose;[9]

(ii) Facts showing that the court has jurisdiction;[10]

(iii) A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees so far as the case admits;[11]

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7 *Bidhu* v. *Kulada Prasad*, 50 IC 525, 46 C 877; *Jagat Tarni Dasi* v. *Prafulla Chandra*, 35 IC 792 Cal; *Deolal* v. *TulaRam*, A 1928 Nag 319, 109 IC 785; *Haji Mohamed Nabi* v. *Province of Bengal*, 46 CWN 59.

8 *Jatis Chandra* v. *Kshirod*, A 1943 Cal 319, 47 CWN 186, 76 CLJ 83.

9 O.7, R.1 (e).

10 O.7, R.1 (f).

11 O.7, R.1 (i).

(iv) When any party is a minor or a person of unsound mind, a statement to that effect;[12]

(v) When the plaintiff sues in a representative character, a statement to that effect, coupled with a statement that he has taken the steps (if any) necessary to enable him to institute the suit;[13] and,

(vi) When the suit is instituted after the period of limitation, a statement showing the ground on which exemption from the law of limitation is claimed.[14]

Each of these particulars should be stated in a separate paragraph of the plaint, but as particulars (i) and (ii) are stated in one paragraph in the Forms given in Appendix A of the Code, and as O.6, R.3, requires that these forms or forms of like character shall be used for all pleadings, these two particulars may be alleged in one paragraph, thus :

"The cause of action for the suit arose on June 23, 1985, and the defendant resides within the jurisdiction of this Court."

Date of Cause of Action : The date of the cause of action should as far as possible be precisely given and not vaguely,[15] such as "previous to August 21, 1989." Where, however, the exact date is not known to the plaintiff, words such as "on or about (date)" or in or about the month of" can be used. O.7, R.1, Clause(e) requires that a plaint should contain "the facts constituting the cause of action and *when it arose*". Under the first part of this clause are of course alleged (in the body of the plaint) facts which are essential for the plaintiff, to prove, in order to obtain the relief claimed by him, but the dates of all these facts need not always be mentioned under the second part of this clause. For instance, the cause of action for suit for damages for breach of contract would be the contract, its breach, and the resulting damages, but it would not be accurate to say that the cause of action for the suit arose on the date of the contract. The date of accrual of cause of action to be mentioned in the plaint is, it is submitted, the date of that event which makes the cause of action for the suit complete, in other words, which gives the plaintiff the right of suit, e.g., in case of breach of contract, the date of the breach. It should be

12 O.7, R.1 (d).
13 O.7, R.4.
14 O.7, R.6.
15 *Sonamul* v. *Sunara*, 8 BLR 23.

distinguished on the one hand from the date of any other previous fact which is part of the cause of action, (e.g., date of the contract) and, on the other hand, from that of any subsequent event which is not material as part of the cause of action, though it may have been the immediate cause for filing the suit (e.g., the date of demand of damages and defendant's refusal). But a mere inaccuracy in the date, e.g., giving the date of contract instead of the date of breach is not fatal, if defendant is not prejudiced thereby.[16] If all the facts constituting the cause of action are correctly narrated, a wrong recital of the date of accrual of cause of action is not fatal.[17]

As the object of this allegation is to determine whether the suit is within time, it is best to mention the date of the starting point of limitation as that of the accrual of the cause of action. Section 3 of the Limitation Act, 1963 lays down that every suit instituted, appeal preferred and application made after the prescribed period, shall be dismissed although limitation has not been set out as defence. It is, therefore, the duty of the court to find out whether the plaint is in time. Thus the cause of action for suit on the basis of contract arises on the date of its breach, and that for a tort, on the date on which the tortious act is committed, and the date of accrual of damages to the plaintiff in case of an act not actionable without special damages, (e.g., in suits for public nuisance). In some cases of contract, the dates of the contract and of its breach are the same, e.g., in suits on bonds or pronotes payable on *demand*, money under which is payable forthwith or immediately. Similarly, a loan taken without a definite promise for repayment is also considered to be repayable forthwith and the cause of action for suit for recovery of such a loan is the date thereof.

In a suit on a bond the date of the bond or the date of payment fixed in it should be stated and not the date on which money was last demanded and refused. Similarly, in a suit for ejectment, the date on which the defendant took wrongful possession or the date on which plaintiff's right to take possession accrued (e.g., the death of the person from whom

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

17 *Firm Sitaram Bindraban* v. *G.I.P Ry.*, A 1947 Nag 224; *Jethmal* v. *Hiralal*, A 1972 Raj 220; *Narayan Nanda* v. *Shanker Sahu*, 1975 (1) CWR 224, 41 CLT 571.

plaintiff claims to inherit or the date of determination of tenancy), should be given, and not the date on which the defendant refused to hand over the property to the plaintiff.

There are, of course, cases in which a demand is necessary and such a demand alone gives a cause of action for the suit, e.g., in a suit for refund of a deposit, or for accounts against an agent during the continuance of the agency. In fact, whenever money is payable only when demanded by the creditor, a demand has to be made before the suit and such demand alone furnishes the cause of action. The words "*on demand*" used in, bills of exchange and promissory notes are not, however, used in the sense of being payable forthwith or immediately, and no demand is necessary before bringing a suit on them.[18] The limitation also runs in such cases from the date of the bill or note. In a case where the mortagage bond provided for payment of interest every month and the principal when demanded, it was held that the principal did not become due until it was actually demanded,[19] but when money is payable on a fixed date, no demand is necessary. In cases of recovery of damages for breach of contract or for tort, demand is not necessary before suit, nor is it necessary before a suit for recovery of property taken wrongfully by the defendant. No demand for rent is necessary as a lessee is bound to pay it under section 108 (*i*), Transfer of Property Act.[20] If A undertakes to pay money to C on behalf of B but no time for payment is specified no cause of action arises against A until payment is demanded by either B or C.[1] Thus demand is necessary in all cases in which limitation runs from the date of demand.

Whenever, therefore, no demand is necessary to give a cause of action for the suit, it is not material to allege it, even if it has been made, much less is it correct to give the date of such demand and refusal as that of the accrual of cause of action. If, however, in such a case the defendant pleads his readiness to pay and claims exemption from cost, the plaintiff can prove that the defendant had committed default inspite of a demand,

18 *M.Chetty* v. *Palaniappa*, 13 Bur LT 21; *Secretary of State* v. *Prasad Bafull*, 46 M 259; *Meghraj* v. *Johnson*, 11 NLR 189; *Sheikh Jamu* v. *Muhammad Ibrahim*, A 1926 Nag 194; *Framroz* v. *Mohammad Essa*, 28 BLR 141.

19 *B.R. Swamy* v. *The Official Assignee*, 19 MLJ 474, A 1925 Mad 1120 FB.

20 *Allibhoy* v. *Jiwanji*, 111 IC 530, A 1929 Sindh 13.

1 *Ram Ratan* v. *Abdul Wahid*, 49 A 603, 101 IC 601, 25 ALJ 411.

as it would then become a relevant fact. In cases in which demand is necessary before a suit, it should be pleaded, and the date of such demand and refusal will be the date of the cause of action. Even in such cases, the first demand would furnish cause of action and any subsequent demand are not material and need not be alleged. The allegation that money was demanded several times, but always refused and the cause of action arose, or finally arose, on the date of the last refusal is, therefore, clearly unnecessary.

Jurisdiction : The allegations made in the plaint decide the forum. The jurisdiction does not depend upon the defence taken by the defendants in the written statement.[2] It is also not unusual to find in plaints a vague statement to the following effect : "That the court has jurisdiction to try the case." What is really required is a statement, not of the fact that the court has jurisdiction, but of *the facts showing that the court has jurisdiction.* A plea in the plaint that the court has jurisdiction to entertain the suit is technically defective where it does not allege how and where the cause of action arose in terms of sections 16, 17, 19 and 20 C.P.C.[3] These sections lay down the rules for determination of the *forum* for a suit. Briefly, the provisions are that all suits relating to immovable property or for recovery of movable property under distraint or attachment must be filed in the court within the local limits of which the property happens to be. In all other cases, a suit should be instituted, either where the cause of action or any part of it arose, or where all the defendants reside or carry on business or personally work for gain, or even where some of the defendants reside, provided others acquiesce in such institution or leave of the court has been obtained.

A suit to obtain compensation for injury to immovable property may, in cases where such relief can be entirely obtained through the defendant's personal obedience, be instituted where the defendant resides, if the plaintiff so wishes. Sometimes in mercantile contracts parties agree that any suit arising out of the contract should be instituted at a particular place out of several places where the courts may otherwise have jurisdiction. Such a contract has been held to be legal,[4] and should be alleged in the plaint to

2 *Abdulla Bin Ali* v. *Galappa*, A 1985 SC 577.

3 *Krishna Swamy* v. *Raja C. Reddiar*, A 1942 Mad 614.

4 *Angle Insulations* v. *Davy Ashmore India*, (1995) 4 SCC 153; *Patel Roadways*

show that the said court alone has jurisdiction. This rule is subject to two qualifications. One, parties cannot by agreement confer jurisdiction on a court which does not have territorial jurisdiction at all, though they can choose one out of several courts having concurrent jurisdiction.[5] Secondly, such agreement, though valid, is not an absolute bar to the other court entertaining the suit in exceptional circumstances.[6]

The plaint should, therefore, show on which of the above grounds the court has jurisdiction. For example, "That the defendant reside within the jurisdiction of this court" or "That defendant Nos. 2, 3 and 4 reside within the jurisdiction of this court and though defendant No. 1 does not, an application is being made for leave to sue in this court", or "That the property in respect of which this suit is brought lies within the jurisdiction of this court", or "That the bond was executed and money borrowed at Simla, within the jurisdiction of this court." or "That the money payable under the contract was made payable at Meerut, within the jurisdiction of this court"or "That the defendant caused the wrong complained of, in this plaint, at Agra, within the jurisdiction of this court." These facts should be clearly stated in the body of the plaint and not left to be inferred, e.g., if jurisdiction is claimed on the ground of residence, it is not sufficient that the residence of the defendant is stated in the heading of the plaint.[7] In a suit for possession of property situated in Burma and Madras, the following statement in the plaint was held to be defective as it did not show how and where the cause of action arose in terms of sections 16, 17 and 20, C.P.C. : "The cause of action arose at Srirangam, Tiruvanaikoil, Manakkal, etc., villages in the Trichinopoly district within the jurisdiction of this court."[8]

Valuation of Suit : The plaintiff must distinctly and separately give in his plaint the valuation of his claim for the purposes of court-fee and of

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Ltd., Bombay v. *Prasad Trading Company*, A 1992 SC 1514; *A.B.C. Lamonart Pvt. Ltd.* v. *A.P. Agencies, Salem*, A 1989 SC 1239; *Kondepu* v. *Elukkoru*, A 1944 Mad 47, 1943 MWN 703; *Hakam Singh* v. *Gammon (India) Ltd.*, A 1971 SC 740; *Patel Roadways Ltd.* v. *Republic Forge Co.*, A 1985 AP 387.

5 *Patel Roadways Ltd., Bombay* v. *Prasad Trading Co.*, A 1992 SC 1514; *Thiakesar Alai* v. *Lakshmi & Co.*, (1984) 1 MLJ 428.

6 *Patnaik Industries* v. *Kalinga Iron Works*, A 1984 Ori 182; *All Bengal Transport Agency* v. *Hare Krishna*, A 1985 Gau 7.

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

8 *Krishnaswami* v. *Venugopala*, A 1942 Mad 612.

jurisdiction, though both may be stated in one paragraph. The two valuations are different in character, though in most cases they may be the same.

(i) **For Court-fee :** The valuation for the purposes of the court-fee is required in those cases only in which court-fee is charged, under the Court Fees Act, on the valuation, *i.e. ad valorem*, e.g., in suits for recovery of money, property, etc. In such cases the object of the rule is to enable the court to check, with reference to the valuation given in the plaint, whether the court-fee paid is sufficient or not. If court-fee is payable on the value of the property, as in the case of a suit for possession of a house, that value should be stated, but where some other basis has been prescribed for computing the court-fee, the basis on which court-fee is calculated, as well as the amount calculated on that basis should be stated.

In suits for which a fixed court-fee is payable, e.g., in suits for declaration without a consequential relief, no value for the purposes of court-fee need be given, but it may be alleged that a fixed fee has been paid on the plaint. Where a claim embraces several distinct causes of action, as a suit on several bonds, the valuation of claim in respect of each such cause of action should be separately given, as court-fee is separately payable on each.[9] But where several claims or reliefs arise out of the same cause of action, the valuation of the suit is the aggregate of the valuations of all the claims or reliefs.[10] For instance, in a suit on two bonds, the valuation should be stated thus : "For purpose of court-fee, the value of the claim on the bond of 1973 is Rs. 405, and that of the claim on the bond of 1974 is Rs. 302. The value for purposes of jurisdiction is Rs. 707." (It should be noted that court-fee calculated separately on Rs. 302 and Rs. 405 will be more than that calculated on Rs. 707). In a suit for possession of a house valued at Rs. 1000, and for recovery of Rs. 500 as damages for wrongful possession, the allegation should be : "The value for the purposes of jurisdiction and court-fee is Rs. 1,500, because the two claims arise out of the same cause of action."

When, however, alternative reliefs are claimed, the value for the purpose of court-fee is the value of the larger relief.[11] An additional claim

9 Section 17, Court-Fees Act.

10 *Surajpal* v. *Jagarnath Pd.*, 1954 ALJ 710.

11 *Kashinath* v. *Govind*, 15 B 82; *Mukhalal* v. *Ramdheyan*, 44 IC 143 Pat.

for mesne profits or interest from the date of suit to the date of possession or realisation does not require court-fee and need not therefore be valued at all.[12] Requiring a defendant to demolish certain construction illegally made by him is claim for a mandatory injunction and the relief for it must be valued as laid down in section 7 (IV-B) (b) of the Court-Fees Act.[13]

(ii) For Jurisdiction : Valuation of a claim for the purpose of jurisdiction is required in order to determine whether the suit is within the pecuniary jurisdiction of the court, and also further, for determining the *forum* of appeal. In some cases this is required also for determining the amount of process-fee required to be paid, as, under rules framed by some High Courts, that fee often varies according to the value of the claim.

There is no difficulty about valuing the suit when *ad valorem* court-fee is payable, as in all such cases (except those referred to in section 7, paras, V, VI, IX, and X (d) of the Court Fees Act), the value for purposes of jurisdiction is the same as that for the purposes of court-fee.[14]

There are, however certain suits, the subject-matter of which does not admit of being satisfactorily valued. Prominent instances of such suits are those the subject-matter of which is incapable of being estimated at a money value. The Court-Fees Act, has, in all such cases, prescribed a fixed fee to be payable. Section 9 of the Suits Valuation Act provides that such suits are to be valued according to the rules to be framed by the High Courts. If any such rules have been framed, valuation shall be made accordingly but where no such rules have yet been framed, a plaintiff is entitled to put his own valuation on such claims.[15] Such valuation is necessarily arbitrary, but it *prima facie* determines the jurisdiction of the court, though a defendant may take an objection of under-valuation, or over-valuation, in which case the question will be determined by the court. This is not the proper mode of valuation of suits which affect property; in such cases the suits should be valued according to the value of the property

12 *Vithal* v. *Govind*, 17 B 141.

13 *Banwarilal* v. *Ram Gopal*, 1957 ALJ 438.

14 Section 8, Suits Valuation Act.

15 *Zair Hussain* v. *Khurshed Jan*, 28 A 545, 3 ALJ 266; *Jan Muhammad* v. *Mashar Bibi*, 34 C 352, 11 CWN 458, 5 CLJ 400; *Jasoda* v. *Chhotu*, 34 B 26 (all cases of restitution of conjugal rights); *Sheo Dueni* v. *Tulsi*, 19 A 378 (suit for setting aside an adoption).

affected thereby.[16] For purposes of jurisdiction of a suit for possession of land, the value of garden and building standing on the land is to be taken into account, even though no possession is sought over the garden and the building.[17]

Allegation of Minority or Insanity of a Party : Though there is no case law on whether the description in the cause title of the case is sufficient compliance with the rule which requires that where a plaintiff or a defendant is a minor or a person of unsound mind, *a statement to that effect* shall be contained in the plaint, it is better that such statement should be contained in the body of the plaint also. This statement should be made in the plaint, preferably in the first paragraph thus:

"1. The Plaintiff is a minor, and so are defendant Nos. 4 and 5, and defendant Nos. 1 and 2 are persons of unsound mind."

The name of the proposed guardian *ad litem* need not be stated in the body of the plaint. Instead a separate application with affidavit showing the relationship of that person, whose name is for appointment as guardian, with the defendant and also that his interest is not adverse to him should be filed, and the court would issue notice on the same.

Plaintiff's Representative Character : If the plaintiff sues in a representative character, that fact should also be stated in the opening paragraphs of the plaint, thus:

"The plaintiff is the Official Receiver of the property of AB, son of CD who has been adjudged insolvent by the District Judge, Varanasi under an order, dated....., and sues as such."

or

"The plaintiff is the manager of a joint Hindu family composed of himself and his sons, and sues as such."

or

"The plaintiffs are Hindu residents of village.....and as the number of other Hindu residents of the said village, who are interested in the subject

16 *Ram Krishnamma* v. *Bhagamma*, 15 M 56; *Ramu* v. *Sankara Aiyer*, 31 M 98 (suit for compulsory registration); *Krishna* v. *Raman*, 11 M 266 (suit for removal of a Karnavan); *Keshava* v. *Lakshminarayana*, 6 M 192 (suit for setting aside an adoption).

17 *Shanti Pd.* v. *Mahabir Singh*, 1957 ALJ 431 (FB).

of this suit to the same extent as the plaintiffs, is large, plaintiffs bring this suit on behalf, and for the benefit, of all Hindu residents of the said village....."

Preliminary Steps : If a plaintiff has, under any law, to take any preliminary steps before being entitled to bring a suit in a representative capacity, he must also state that he has taken those steps. For instance, a suit to establish a right to the estate of a person dying intestate to whom the Indian Succession Act applies cannot be instituted unless letters of administration have been obtained.[18] The plaint, therefore, should contain an allegation that the plaintiff has obtained the letters of administration. For this reason, a plaintiff, claiming a debt or security by survivorship, cannot be allowed to succeed as an heir as in that case a succession certificate would have been required.[19]

But, when the obtaining of any authority, e.g., a Probate or Succession Certificate, is laid down only as a condition precedent to the passing of the *decree*, it is not absolutely necessary that it should be obtained before the suit, and it has been held that it is sufficient if such probate or certificate is obtained and produced before the court is called upon to pass a decree.[20] Therefore, it is not necessary to allege in the plaint that the plaintiff has obtained a probate or a succession certificate, because obtaining this document is not a step necessary to entitle the plaintiff to sue.

Limitation : If a claim is *prima facie* barred by limitation, and the plaintiff claims it to be within time by reason of any of the exceptions to the general rule of limitation (*i.e.*, under any of the section of the Limitation Act), the ground upon which exemption is claimed shall be shown in the plaint,[1] but when the claim is not *prima facie* barred by limitation, no additional facts bringing the case also within an exception need be alleged.[2] If the claim is *prima facie* barred by the general rule of

18 *Setna* v. *Hemingway*, 38 B 618; *Meyappa* v. *Subramanian*, 43 IA 113.

19 *Kamlakant* v. *Madhavji*, A 1935 Bom 343, 37 BLR 405.

20 *Chandra Kishore* v. *Prasanna Kumari*, 38 C 327; *Jamshedji* v. *Hiraji*, 37 B 158; *Mangal Khan* v. *Salimulla*, 16 A 26; *Kalian Singh* v. *Ram Charan*, 18 A 34.

1 O.7, R.6; *Badruddin Khan* v. *Mayhor Khan*, 1938 ALJ 1189; *Ramaswami* v. *Anaiya Padyachi*, A 1962 Mad 210.

2 *Raghunath* v. *Sayyad Samad*, 12 CWN 617, 7 CLJ 560; *Gangadhar* v. *Abdul*, 11 CLJ 34, 14 CWN 128; *Sudhir Kumar Pandey* v. *Bank of India*, A 1991 Pat 267.

limitation, and the ground of exemption is not alleged, the plaint is liable to be rejected under O.7, R.11 (*d*). It should be noted that the rule does not require that the ground of exemption should be *specifically* stated. All that it requires is that the plaint should *show* the ground of exemption.[3] For instance, it is sufficient if a part payment in the handwriting of the defendant is alleged to have been made within limitation. It is not necessary that it should be expressly alleged that the plaintiff claims limitation from that date. But, it is always better and more proper to make a specific allegation, in a separate paragraph of the plaint, of the ground of exemption claimed by the plaintiff. This allegation should be made very clearly so as to bring the case within one of the recognised exceptions. For instance, if a payment has been made it is not sufficient to say that so much was paid on such and such date, therefore, the suit is within limitation, but is must be stated that it was made towards the debt in suit by the debtor or his agent, and that the acknowledgment of payment was made or signed by the person making the payment.

It has been held that this rule should not be strictly construed. Thus, when a suit was filed on the re-opening of the courts after the summer vacation and its period of limitation had expired during the vacation, it was held that the court should take judicial notice of the holiday and the suit should not be dismissed on the ground that the fact is not mentioned in the plaint.[4] Similarly, it has been held that when after the plaint has been returned for presentation to the proper court, it is presented to the latter court after the period of limitation, no statement under this rule was necessary as the endorsements required by O.7, R. 6, were sufficient.[5] But as it is not in all cases that the time during which a suit remained pending in the former court can be excluded from the period of limitation, it is submitted that on a strict view the endorsements alone may not be treated as sufficient to show the ground of exemption from limitation for before section 14 of the Limitation Act can be applied, it has further to be shown that the plaintiff was prosecuting the suit in the former court with due diligence and in good

3 *Deo Raj* v. *Shiva Ram*, 25 IC 368, 1914 PR 74, 1914 PLR 260, 1914 PWR 165; *Kamla Devi* v. *Gurdayal*, 17 ALJ 330, 51 IC 283; *Mangli* v. *Gaya Prasad*, A 1947 Oudh 235.

4 *Tek Chand* v. *Paltu*, 56 IC 926, 16 NLR 198.

5 *Sukhbir Singh* v. *Piare Lal*, A 1923 Lah 591, 82 IC 866; *Yereni* v. *Vappulapati*, 9 IC 154, 9 MLT 374; *Shiv Tewari* v. *Ganesh Prasad Misra*, A 1978 All 117.

faith, and an allegation to that effect should be made in the plaint, if the benefit of section 14 is claimed.

If a plaint does not show the ground of exemption, the plaintiff cannot be allowed to raise it,[6] nor can any document be set up at the trial as being an acknowledgment saving limitation,[7] but he can be granted leave to amend his plaint by stating the ground of exemption.[8] The court may refuse to take notice even of an oral statement of plaintiff's pleader when the ground was not alleged in the plaint.[9] He cannot be allowed to take advantage of an allegation in the defendant's written statement for claiming the benefit of section 20, Limitation Act 1908,[10] corresponding to section 19, Limitation Act 1963. It has, however, been held that it is open to the plaintiff to show in reply to the defence set up that his claim is within time by reason of an acknowledgement of the defendant.[11] When a ground has been stated in the plaint, the plaintiff is not precluded from taking another, and not inconsistent ground, if he believes that the latter is the true ground to get over the bar of limitation.[12] In an Oudh case[13] the new ground of exemption accepted was furnished by an Act of the legislature. But, in any case this may not always be accepted without amendment of the plaint. In such cases unless the plaint is amended, the suit may be dismissed, though the court may in its discretion accept any ground though not specifically pleaded, provided it is not inconsistent with the grounds set out in the plaint.

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6 *Jageshwar* v. *Raj Narain*, 31 C 195; *Uttam Chand* v. *Mst. Thakurdevi*, 4 LLJ 190, 3 Lah 233, A 1922 Lah 39 (DB); *Ramaswamy* v. *Anaiya*, 165 IC 737, A 1936 Mad 545; *Girdharilal* v. *Rannoo*, 1944 NLJ 37 Nag.

7 *Marudai* v. *Chinnakannu*, 25 MLT 295, 52 IC 243, 1919 MWN 429, 9 LW 82; *S.M. Misrimal* v. *Radha Krishnan*, A 1972 Mad 108.

8 *Ram Sukh* v. *Ghulam Md.*, 1918 PWR 115, 46 IC 495, 1918 PR 102, 1918 PLR 120; *S.M. Misrimal* v. *Radhakrishnan*, A 1972 Mad 108.

9 *Ghasiam* v. *Girja Shanker*, A 1944 Oudh 247.

10 *Debi Ghilabhai* v. *Mehta*, A 1935 Cal 255, 155 IC 721, 39 CWN 139.

11 *Ram Autar* v. *Beni Singh*, 20 OC 89, 68 IC 195, A 1922 Oudh 135; contra, *Mahadeva* v. *Marudai*, A 1933 Mad 874, 1953 MWN 931.

12 *Yakub* v. *Bai Rahmal*, 10 BLR 345; *Percy F. Fisher* v. *Ardeshir*, 37 BLR 165.

13 *Rajabahadur* v. *Raja Ram*, 1940 OWN 988; *Palni* v. *Savugam*, A 1933 Mad 395, 142 IC 192, 1933 MWN 595, 64 MLJ 317.

Chapter XIV

PLAINT- THE SUBSTANTIAL PORTION AND RELIEF

Substantial Portion : The other portion of the body of the plaint, which must be called its substantial portion, should contain a statement of all the facts constituting the cause of action,[1] with such particulars of those facts as are necessary.[2] And where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as possible separately and distinctly.[3] Thus, in a suit on two bonds, the particulars of each, with an account of the money due, should be separately given. The plaint shall further show, either specifically or by implication from other facts, that the defendant is, or claims to be, interested in the subject-matter, and that he is liable to be called upon to answer to the plaintiff's demand.[4] Where there are more defendants than one and they are not jointly interested in the claim, it should be shown what the liability of each is and why each has been impleaded in the suit. Similarly, if more plaintiffs than one bring a joint suit and their interest in the subject matter is not joint, their causes of action should be separately shown.

Cause of Action means every fact which would be necessary for the plaintiff to prove in order to support his title to a decree,[5] in other words, it is a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit.[6] Cause of action is not only infringement of the right at a particular moment but it means material facts in the case of the plaintiff.[7] But, as has already been explained earlier,[8]

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1 O.7, R.1 (e).
2 *Vide* Chap. VI, *ante*.
3 O.7, R.8.
4 O.7, R.5.
5 *Murli* v. *Bholaram*, 16 A 165.
6 *Dhunjisha* v. *Forde*, 11 B 649; *Musi* v. *Manilal*, 29 B 368; *Raghunath* v. *Gobind Narain*, 22 C 451; see also, *Ganesh Trading Company* v. *Mouji Ram*, A 1978 SC 484, (1978) 2 SCC 91 (para 10).
7 *Puranmal* v. *Onkarnath*, A 1959 Pat 128; *Aziz Fatima* v. *Munshi Singh*, A 1980 All 277.
8 Chaps. II to VI.

these facts should be carefully distinguished from inferences of law on the one hand, and from evidence necessary to prove such essential facts on the other, and no fact which is only relevant for proving an essential fact should be alleged in the plaint. This statement of facts in the plaint should in no way offend against the general rules of pleading already given. What is required is a statement of the facts with particulars from which the court may infer that the plaintiff has a cause of action and not a bare statement that the plaintiff has a good cause of action.[9] But if facts are correctly stated a wrong statement of inference from those facts would not be fatal. For example, when a plaintiff correctly stated that the property which he claimed by inheritance belonged originally to his maternal grandfather A and on his death devolved on his son B, and on the latter's death on B's mother C, but claimed as heir (daughter's son) of A instead of claiming as sister's son of B, the latter statement which was only an inference from facts correctly stated was held not to be fatal.[10]

A pleader should be very careful in stating these facts, for a plaintiff is entitled to succeed only on the cause of action alleged by him in the plaint,[11] and if he omits any material facts, which is a part of the cause of action of his claim, his plaint is liable to be rejected under O.7, R.11 (a), unless he is granted permission to amend it. Amendment, however, cannot be claimed as of right, and when it is allowed, the plaintiff is liable to be saddled with costs. Therefore, when there is a reasonable doubt whether a particular fact is essential or not, it is always safer to allege it than to omit it. What facts are essential to constitute the cause of action for a particular claim depends on the claim itself.

Suits on Contract : Generally speaking, the plaintiff's right or title which has been infringed must be stated first, and then the fact of infringement. Thus, in a suit brought on a contract, the contract must first be alleged, and then its breach, and then the damages. The actual contract which was in force between the parties at the date of the breach should alone be alleged. If there have been, at different times, different agreements between the parties, it is unnecessary to set out the original terms which

9 *Ram Prasad* v. *Hazarimull*, 58 C 416, A 1931 Cal 458, 134 IC 538.
10 *Moti Mahton* v. *Debal Mahton*, A 1935 Pat 503.
11 *Denobundhoo* v. *Kristomonee*, 2 C 152.

have been dispensed with but it is sufficient to state the modified contract as it stood when the cause of action accrued. Nor need contingencies be stated, if the events upon which they were contingent never happened. If there are several covenants, some of which are broken and some not, the latter need not be stated in the plaint. The breach must be stated in the terms of the contract or words co-extensive with effect or meaning of it, unless the words of the covenant are too general and would give no idea of the specific breach. If the contract is to do more things than one, the plaintiff must state that the defendant has done none of them, or if he has done any, it should be set out precisely. Thus, if the promise was to pay Rs.500 on a particular day, it is not sufficient to say that Rs. 500 was not paid on that day. It should be alleged that "Rs. 500 *or any part thereof* was not paid on the date fixed or *at all*". Special damages must also be alleged with precision. When a plaintiff alleged that she had "lost several suitors" on account of a slander, it was held to be too general a statement, and names should have been given.[12] But sometimes, a plaintiff is allowed to allege generally a loss of business or custom and to prove it without having recourse to particular instances, e.g., in a case for infringement of a patent.

Suits on Tort : In a case of tort, where the right violated, is not peculiar to the plaintiff but one possessed by every citizen, it need not be stated, and the wrong alone need be alleged, with the special damages claimed, if any. But when the plaintiff claims a special right, it must be alleged. For instance, in a suit for damages for slander, assault or malicious prosecution, the wrong alone need be stated. It is not necessary to state that the plaintiff was entitled to a right to remain immune from the attack of the defendant on his body or on his fair name. But in case of infringement of a copyright or of obstruction to an easement, the plaintiff's right should be specifically stated before alleging the act of infringement or obstruction. In case an act of tort is actionable only when done in particular manner, e.g., maliciously, negligently or with a particular knowledge, the plaintiff should also allege that it was done in that manner.

Suits for Declaration : Where the suit has been necessitated by any act done to jeopardise the plaintiff's right or evidence of it, that act

12 *Barnes* v. *Prudlir vel Bruddle*, 1 Sid 36.

should also be stated. Thus in a suit for a declaration of right, the plaint should specify not only the plaintiff's title to that right, but also the act of interference with or challenge to that right and the circumstances necessitating the claim for declaration.[13]

There are certain cases in which the plaintiff's right alone constitutes the cause of action,without any infringement. For instance, in a suit for partition, all that has to be stated is the title of the plaintiff and the defendant, *i.e.*, their shares and interests, and it is neither necessary nor proper to show any deraignment of (*i.e.*,challenge to) the plaintiff's title.

Matters of Inducement or Introductory of Facts : The facts constituting the cause of action are often preceded by what are known as "matters of inducement".[14] They are sometimes necessary for a clear understanding of the facts constituting the cause of action, but they should be reduced to a minimum, as, strictly speaking, they are not themselves material facts.

Avoid Frivolous, Vexatious Allegations: One other precaution which every lawyer has to take in drafting a plaint is to avoid making any frivolous and vexatious allegations, which are generally stated as the back ground of the dispute. Such allegations are not required to be made by law. In fact, they may create a prejudice against the plaintiff, and may result in saddling the plaintiff with compensatory costs under section 35A, C.P.C.

Part III—Relief

The third and the last, though not the least important, part of a plaint is the relief sought by the suit. The relief sought should be accurately worded and it is risky to use loose or inartistic language as there is always a danger of the court throwing out the case,[15] though courts should not be too strict if it can be fairly inferred what the plaintiff really means.[16]

In a civil suit different kinds of reliefs can be claimed, e.g., recovery of debt, damages, or movable property; possession of, or declaration of

13 *Syud Khadim Ali* v. *Nazeer Begum*, (1972) 3 AHCR 262.

14 *See* Chapter III.

15 *Saida Begum* v. *Sabir Ali*, A 1962 All 9 (a case of execution).

16 *Vohara A.M. Lakhewala* v. *State of Gujarat*, A 1971 Guj 241; *State* v. *Sidh Ram*, (1973) 3 SLJ 69; *Udhav Singh* v. *Madhav Rao Scindia*, (1976) 2 SCR 241, A 1976 SC 744.

title to, immovable property, declaration of any right, specific performance, injunction, rendition of account, appointment of a receiver, etc. A plaintiff might claim any one or more of such reliefs, either simply or in the alternative, (e.g., he may sue for pre-emption or partition),[17] but whatever reliefs he claims must be stated in the plaint specifically,[18] as reliefs claimed in the plaint cannot be supplemented by any oral prayer. Even where alternative relief has been prayed for, the Court before granting the same must record finding that it is impossible to grant the main relief.[19] Where the two alternative reliefs claimed by the plaintiff are wholly inconsistent, the court should not grant any relief.[20] Nor can a court allow a person more than he himself claims,[1] but it is the duty of the court to mould the relief according to the facts proved, which however, should not be inconsistent with the pleading.[2] Too much insistence should not be laid on the technicalities of the pleadings.[3]

When a plaintiff sued for a decree for sale on a mortgage, he was not allowed a personal decree merely on his oral statement before the court, asking for it,[4] and when he sued for one-fourth share of the land, he cannot be allowed possession of the whole.[5] The plaintiff omitting a relief will, therefore, have to make an application for amendment which is liable to be rejected if by that time limitation for claiming that relief has expired (*See* Chap. X, *ante*). Each relief should be clearly and separately stated and two or more reliefs should not be mixed together.

It is not necessary that the plaintiff should claim the relief for himself, for cases may be conceived in which the plaintiff is not entitled to claim a

17 *Abu Isa Thakur* v. *Dinabandhu*, A 1947 Cal 426, 151 CWN 639; *Krishna Devi* v. *Addl. Civil Judge, Bijnore*, A 1985 All 131.

18 O.7, R.7.

19 *Sheriff Iqbal Hussain Ahmad* v. *Kota Venkata Subbamma*, A 1994 AP 164 (DB).

20 *Md. Baksh* v. *Hussaini*, 15 Ind. Appeals 81.

1 *Buddhu Lal* v. *Ram Sahai*, 138 IC 808, 9 OWN 523, A 1932 Oudh 244; *Om Prakash* v. *Ram Kumar*, A 1991 SC 409.

2 *Sundar* v. *Mahadeo*, A 1942 Pat 243; *Gobind Prasad Sinha* v. *Kulwanti*, A 1985 Pat 31; *Narendra Kumar Jain* v. *Sukumar Jain*, A 1994 All 1 (Failure to claim correct relief is no ground for the rejection of the plaint); *Managonbinda* v. *Brajabandhu Misra*, A 1986 Ori 281.

3 *Kesavalu Naidu* v. *Duraisamy Naidu*, 1958 (2) MLJ 189.

4 *Rawat* v. *Gur Prasad*, 114 IC 309, A 1929 Oudh 303.

5 *Fazal Din* v. *Milkha*, 145 IC 182, A 1933 Lah 193.

decree in his favour. For instance, where a trustee refuses or neglects to sue in respect of a trust, the beneficiary may bring a suit impleading the trustee as a defendant and praying for decree in favour of the trustee against the principal defendant.[6]

If a plaintiff can claim more than one relief on the same cause of action, he must claim all, otherwise he shall not be entitled to bring a new suit for the omitted reliefs, unless the omission in the first suit was with the leave of the court.[7] Such leave must be expressly obtained and where a relief was omitted it was held that the court's remark in the judgment that a claim for the omitted relief could be brought later on was held not to be such permission.[8] The only exception to this rule is a mortgage suit, for such a suit can be brought even after a personal decree, on the same mortgage bond, has been previously obtained. Such a suit will become necessary, if in execution of the decree the plaintiff wants to sell the mortgaged property which he cannot do without bringing a suit for sale.[9]

Damages : As has already been explained in Chap. II, damages are of two kinds, general damages and special damages.

The plaintiff has to claim specific amount as general damages and it has to be valued for the purpose of jurisdiction and court fee. In every money suit, the precise amount claimed has to be stated.[10] As he cannot get more than the amount claimed by him, the practice generally is to claim a larger amount than the court is expected to allow. If the case is one of breach of contract, and no damages have actually resulted from the breach, the plaintiff may still get nominal damages, and it would be unnecessary in such cases to claim a large amount.

Where damages have actually resulted from the defendant's act, whether in breach of a contract or in tort, the plaintiff should claim the exact amount of such damages. He has to give full particulars of every paisa he claims. The damages should be such as have resulted directly and immediately from the defendant's act, and, as in the ordinary and

6 *Taun Man* v. *Che Som*, A 1932 PC 146, 151.
7 O.2, R.2: *See* Chap. XI, *ante*.
8 *Kishan Narain* v. *Nizamuddin*, 1937 OWN 1146.
9 O.34, R.14.
10 O.7, R.2.

natural course of things do arise from such act and not remote damages. The plaintiff should not, therefore, claim special (as opposed to general) damages, more than the actual amount of such damages, if any. He can, under certain circumstances, claim even greater, *i.e.*, extraordinary damages, if he has suffered any, in case he had given notice to the other party that a breach of the contract would result in such damages to him.[11] It is the date of breach which has to be taken into consideration in assessing the damages and the plaintiff can, therefore, claim damages incurred on that date, e.g., in case of non-acceptance of goods sold, the plaintiff can claim the difference of the contract and market prices on the day fixed for delivery, and the price which the goods fetched at a resale on a later date, cannot be taken into account,[12] (unless the re-sale is made under Section 54 of Sale of Goods Act). But future damages anticipated at the date of suit, to result from the breach, not only may, but must, be claimed and if they are not claimed, subsequent suit for them will be barred by O.2, R.2.[13] If a definite sum is mentioned in the contract as being payable in case of breach, the plaintiff can claim anything up to that amount without showing the actual damage, unless the damages so specified are penal in nature.[14]

Similarly, in a case of tort, the circumstances existing on the date of tort have to be taken into consideration, and, though the injured party must act reasonably, he is not bound to spend money for any possible advantage to the tort feasor.[15] As in a breach of contract so in a case of tort, the plaintiff must claim all damages which have actually resulted as well as those which are bound to result in future from the tortious act, and a subsequent suit for damages incurred after the institution of a previous suit would be barred by O.2, R.2. For instance, if A is beaten by B and has to remain in hospital in consequence, and he brings a suit before he is fully cured and discharged, for expenses incurred on treatment, as damages, he cannot bring a separate suit for any future expenses incurred by him

11 For example of such damages, *see*, Precedent of "Suit for special damages for breach of contract to do work within time".

12 *Firm Ganga Ram* v. *Kodoo Mal*, 88 IC 571 Sindh.

13 *Simpson* v. *Cleghorn*, 4 CLR 91.

14 *See* sections 73 and 74 Contract Act, and case law there on.

15 *Rogers* v. *John King & Co.*, 53 C 239.

after institution of the suit. He must either wait until he is in a position to claim all the damages, or must estimate his future damages and add the same to the sum claimed as damages already incurred. But if the tort is a continuing wrong, e.g., a nuisance, and damages continued to arise from day to day so long as the tort continues, the plaintiff can claim damages arising from the tort up to the date of suit only, and a separate suit would be necessary for damages for tort continued after the suit.[16]

In every suit for money, the precise amount claimed must be stated in the plaint, with a statement of any amount set off or relinquished by the plaintiff.[17] The plaintiff can be awarded a decree for any amount up to the amount claimed by him, but not for a higher amount, except after amendment of the plaint. In a claim for money found on taking accounts, however, the plaintiff is required to state only approximately the amount claimed by him, and if a larger amount is found due, he can be awarded a decree for that, on payment of the additional court-fee.[18] The same would be the case in a suit for mesne profits.[19]

Redundant Relief: The prayer should be for necessary and effectual reliefs only and no relief should be sought, which is not necessary or the grant of which will be implied in the grant of the other and main relief prayed for. For instance, a decree for possession of property in favour of the plaintiff as owner implies a judicial recognition of his right of ownership and no relief for declaration of such right need be added to the claim for possession. Similarly, if a Hindu father transfers the family property to a stranger without legal necessity, the sons can recover the property, but the relief in such cases need only be for possession of the property, and it is needless to claim a declaration that the sale by the father is null and void.

So, in a suit to recover possession of property by a reversioner from the hands of a transferee from the life-estate owner, or to recover possession of land from a lessee under a lease granted by an agent beyond his authority, all that is necessary is to state the grounds of the claim, (e.g., that the transfer was without any legal necessity, or beyond the legitimate authority

16 *Darley M.C. Co.* v. *Mitchell*, (1886) 18 App Cas 127; *Crumbie* v. *Wallsend Local Board*, (1891) 1 QB 503.

17 O.7, R.2 and O.7, R.1 (*b*).

18 O.7, R.2.

19 *Midnapur Zamindari* v. *Bijoy Singh*, 72 CLJ 14.

of the agent), and to claim simply a decree for possession. It is not necessary that a prayer for cancellation of the transfer or lease or for having it declared null and void should be made.[20] Whenever a plaintiff is entitled to treat as a nullity any document under which a defendant claims property to which the plaintiff is entitled, he can always disregard it, but where the document is merely voidable and not void he is bound to pray for cancellation apart from possession. For instance, if A sells his house to B and puts the later in possession, he cannot recover the house on the ground that the sale-deed had been obtained from him by B by fraud (other than fraud about the character of the document intended to be executed), unless he also prays for cancellation of the sale-deed.[1] In such cases, a prayer for cancellation of the sale-deed should be made separately and distinctly from that for possession.

Sometimes the addition of such redundant reliefs by unskilful or careless pleaders involves their clients in needless expense and trouble. If, for instance, the suit is brought more than three years after the transfer by the father, limitation might be pleaded to the claim for cancellation of the transfer, though it has been held that the prayer for cancellation may be regarded as redundant and the 12 years, rule of limitation applicable to a suit for possession should be applied.[2]

It has already been pointed out that it is unnecessary to anticipate the defence of a defendant and to make an attempt to give a reply to it in the plaint, much less to add a prayer for declaration of the weakness of that claim. If a plaintiff claims a house, as owner, from A who claims under a lease or mortgage from a trespasser B, it is not necessary to pray for a declaration that B has no title to the property.

Another example of redundant relief is the claim for several declarations when only one is necessary and all the rest simply follow from it. For instance, a prayer in the following form, "It be declared that the plaintiff is in possession of the field as proprietor, that defendant is not

20 *Unni* v. *Kunchi Amma*, 14 M 26, 27; *Harihar Ojha* v. *Dasarathi Misra*, 33 C 257, (265, 266); *Bijoy Gopal* v. *Krishna Mahishi Debi*, 4 ALJ 329 (331) PC, 34 IA 87.

1 *Ningawwa* v. *Byrappa*, A 1968 SC 956, (1968) 2 SCR 797.

2 *Unni* v. *Kunchi Amma*, 14 M 26 (27); *Harihar Ojha* v. *Dasharathi Misra*, 33 C 257 (265, 266); *Bijoy Gopal* v. *Krishna*, 4 ALJ 329 (331) PC, 34 IA 87.

the owner of it and that he has no right to eject the plaintiff treating him as his tenant" should not be made. The plaintiff should claim simply a declaration of his title as owner, and the rest of the propositions would follow as a matter of legal inference from it.

The grounds on which a relief is claimed should not be mentioned in the relief.

General Relief : The Code also provides that it is not necessary to ask for any general or other relief, in addition to the main relief or reliefs which the plaintiff claims. Such general or other relief can always be given, as the court may think just, to the same extent as if it has been asked for.[3] The practice of adding a relief in the following or similar form "Any other relief to which the plaintiff may be found to be entitled", or "as the nature of the case may require", is, however, common and has been adopted even in the relief in Precedent No. 43 given in Appendix A, C.P.C. But the court cannot give any relief which is not founded on the allegations in the plaint.[4] When relief is claimed on the basis of easement, relief cannot be granted to the plaintiff on the grounds of customary right.[5] The court cannot make out a new case altogether and grant relief neither prayed for in the plaint nor flows naturally from the grounds of claim as stated in the plaint.[6] Thus, if the plaintiff sues for declaration of title under a sale-deed, he cannot be allowed to succeed on the basis of a title by adverse possession.[7] Nor can any relief be given by way of general relief which would be of an entirely different description from the main relief;[8] as prayer for other relief can only mean other relief ancillary to main relief. Thus, in a suit by a reversioner against a Hindu widow for an injunction restraining her from committing waste and for appointment of a receiver, the plaintiff cannot, if he fails in the relief claimed, be given a declaration that he is the

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3 O.7, R.7; *Shivdayal* v. *Union of India*, A 1963 Punj 538.

4 *Badaruddin* v. *Herajatulla*, 54 IC 797; *Mohammad Sultan Wani* v. *Qasim Ali*, A 1977 J&K 21.

5 Baldeo v. *Abdul*, A 1948 Pat 425.

6 *Govind* v. *Kulwanti*, A 1985 Pat 31.

7 *Somasundaram* v. *Vedivelu*, 31 M 531.

8 *Abdul Rahim* v. *Mohammad Barkat*, 55 C 519, A 1928 PC 167, 56 IA 96; *Kisan Bhagwan* v. *Shree Maroti*, A 1947 Nag 233; *Bundi Singh* v. *Shivnandan Prasad Shaw*, A 1950 Pat 89; *Kedarlal* v. *Harilal*, A 1952 SC 47.

next reversionary heir.[9] Nor can a decree be passed in favour of a *pro forma* plaintiff in the event of the failure of the claim of the real plaintiff.[10] Nor can a decree for judicial separation be passed in a suit for dissolution under Parsi Marriage and Divorce Act.[11] In a suit under section 13 of the Hindu Marriage Act, however, relief was granted under section 10 of the Act.[12]

In a suit for sale of the mortgaged property, a simple money decree can be passed, if the mortgage contains a personal covenant to pay;[13] and in a suit for possession as mortgagee, a simple money decree can be passed if the document relied on as a mortgage is found not to operate as such.[14] In a suit on a pronote, a decree on original consideration was passed when in the plaint all the facts showing the original consideration were stated.[15] In a suit for rent, whether on failure to prove the contract a decree for damages for use and occupation can be passed, there is conflict of opinion.[16] In a suit on contract, if the contract is found to be void, a decree for money under section 70 Contract Act can be passed.[17] However, the plaintiff cannot establish a claim under section 70 of the Contract Act, in the absence of proper pleadings showing that the ingredients of that section were fulfilled.[18] The court can pass a preliminary decree

9 *Janki* v. *Narayansami*, 43 IC 207, 36 M 634.

10 *Debi Dayal* v. *Bhan Pertap*, 31 C 433.

11 *Phrioze Bomansha* v. *Srimibai*, 173 IC 395, 10 RB 329, A 1938 Bom 65, 39 BLR 1146.

12 *Bhagwan Singh* v. *Amar Kuer*, A 1962 Punj 144; see also, *Browne* v. *Browne*, 165 IC 12, 1936 OWN 918.

13 *Shukhdeo* v. *Lachhman*, 24 A 456; see however, *Rajamohan* v. *Manzoor*, A 1937 Oudh 410, 169 IC 785; *Kalka Singh* v. *Badri Singh*, A 1947 Oudh 33; also see, *Naresh* v. *Bidya*, 95 IC 1004 (converse case: Decree for sale passed when money decree claimed).

14 *Bisram* v. *Bhagwant*, A 1926 Oudh 210, 91 IC 6.

15 *Gulabgir* v. *Nathmal*, 27 NLR 327.

16 Yes: *Ajodhya* v. *Kaiwan*, 74 IC 582; *Sheo Karan* v. *Prabhu Narayan*, 6 ALJ 167, 31 A 276 FB; *C.N. Chandra* v. *Ahmad Yar*, 13 Lah LT 34; see contra, *O. Leary* v. *Maung on Gaing*, 4 Bur LT 197, 11 IC 863; *Phul Chand* v. *Kalu Ram*, 1971 Ren CJ 285; *Kripa Shanker* v. *Janki Pd.*, 196 IC 950 Pat.

17 *State* v. *B.L. Mandal*, A 1962 SC 779; *New Marine Co.* v. *Union of India*, A 1964 SC 152.

18 *Union of India* v. *Sitaram Jaiswal*, A 1977 SC 329, (1976) 45 CC 505.

directing enquiry into future mesne profits under O.20, R.12, even if no specific prayer has been made.[19] But it is safer to make a specific prayer.

It is not the form of the prayer which matters, but it is the substance thereof which should be looked into.[20] The plaintiff ought to get such reliefs as he is entitled to on the facts established on evidence even if that relief has not been specifically prayed for.[1] There is no impediment in passing a decree for eviction of sub-tenants also even in the absence of any specific prayer for eviction against them when the requisite pleadings for such a decree for eviction have been made in the plaint.[2] Where the relief flows out of the pleadings of the parties, who knew what they were litigating for, relief may be granted on an alternative basis although the suit as framed may not be maintainable.[3] It is permissible to grant a relief on the basis of an alternative case not made out in the plaint but admitted by the defendant in the written statement.[4] Though a relief is claimed upon a specific ground the court can grant it upon a different ground disclosed in the allegations in the plaint and the evidence.[5] Where in a suit to enforce a mortgage which is found to be void, claim for restitution of money under section 65 of the Contract Act may be entertained although not pleaded in the plaint or appeal.[6]

Where the plaintiff claimed that the defendant borrowed on behalf of the firm and the court found that the debt was in his personal capacity, a personal decree was granted although no alternative case was put forward by the plaintiff.[7] Where the plaintiff prayed only for the possession of the property, the grant of relief of mandatory injunction for the demolition of unauthorised construction was held to be falling within the general and ancillary reliefs since without ordering demolition the grant of relief of

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19 *Gopal Krishna Pillai* v. *Meenakshi Ayal*, A 1966 SC 155.
20 *Radhabhai* v. *Nand Lal*, A 1965 Bom 649.
1 *Shivdayal* v. *Union*, A 1963 Punj 538.
2 *Noorul Huda* v. *Kira Basu*, A 1986 Cal 39 (DB).
3 *Kulasekarapattinan & Co* v. *Radhelal*, A 1971 MP 191 (DB).
4 *Indermal* v. *Ram Prasad*, A 1970 MP 40 (DB); *Narayanaswami* v. *Kochadai*, A 1969 Mad 329.
5 *Rasul* v. *Ramsuran*, 22 Cal 589.
6 *Raja Mohan* v. *Manzoor*, A 1945 PC 29.
7 *Parasu Ram* v. *Sant*, 39 Pat 714.

possession alone would be meaningless.[8] Where the plaintiff in a suit prayed only for damages for wrongful dismissal and did not pray for arrears of salary, it was held by the High Court of Calcutta that it made no practical difference if the plaintiff is re-imbursed with loss of wages or damages.[9]

Court's Power to Grant Different Relief [10] : When necessary facts are stated in the plaint which, if established, entitle the plaintiff in law to obtain certain reliefs, it is open to the court to grant him such reliefs, although the reliefs asked for may be inartistically framed. In a case where the facts asserted by the plaintiffs (puisne mortgagees) which entitled them to the right of subrogation were not disputed, it was held that the court could grant them appropriate reliefs on the basis of subrogation, even if the plaintiffs alleged the suit to be one for contribution in respect of the amount paid by them to discharge a prior mortgage.[11] When a relief is claimed on a specific ground, the court may grant it on a different ground, if the latter is disclosed by the allegation in the plaint and the evidence in the case.[12] Thus, in a suit for possession as owner, the plaintiff was given a decree for possession as a service-tenure-holder.[13] If a suit for specific performance is dismissed, a decree for refund of the deposit admitted in the written statement was granted although no such alternative claim was asked for.[14]

In a suit for possession, a decree for redemption was given.[15] In a suit for dissolution of partnership and ascertainment of plaintiff's share, where the defendant pleaded that the partnership had been dissolved and a certain sum of money was found due to the plaintiff, it was held the court could give a decree for that amount.[16] In another case, where a partner sued another for a definite sum said to have been allotted to him on

8 *Md. Shafi* v. *Misra Begum*, A 1996 AIHC 4287 J&K (DB).

9 *Union* v. *Jyotirmoyee*, A 1967 Cal 461.

10 *See also* Chapter VIII under heading 'Court not to set up new case'.

11 *Babulal* v. *Bindhachal*, A 1943 Pat 305, 22 Pat 187.

12 *Rasul Jehan* v. *Ram Saran*, 11 C 539; *Haji Khan* v. *Baldeo Ram*, 24 A 90; *V Kamlaksha Pai* v. *Keshava Bhatta*, 1971 KLJ 538; *Arakhita Swain* v. *Kandhuni Swain*, A 1983 Ori 199.

13 *Jokhan* v. *Mahes*, 27 IC 720, 13 ALJ 150.

14 *Firm Shiwas* v. *Mahabir*, A 1951 SC 177.

15 *Munga Lal* v. *Sagarmal*, A 1936 Pat 629.

16 *Karu Musi* v. *Jaldu*, 1913 MWN 432, 19 IC 848, 24 MLJ 561.

dissolution and taking of account and it was found that account had not been settled, the court gave a decree for accounts.[17] In a suit on the footing of a partnership, the court can pass decree on the footing of holding out under section 28 of the Partnership Act.[18] A suit for exclusive possession can be converted into a suit for partition and for possession or such share as may be found to belong to the plaintiff.[19]

If relief has been claimed under a wrong provision the court may thus grant relief under the provision applicable.[20] In a case in which the plaintiff claimed easement by prescription, their lordships of the Privy Council decreed the claim on the basis of right arising from a grant.[1] On the question whether, if plaintiff claims ownership, can he, be given an injunction on the ground of easement, there are conflicting decisions.[2] In a suit for prohibitory injunction based upon easementary right, the court granted a mandatory injunction observing "the court has power to mould the relief" and grant an appropriate relief. The Appellate Court, too, has power to pass under O.41, R.33, any decree as ought to have been passed.[3] Where a suit was for present possession of a holding, a decree for declaration of title and right to take possession after a term was granted.[4] In a claim for confirmation of possession, relief for recovery of possession was granted.[5] A plaintiff suing for possession can be granted a decree for joint possession[6] and a plaintiff suing for ejectment in his individual capacity may, on the finding that the holding belongs to him and others, be given a

17 *Sheodat* v. *Pushi Ram*, A 1947 All 229, 1947 ALJ 181; *Ganga Pd.* v. *Sukia*, A 1977 All 210.

18 *Minor Periakaruppan* v. *T.S. Subharama*, A 1943 Mad 190.

19 *Gangaram* v. *Butrusao*, A 1952 Nag 202.

20 *S. Mallaiah* v. *Eisther*, 1994 (2) ALT 356(AP) (DB); *Sobana Bai* v. *Eppsi*, A 1985 Mad 315; *Prabhulal* v. *Kalu Ram*, 1985 Raj LW 713; *Jagdish Balwantrao Adhyankar* v. *State of Maharashtra*, A 1994 Bom 141 (FB); *M. Seshireddy* v. *Subba Reddy*, 1995 (3) ALT 635 (AP); *Yashoda Devi* v. *B. Dayakar Reddy*, 1994 (3) ALT 10 (DB).

1 *Maharani Rajroop Koer* v. *Abdul Hossein*, 6 C 394, 7 IA 240; *Secretary of State* v. *Mathurabhai*, 14 B 213 (220).

2 *Tamanabhat* v. *Krishta*, 144 IC 998, 53 BLR 144, A 1933 Bom 122, (*Yes*); *Imam Din* v. *Nizam Dei*, A 1933 Lah 267, (*No*); See also, Chapter VII, *ante*.

3 *Bhondoo* v. *Udatoo*, 1970 All 307.

4 *Bhagwana* v. *Ch. Gulab Kuer*, A 1942 All 221.

5 *V. Krishna Rao* v. *Kotini Sita Ram Dora*, (1973) 2 CWR 1283, 39 CLT 975.

6 *Sheikh Surat* v. *Mahomed Yunus*, 73 CLJ 42.

decree on behalf of all the co-sharers.[7]

A plaintiff suing for a larger relief should be given a decree for the smaller relief if he is found entitled to that.[8] But a court cannot give to a plaintiff more than what he asks for.[9] In a suit for a share of profits in a *theka* the court finding that plaintiff was not entitled to a decree for profits but to a decree for maintenance gave him that decree.[10] But where plaintiffs sued for a declaration that they were sole owners of a certain *shamilat* land and it was found that this was not correct as defendant had also some share in it and the suit was therefore dismissed, the High Court refused to determine the defendant's share and grant a decree to the plaintiffs for declaration of their remaining share, as the determination could not be made without further enquiry.[11] Where one of the co-sharers of joint-land sued the other, who was in sole possession, for mesne profits and the suit was dismissed as no ouster had been proved, it was held that the defendant was not in wrongful possession, and the Appellate Court refused to give a decree for plaintiff's share of profits on the ground that different considerations would arise if the suit were to be regarded as one for profits.[12] Claims for partition and maintenance have been held to be different and it has been held that they should be separately pleaded, and a decree for maintenance cannot be passed when a suit for partition fails.[13]

In all such cases in which a court is called upon to give a relief different from that claimed by the plaintiff, the test is to see whether the defendant is not taken by surprise, and there can be no surprise if the relief granted is consistent with that claimed and with the case raised by the pleading,[14] or is less than that claimed by the plaintiff. It has even been observed in the

7 *Budha Singh* v. *Sant Singh*, 95 IC 121; *Dhanimati Devi* v. *Keshabe Mahatenta*, A 1978 Ori 52.

8 *Pitambar* v. *Ram Joy*, 7 WR 93; *Lakshman* v. *Hari*, 4 B 584; *Venkatramana* v. *Verahalu*, 1939 MWN 1028, 50 LW 681.

9 *Mt. Parbati* v. *Ram Sahai*, 138 IC 808, 9 OWN 523. A 1932 Oudh 294.

10 *Narayanaprasad* v. *Lakshman Prasad*, A 1945 Nag 229.

11 *Udham Singh* v. *Ram Singh*, A 1937 Lah 428.

12 *Debiprasad* v. *Sarabjit*, A 1947 Oudh 129.

13 *Chiman Das* v. *Kundanmal*, A 1943 Sindh 100.

14 *Hemendra* v. *Upendra*, 34 C 433, 22 CLJ 419, 32 IC 437, 20 CWN 446; *Abdul Khaleque* v. *Bepin Behari*, A 1936 Cal 465; *Chabilal* v. *Jherulal*, A 1971 Cal 540; *Fazal Ilahi* v. *Guddar Shah*, 109 IC 929, A 1937 Lah 1; *Indermal Tekaji Mahajan* v. *Ram Prasad Gopilal*, A 1970 MP 40.

undernoted case that plaintiff need do no more than suggest the relief to which he is entitled, and it is for the court to determine what relief should be given on the facts found,[15] but O.7, R.1 (*g*), requires the relief to be stated. Where all facts were stated in the plaint and the plaintiff claimed only one relief although he could have claimed another alternative relief, it was held that the court could grant the latter relief.[16]

But the fact that the court can give the right relief should be no excuse for a pleader for not being careful in claiming the right relief, for the mistake may at least deprive his client of the costs of the suit. It is his duty to claim the relief to which his client is entitled on the facts, and if he is entitled to several reliefs in the alternative, he should claim those reliefs alternatively.

Costs : A court is bound to pass an order about the costs of a suit, and as it cannot deprive a successful plaintiff of his costs, except for special reasons to be recorded.[17] Hence it is not strictly necessary to claim costs as a definite relief.

Future Interest : In all money suits, the plaintiff should claim interest from the date of the institution of the suit to that of payment. Although there is nothing in the Code to require a plaintiff to claim it or to prevent a court from awarding such interest if it is not claimed,[18] still it is always better to claim it. If such interest is not claimed or allowed, no separate suit for it will lie.[19] (See precedents on interest in part II, *post* which may be referred to along with notes thereunder for pleading regarding interest.)

Future Mesne Profits : Similarly, a claim for mesne profits from the date of suit may also be added to one for possession or past mesne profits or for both. On the question whether the plaintiff's omission to claim future mesne profits is a bar under O.2, R.2, to a subsequent separate suit for them, see discussion in Chap. XI, *ante*. It is always safer for the plaintiff to claim future mesne profits also, in every suit for possession. But if the suit is one under section 6, Specific Relief Act, no mesne profits can be claimed, and a separate suit for them is maintainable.[20]

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15 *Bulaki Das* v. *Ganpat Rao*, A 1946 Nag 112.
16 *Naga* v. *Kini*, A 1933 Pat 695.
17 Section 35 (2) C.P.C.
18 *Yadaorao* v. *Ram Rao*, A 1940 Nag 249; *State* v. *Ajit Singh*, A 1979 Punj 179 (FB).
19 Section 34 (2) C.P.C.
20 *Sheo Kumar* v. *Narain Das*, 24 A 501, 22 AWN 139.

Chapter XV

DEFENCE

Filing Written Statement: It is incumbent on the defendant to file his defence in writing. If the defendant fails to file written statement, the court may pronounce judgment against him or may under O.8, R.10, make such order in relation to the suit as it deems fit. If the defendant has omitted to avail of his right to file a written statement at or before the first hearing, the court can extend the time for filing it, in exercise of its discretion, if the circumstances so warrant. The rule has to be worked in a manner so as to advance justice.[1] The written statement of one of the defendants cannot be binding upon the other defendants.[2]

Requirement of Written Statement: When the defendant appears and files a written pleading by way of defence, his pleading should conform to all the general rules of pleading laid down in the preceding chapters. The object of the present chapter is to discuss only the particular and special requirements of the defendant's pleading, apart from the requirements already mentioned in respect of pleadings generally. A subsequent pleading filed by the plaintiff, either in reply to a defendant's claim of set off, or with leave of the court, in answer to defendant's pleas in defence, is also called a "written statement" (also called Replication or Rejoinder). All the rules relating to defendant's written statement apply, *mutatis mutandis* to such written statement of the plaintiff also. It is the duty of the defendants to raise all the pleas in the written statement else plaint averments are deemed to be admitted and the plea not raised cannot be allowed to be raised at the hearing.[3]

Considerations Before Drafting a Written Statement: Before proceeding to draft a written statement, it is always necessary for a pleader to examine the plaint very carefully and to see whether all the particulars are given in it and whether the whole information that he requires for fully understanding the claim and drawing up the defence is available. If any particulars are wanting, he should apply that the plaintiff be required to

1 *Mehar Chand* v. *Suraj Bhan*, A 1971 Punj 435.
2 *Jugeshar* v. *Sheopujan*, A 1986 Pat 35.
3 *Wungrayo Tankhul* v. *Shanghar Tanghul*, (1996) 1 GLR 289 (Gauh).

furnish them before the defendant files his written statement. If he cannot make a proper defence without seeing any documents referred to in the plaint, and the defendant has not with him copies of them, or the copies do not serve the required purpose, he should call upon the plaintiff to grant him inspection of them and to permit him to take copies, if necessary, or, if he thinks necessary, he may apply for discovery of documents. If he thinks any allegations in the plaint are embarrassing or scandalous, he should apply to have them struck out, so that he may not be required to plead to them.

If there are several defendants, they may file a joint defence, if they have the same defence to the claim. If their defences are different, they should file separate written statements, and if the defences are not only different but also conflicting, it is not proper for the same pleader to file the different written statements. For instance, if two defendants, executants of a bond, are sued on the bond, and their plea is one of satisfaction, they can file a joint written statement. If the plaintiff claims limitation from the date of certain acknowledgment made by one defendant and contends that the acknowledgment saves limitation against the other also, the defendants may file separate written statements. In a suit on a mortgage-deed executed by a Hindu father, to which the sons are also made parties on the ground that the mortgage was for a legal necessity, if the sons want to deny the alleged legal necessity they should not only file a separate defence from their father's but should also preferably engage a separate pleader.

(1) Formal Portion of Written Statement: A written statement should have the same heading and title as the plaint, except that, if there are several plaintiffs or several defendants, the name of only one may be written with the addition of "and another" or "and others", as the case may be. The number of the suit should also be mentioned after the name of the court. After the name of the parties and before the actual statement, there should be added some words to indicate whose statement it is, e.g., "written statement on behalf of all the defendants" or "written statement on behalf of defendant No. 1", or "written statement on behalf of the plaintiff in reply to defendant's claim for a set off" or "written statement (or replication) on behalf of the plaintiff filed under the order of the court,

dated....." or "written statement on behalf of the plaintiff, filed with the leave of the court". The words "The defendant states....." or "The defendant states as follows" may be used before the commencement of the various paragraphs of the written statement but this is optional.

No relief should be claimed in the written statement, and even statements such as that the claim is liable to be dismissed should be avoided. But when a set off is pleaded or the defendant prefers a counter-claim for any excess amount due to him, a prayer for judgment for that amount in defendant's favour should be made.

(2) Body of the Written Statement: The rest of the written statement should be confined to the defence.

Forms of Defence: A defence may take the form of *(i)* a *"traverse"*, as where a defendant totally and categorically denies the plaint allegation, or that of *(ii)* *"a confession and avoidance"* or *"special defence"*, *where* he admits the allegations but seeks to destroy their effect by alleging affirmatively certain facts of his own, as where he admits the bond in suit but pleads that it has been paid up, or that the claim is barred by limitation, or that of *(iii)* *"an objection in point of law"* e.g., that the plaint allegations do not disclose a cause of action, or that the special damages claimed are too remote. Another plea may sometimes be taken which merely delays the trial of a suit on merits, e.g., a plea that the hearing should be stayed under section 10, C.P.C., or that the suit has not been properly framed, there being some defect in the joinder of parties or causes of action and the case cannot be decided until those defects are removed. These pleas are called *(a)* *"dilatory pleas"* in contradistinction to the other pleas which go to the root of the case and which are therefore known as *(b)* *"pre-emptory pleas"* or *"pleas in bar"*. Some dilatory pleas are not permitted in pleadings, but must be taken by separate proceedings, e.g., the plea of section 34 of old Arbitration Act of 1940. (now see section 8 of the Arbitration & Conciliation Act, 1996). Others may either be taken in the written statement, or by a separate application filed at the earliest opportunity, as some pleas, such as that of a misjoinder and non-joinder, cannot be permitted unless taken at the earliest opportunity.[4]

4 O. 1, R. 7 and 13.

A defendant may adopt one or more of the above forms of defence, and in fact he can take any number of different defences to the same action. For example, in a suit on a bond he can plead that the claim is barred by limitation, he can plead that, as no consideration of the bond is mentioned in the plaint, the plaint does not disclose any cause of action, he can plead that the bond being stated to be in favour of two persons the plaintiff alone cannot maintain the suit . He can as well plead one form of defence to one part of the claim, and another defence to another part of it.

He can take such different defences either conjointly or alternatively, even if such defences are inconsistent. But certain inconsistent pleas such as those which depend for their proof, on entirely contradictory facts, are generally not tenable. The question how far inconsistent pleadings are allowed has already been discussed in Chapter VII.

A ground of defence, which has arisen to the defendant even after the institution of the suit, but before the filing of his written statement, may also be raised.[5] In case of defendant's death, his legal representative cannot raise a defence which the deceased defendant could not himself have taken.[6]

All defences which are permissible should be taken in the first instance, for, if the defendant does not take any plea, he may not be allowed to advance it at a later stage, particularly when it involves a question of fact.[7] When the defendant has already filed a written statement, he cannot be allowed to raise the plea later that in view of an arbitration agreement between the parties the suit was not maintainable.[8] A plea not raised in written statement cannot be raised at the time of trial of suit.[9]

How to Draft a Written Statement : When the defendant relies on several distinct grounds of defence or set off founded upon separate and distinct facts, they should be stated in separate paragraphs,[10] and when a ground is applicable, not to the whole claim but only to a part of

5 O. 8, R. 8.
6 *Sadho Singh* v. *Firm Kalin A Singh*, A 1944 Lah 473.
7 *See* Chapter X, *ante*.
8 *National Insurance Co.* v. *Calcutta Dock Labour Board*, A 1977 Cal 492.
9 *Himjit Construction* v. *Tarun Sarkar*, A 1985 Cal 200.
10 O.8, R.7.

it, its statement should be prefaced by words showing distinctly that it is pleaded only to that part of the claim, thus : "As to the mesne profits claimed by the plaintiff, the defendant contends that, etc." or "As to the price of cloth said to have been purchased by the defendant, the defendant contends that, etc."

When it is intended to take several defences in the same written statement, the different kinds of defences should be separately written. It is convenient to adopt the following order for the several pleas:

I— Denials.

II— Dilatory pleas.

III—Objections in point of law.

IV—Special defence (pleas in confession and avoidance).

V— Set off.

VI—Counter-claim.

All admissions and denials of facts alleged in the plaint should be recorded in the first part of the written statement and before any other pleas are written. If a defendant wishes to add an affirmative statement of his own version to the denial of a plaint allegation, or to add anything in order to explain his admission or denial, it is better and more convenient to allege the additional facts along with the admission or denial, than to reserve them until after the admissions or denials have been recorded. For example, if a defendant wants not only to deny that the plaintiff's father died in 1982, but also to assert that he died in 1972, as he means to base a plea of limitation on that ground, he should plead that "the defendant denies the allegation in paragraph 2 of the plaint that the plaintiff's father, AB, died in 1982, and asserts that the said AB died in 1972".

If there are some defences which are applicable to the whole case and others which apply only to a part of the claim, the former should preferably be pleaded before the latter.

In what form each of the different kinds of defences should be stated will now be discussed separately.

I—Admissions and Denials

The written statement should begin with the admission and denial of the material facts alleged in the plaint. Each fact should be taken up in the

same order in which it is alleged in the plaint, and it should either be admitted or denied, or when the defendant has no knowledge of it (e.g., when he was no party to the alleged transaction), he may simply refuse to admit it. It would not be sufficient to plead a general denial of the facts alleged in the plaint (O.8, R.3). Though this rule refers to denials, it covers non-admission also,[11] and therefore non-admissions should also be specific and not general.

The practice of stating "not known" or "the defendant has no knowledge of the facts alleged in paragraph ____ of the plaint" is wrong, and this cannot be held to mean denial or non-admission because a party might admit even a fact of which he has no knowledge.[12] Even if a defendant alleges no knowledge of a fact pleaded by the plaintiff it does not amount to a denial of the existence of that fact, not even an implied denial. It would, therefore, be taken to be admitted in terms of O.8, R.5.[13] Therefore, if defendant does not admit a fact he should say so expressly. Even where want of knowledge is his reason for non-admission, the defendant should say that he *does not admit* such and such facts. Where a defendant simply puts the plaintiff to proof of the allegations in the plaint, he will be deemed to have admitted the facts alleged in the plaint.[14] The defendant must raise by his pleading all matters which show that the suit is not maintainable and that the transaction is either void or voidable in point of law. If such a pleading had not been raised in the written statement it would not be allowed to be raised at a later stage in the proceedings.[15]

Nothing, however, need be denied which is not expressly alleged in the plaint, even if the defendant thinks it might be in the plaintiff's mind or that the plaintiff really meant to allege it. If a suit is brought on a bond

11 *Thorp* v. *Holdsworth*, (1876) 3 Ch D 637, 640.

12 *Laxmi* v. *Ramlal*, A 1931 All 423, 131 IC 414.

13 *Jahuri Sah* v. *Dwarika Pd. Jhunjhunwala*, A 1967 SC 109; *Roopi Bai* v. *Nahaveer*, A 1994 Raj 133 (unless by necessary implication it amounts to denial of the fact pleaded, mere plea of ignorance amounts to admission of fact); *Hariram Lehrumal Sindhi* v. *Anandrao Narayanrao Mukati*, A 1992 MP 1; *Dhanbai* v. *State of M.P.*, A 1979 MP 17 (DB); *Maganbhai Chhatubhai* v. Maniben, A 1985 Guj 187 (denial found evasive in the case).

14 *Abubacker* v. *Abdur Rahiman*, 1960 KLT 348.

15 *Union* v. *Surjit Singh*, A 1979 SC 1701; *Munavar Hussaini* v. *Narayanan*, A 1984 Mad 47.

executed in lieu of an earlier bond, it is absurd to allege in defence that the defendant did not receive a single paisa as consideration for the bond in suit, as the plaintiff does not say that the defendant received cash consideration. Where the allegations made in the plaint or writ petition are vague,[16] or do not make out a case,[17] denial of the allegation is not necessary.

Ordinarily a party should frankly admit a fact in his opponent's pleading which is known to him to be true. It is not a fair attitude to commence by denying everything. In addition to the bad impression such an attitude creates on the mind of the judge, a party unnecessarily denying a fact may, if the judge so orders, have to pay the costs of proving it. In a rare case, however, a pleader will be justified in refusing to admit a fact or a document, in order to compel his opponent to call a particular witness whom he wants to cross-examine in order to prove through his mouth, facts which are essential to his case, and which no other witness could prove.

The words "not admitted" and "denied" are not synonymous and should not be indiscriminately used. Where a fact is such that it must be within the defendant's knowledge, it must be either admitted or denied, and it is not sufficient to say that the defendant does not admit it.[18] For example, if the plaintiff alleges that the defendant beat him, it is absurd for the defendant to say that the allegation is not admitted; he should deny it if it is untrue. But when the defendant has no knowledge or at least the fact is such that the defendant cannot be supposed to have a personal knowledge of it, he can merely refuse to admit it and in that case it would be proper to say that the fact is "not admitted".

The general rule that every allegation in the plaint should be specifically admitted or denied is subject to two well recongnised exceptions:

(1) *Matters of law, or inferences from law*, if pleaded in the plaint need not be traversed, because O. 8, R. 3, applies to facts only. But if

16 *PNA Ganapathy* v. *Secretary Government of India*, A 1994 Mad 33.

17 *Trustpuram Resident's Association* v. *Corporation of Madras*, A 1991 Mad 178.

18 *Sheikh Abdul Sattar* v. *Union of India*, A 1970 SC 479; *Ram Singh* v. *Col. Ram Singh*, A 1986 SC 3; *Narayan Rao* v. *State of Tripura*, A 1993 Gau 59; *State* v. *Sardarmal*, A 1987 MP 156; *Bharosi Sao* v. *Manik Chand Gupta*, A 1986 Pat 24.

such allegation of law is not admitted, the defendant may take an objection in point of law. For instance, if a plaintiff alleges that he is related to A in a particular way and that therefore he is the legal heir of A, the defendant may simply deny that the plaintiff is related to A as alleged, but he need not say that he does not admit or that he denies that the plaintiff is the legal heir of A. If he means to contest that, even if the plaintiff is related to A as alleged, still he would not be his legal heir, he should do so by separate plea (as an objection in point of law). The question whether or not the provisions of Article 299 (1) of the Constitution have been complied with is a question of fact and not of law and it cannot be allowed to be raised unless it is sufficiently pleaded in the written statement.[19]

(2) *Damages :* The defendant need not plead to the claim or amount of damages alleged in the plaint,[20] whether the damages claimed are general or special. He may, however, plead that the damages claimed are too remote, or not sufficient to give a cause of action to the plaintiff.

It is also not necessary to deny the relief sought by saying e.g., "The relief sought is not admitted." Nothing need also be said about the paragraphs containing the formal allegations of facts showing that the court has jurisdiction and the allegation about valuation of the suit, unless the defendant intends to question these matters and the facts alleged by the plaintiff. In such cases the defendant should definitely state that he does not admit the facts adding his own version, thus — "The defendant denies that the property is worth Rs. 8000 and submits that it is worth Rs. 42,000 and the suit is not cognizable by this court'.

The following two rules must be remembered when traversing the opponent's allegations:

(I) That the denials must be specific, and

(II) That the denials must not be evasive.

I. Denials must be Specific : O.8, R.5 lays down that every allegation of fact in the plaint if not denied specifically or by necessary implication, or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted. The denial should be definite and unambiguous.

19 *State of Madhya Pradesh* v. *Firm Gopi Chand Pardad*, 1971 MPLJ 898.
20 O. 8, R. 3.

A general denial to pay any damages is insufficient and it is necessary for the defendant to specifically deny the quantum claimed by the plaintiff.[1]

Every allegation, the truth of which is desired to be denied, should be taken up separately and categorically denied in the written statement. It is not ordinarily proper to state that the defendant does not admit a particular paragraph of the plaint, or that a particular paragraph or a particular allegation is not admitted "as alleged", or "in the way it is mentioned", or that "a portion of paragraph 4 is admitted and the rest is not". The denial should be bold and clear and there should be no half-hearted denial, nor is any explanation needed for the denial, such as "The defendant does not admit the fact *because (he has no knowledge of it") or, (the defendant is a stranger to the family) or, (is a resident of another village)*". The proper mode of denial is to single out the particular fact which a defendant wants to deny and to deny it, as far as possible, in the words of the plaint itself. For example, "the defendant denies the allegation that he was the agent of the plaintiff", or "the defendant admits that he made to the plaintiff the representation set out in paragraph 3 of the plaint, but denies that he did so fraudulently or with any intention to mislead the plaintiff".

The practice of singling out allegations which are admitted, and adding that the rest are denied, is not strictly accurate. For example, it is not correct to plead that "in para 2 of the plaint, it is admitted that the plaintiff's father died in 1972, the rest of the allegations are denied". The allegations which are denied should be specified. The plea that "the facts that the defendant has not specifically admitted should be treated as denied" may not be considered sufficient as denial of any fact.[2] In respect of facts which are not the essentials of the cause of action but are alleged only as matters of inducement or introduction or as explanations of the essential facts, denial may be made with reference to paragraphs, e.g., "the defendant denies the allegations contained in paras 2, 3 and 4 of the plaint". But this

1 *State of MP* v. *Saradammal*, A 1987 MP 156; *Hairdas* v. *Sivarama Subramaniam*, 1989 (103) MLW 184.

2 *Richutranand* v. *Mir Mahbub Ali*, A 1947 Pat 275; *L.A.Subramaniam* v. *R.M.Hitchcock*, 85 IC 900 Mad.

form of denial must be avoided in case of essential facts, except when the allegations are lengthy and the defendant means to deny them wholesale. Even in such a case it will not be proper simply to say that para so and so of the plaint is not admitted. It would be more specific to say that "the defendant denies each and every one of the allegations made in para, so and so" or "the defendant does not admit any one of the several allegations in para so and so". In one case the plaintiff gave a cheque to the defendant to be handed over to his brother, but the defendant himself cashed it and appropriated the money. The plaintiff alleged that he did not obtain definite knowledge of the appropriation until a date within 3 years of the suit, on which the defendant had an interview with him and told him that he had cashed the cheque and refused to pay. The defendant admitted the interview but as to what happened at that interview he did not deny the plaintiff's version but simply stated that it was "not admitted" and in further pleas said nothing about the interview but simply pleaded that the suit was barred by time. An issue of limitation was framed by the court which threw the burden of proving his first knowledge within 3 years of the suit on the plaintiff. The High Court held that it was manifest that the defendant's pleadings were evasive, and that he did not properly raise the issue as to the date of plaintiff's knowledge, and that therefore the plaintiff was not bound to prove that he first came to have knowledge of the misappropriation within 3 years, though he was bound to show this if the defendant had definitely denied the plaintiff's version of what happened at the interview.[3] In another case in which the plaintiff had alleged service of notice on the defendant, that the defendant did not vacate the house and several other facts in one paragraph, the High Court held that defendant's denial of this paragraph was not a specific denial of each fact and the allegation of service of notice must be deemed to have been admitted.[4] The Patna High Court, while holding service of notice, also held that the date on which plaintiff alleged that notice was served will be deemed to have been admitted and it is not permissible to give evidence that notice was served on some other date, when the date mentioned in plaint was not specifically denied.[5]

3 *Sri Kishan* v. *Ghananand*, 1929 ALJ 1153.

4 *Ganga Prasad* v. *Prem Kumar*, A 1949 All 173, 1948 OWN 279; *Narayan Roy* v. *State of Tripura*, A 1993 Gau 59 (para 18).

5 *Ram Sewak* v. *Rajendra Prasad*, A 1981 Pat 300.

If allegations are admitted in their entirety, they need not be repeated but may be admitted with reference to paragraphs, e.g., "The defendant admits the allegations in paras 3 and 4 of the plaint."

Where a joint written statement is filed on behalf of several defendants, a denial on behalf of all of them should be in the following form—"Each of the defendants denies execution of the bond", or "the defendants deny that they, *or either of them*, executed the bond". The plea that "the defendants deny that they executed the bond" or that "the defendants did not execute the bond" is not specific, as it would be consistent with one of the defendants having executed the bond.

In a suit for money due on account, the plaint contained an allegation that certain sums passed on certain dates were paid towards interest and the defendant alleged that the statement of account set out by the plaintiff was untrue and that the benefit of section 20, Limitation Act, 1908 (corresponding to section 19, Limitation Act, 1963) was not available to the plaintiff. It was held that this only meant that defendant denied the alleged payments, and that even if the facts alleged were found to be true, the suggested application thereto of section 20 was incorrect, but the allegation could not be held to be a specific denial of the fact that the payments, if proved, were made towards interest.[6] Where the plaintiff alleged that he was adopted son and had attained majority on a particular date and therefore the suit was within time and the defendant pleaded that "It is denied that the plaintiff is the adopted son and para 1 of the plaint is denied", it was held that there was no specific denial of the allegation that plaintiff attained majority on the particular date alleged by him in para 1.[7]

Denial of Compound Allegation : When a compound allegation, consisting of several distinct facts, is made in the plaint, and it is intended to deny each of such facts, a single denial of the whole allegation will not be specific, but the defendant should break up the allegation into separate parts, denying each of them separately. For instance, if the plaintiff alleges that "the defendant took possession of the plaintiff's house", and the defendant means to deny both the allegations of having taken possession

6 *Shyamlal* v. *Mirtunjay*, A 1947 Pat 446.

7 *Rishab Kumar* v. *Singai Motilal Kastur Chand*, A 1949 Nag 21.

of the house as well as of the house being the plaintiff's house, he must do so by saying that:

"1. The defendant never took possession of the house.

2. The house is not plaintiff's house."

A single traverse in the following form would not be specific :

"The defendant denies that he took possession of the plaintiff's house", for it will be taken to mean that the defendant only denies having taken possession of the house. Similarly, if the plaintiff alleges that "AB executed the said deed on behalf of the defendant, as his agent, acting under a power of attorney duly signed by the defendant", the defendant must not plead a single denial of the whole allegation. If he wishes to traverse the whole allegation, he must plead that :

"1. The said AB never executed the said deed.

2. The said AB never executed the said deed on behalf of the defendant or as his agent.

3. The defendant never signed any such power of attorney, nor did AB ever act under it".

So, if the defendant simply says that he never enticed away the plaintiff's wife, this will be taken to mean a denial of the act of enticing away and not of the fact that the woman was the plaintiff's wife.

It may be right for the plaintiff to allege two or three facts in one para, and join them by "and", but if the defendant wants to deny each of them it will be evasive to say that he denies that para. He should either break up the paragraph in to separate sentences each containing one allegation and deny that allegation or should use the word "or" instead of "and" when denying the whole compound allegation. For instance, if plaintiff says that "defendant paid Rs.10 towards interest and endorsed the payment on the bond" and defendant intends to deny both, he should say that "defendant did not pay Rs.10", and "defendant did not endorse any payment on the bond", or may say, "defendant denies that he paid Rs. 10, *or* that he endorsed any payment on the bond."[8]

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8 *Seth Gobind Ram* v. *Gulab Rao*, 4 DLR 94 Nag.

Consequence of a Denial Not Specific : If the defendant does not choose unequivocal language for denying a fact which he intends to deny, and does not make it clearly appear from his written statement that he does not admit it, he runs the risk of being taken to have admitted it, for there is a rule that "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."[9] The punctuation of this rule in the C.P.C. is defective and would seem to imply that a fact stated to be not admitted will be taken to have been admitted. The rule should be so read as if there were no comma after "implication", or as if before the word "stated" the words "if not" were inserted.[10] By "necessary implication" is meant that the denial of one fact follows necessarily and unmistakably from the express denial of another fact. For instance, if a defendant denies that he was ever a tenant of the plaintiff, the allegation that the plaintiff let the house to the defendant is denied by necessary implication.

If there is no denial or a definite refusal to admit a fact, the fact stands admitted, although the defendant never intended to admit it. In a case in which the defence was, "the defendant puts the plaintiff to proof of the several allegations in his statement of claim" (plaint), it was held that all the plaintiff's allegations stood admitted,[11] although most probably the defendant intended to deny each of them. Similarly, if the defendant says in respect of any allegation that "he has no knowledge" or writes "not known", the allegation will be deemed to have been admitted.[12] The same will be the result if he simply says that "the allegation needs no reply".[13] In a case of libel, the defendant stated in the first paragraph of the written statement that he "does not admit all or any of the allegations in the plaint except such as have been expressly admitted", and then he traversed all allegations specifically but not that of publication. It was held that there

9 O.8, R.5.

10 *Mansa* v. *Ancho*, 1933 ALJ 998, 145 IC 802, A 1933 All 521.

11 *Haris* v. *Gamble*, (1878) 7 Ch D 877, 47 LJ Ch 344.

12 *P.L.N.K.L.Chettyar Firm* v. *Ko Lu*, 152 IC 395, A 1934 Rang 278; see also, *Jahuri Sah* v. *Dwarika Prasad Jhunjhunwala*, A 1967 SC 109; *Roppi Bai* v. *Mahaveer*, A 1994 Raj 133.

13 *U.Lun* v. *U.Chit*, A 1941 Nag 49, 193 IC 114.

being no specific denial of publication, the same should be deemed to have been admitted inspite of the statement in the first paragraph.[14]

Where a defendant in a suit on promissory note pleads that he had given his thumb mark on a blank paper to a third person from whom he had borrowed money and that the third person passed over the blank paper to the plaintiff and the plaintiff had utilised it for filing the suit, the plea did not amount to admission of execution of the pronote in suit.[15] Where, in a suit for dissolution of partnership and accounts, the plaint stated the proportion of shares, and defendants, while alleging that the shares were different, did not specify what the shares were, it was held that the court could treat the evasive denial as an admission of the correctness of the statements in the plaint.[16] Where in an application by a wife under section 27 of the Hindu Marriage Act a list of presents given at the time of marriage was given along with their value, and the husband merely denied the presents having been given without saying anything about the value stated, and his denial was found false, it was held that the value stated in the list annexed to the wife's application must be deemed to have been admitted under O.8, R.5, and it was, therefore, not necessary for her to adduce evidence about it.[17]

This rule of constructive admission does not, however, apply to a person under disability, as minor or a person of unsound mind. No inference from a mere omission to deny can therefore be raised against such a person. This rule being one of pleading only, the constructive admission is only for the purpose of the particular suit and cannot be used against defendant as an admission in a subsequent litigation.[18]

The rule of constructive admission would apply only when the allegations in the plaint are clear and not when they themselves are vague and inconclusive.[19] When in a suit for easement to irrigate through certain

14 *L.A.Subramania* v. *R.H.Hitchocock*, 85 IC 900 Mad; compare, *Richutranand* v. *Mir Mahbub Ali*, A 1947 Pat 275.

15 *Ram Aargas Singh* v. *Gajendra Prasad Singh*, A 1976 Pat 92.

16 *Choitram* v. *Khem Chand*, 113 IC 370, A 1929 Sindh 7.

17 *Ashok Kumar* v. *Usha Rani*, (1985) 1 CCC 113 Del; relying on *Badat & Co.* v. *East India Trading Co.*, A 1964 SC 538.

18 *Mt. Dilali* v. *Lachman Singh*, A 1946 Lah 256.

19 *Haji Shakoor* v. *Volkart Bros.*, A 1937 Sind 11, 168 IC 330; compare, *Bishim Pd. Gupta* v. *Jagmohan*, 1968 BLJR 847.

gool, there was no mention in the plaint of the existence of any tubewell for over 20 years, it is sufficient for the defendant to deny the right of easement and it is not at all necessary for him to say that tubewell existed for less then 20 years.[20]

The rigour of the rule has been further modified in India by providing that "the court may in its discretion require any fact so admitted to be proved otherwise than by such admission".[1] This proviso is borrowed from a similar provision in section 53 of the Evidence Act. The court may always call for proof of any fact which is not expressly admitted and may refuse to draw the inference of admission from the mere omission to deny. But the court should always give due notice of this to the plaintiff either by striking an issue on the point, or by passing an express order that the plaintiff will be required to prove such facts, otherwise the plaintiff will be entitled to rely on the constructive admission and will not be ready with proof of the fact. This discretion should be exercised by the court in a case in which it suspects that the admission is made collusively or to avoid a rule of public policy,[2] etc., as in a proceeding for divorce, or where an allegation of *mala fide* in the plaint is not very probable.[3] The Patna High Court has held that this proviso should not be used to support a plea of limitation.[4] The Supreme Court held that the proviso should be invoked only in exceptional cases and should be construed strictly.[5]

Failure to File Written statement: Under O.8, R.10 as amended in 1977, the Court may pronounce judgment *ex parte* on the defendant's failure to file his written statement. However, the Court has discretion not to do so but to pass such orders as it thinks fit. Thus the court can either call upon the plaintiff to prove the case or adjourn the case or afford a further opportunity to the defendant to file his written statement.[6]

II. Denials Not to be Evasive : When a defendant denies an allegation of fact in a plaint, he must not do so evasively, but answer the

20 *Shankar* v. *Manohar*, 1979 ALJ 489.

1 Proviso to O.8, R.5; *Bharosi* v. *Manikchand*, A 1986 Pat 24.

2 *Venkata* v. *Muthu*, 60 IC 554, 1920 MWN 512, 28 MLJ 43.

3 *Akamma Shedthi*. v. *State*, (1969) 17 Law Rep 862 Mys.

4 *Bichitranand Sahu* v. *Mir Mahebub Ali*, A 1947 Pat 275.

5 *Badat & Co.* v. *East India Trading Co.*, A 1964 SC 538.

6 *State of Uttar Pradesh* v. *Dharam Singh*, 1983 All WC 1; *Modula India* v.

point of substance.[7] By "point of substance" is meant the real gist and significance of the allegation traversed, as distinguished from comparatively immaterial details. Though, ordinarily, a traverse is usually framed in terms of the allegations, yet sometimes it may become ambiguous if it follows, those terms too closely. For instance, if it is alleged that a defendant received a certain sum of money, it should not be sufficient to deny that he received that sum, but he must deny that he received that sum or any part thereof, or else set out how much he received. In a case in which it was alleged that the defendant had not handed over to the plaintiff certain rents which he had recieved from the plaintiff's tenant, the defence was that "the defendant had handed over to the plaintiff all the rents which he had recieved from the plaintiff's tenants". This was bad traverse, as it does not appear whether the defendant had received all the rent due or part of it. He must state, if he received any, and if so, how much rent, and what amount he handed over to the plaintiff.

In a case by a contractor who pleaded that the contract for supply of meat to the army authorities had been sanctioned by X (officer), the defendant (Government) pleaded that the said paragraph "as it stood was not admitted". It was held that "according to the law of pleadings the defendant was bound to deal specifically with each allegation of fact the truth of which was not admitted. The allegation that X was the officer sanctioning the contract was not specifically dealt with and was, therefore, not specifically denied. If its truth was not admitted then it should also have been stated in this para as to who, according to the defendant, was the officer sanctioning the contract".[8] However, as the additional pleas in the subsequent paragraphs did name the officer sanctioning the contract the plaintiff's plea was considered to have been traversed, though, their Lordships added, "we cannot complement the respondent or its law

Kamakshya Singh Deo, A 1989 SC 162; see also *Akttaryar Khan* v. *Azhar Yar Khan*, A 1994 All 193; *Dineshwar Prasad* v. *Parmeshwar Prasad*, A 1989 Pat 139; *Kuvarup Industries Bangalore* v. *State Bank of India*, A 1985 Kant 77; *C.N.Shah* v. *B.V.Thakkar*, 1995 (2) Guj LR 1078 (Guj).

7 O.8, R.4.

8 *Sheikh Abdul Sattar* v. *Union of India*, (1970) 3 SCC 845 (para 9), A 1970 SC 479; see also, *Bhagat Singh* v. *Jaswant Singh*, A 1966 SC 1861; *Kalyanpur Lime Works* v. *State of Bihar*, A 1954 SC 165; *Badat & Co.* v. *East India Trading Co.*, A 1964 SC 538; *Union of India* v. *Pandurang*, A 1962 SC 630.

officer entrusted with the task of drafting the written statement for the manner in which it was drafted".

If a plaint contains the allegation that the defendant did a certain act in a certain manner, e.g., that he wrongfully entered certain premises, a literal traverse of this allegation such as, "the defendant never wrongfully entered the premises" would be ambiguous, for it would not be clear whether the defendant intends to deny the entry or to assert a right to act as he did. Similarly, if the allegation is that the defendant offered, on June 24, 1975, Rs.500 as bribe to the plaintiff's agent, it will be evasive for the defendant to plead that "he denies that, on June 24, 1975 he offered Rs.500 as bribe to the plaintiff's agent", as this would be consistent with his having offered the bribe on any other date, or a bribe of a different amount. The proper traverse would be, "The defendant denies that he offered, on June 24, 1975; or on any other date, Rs. 500 or any other sum, as a bribe to the plaintiff's agent".

It should be noted that if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances,[9] as the circumstances are not often material, but are alleged by the plaintiff as particulars, and what is really required is a denial or admission of the main allegation. Thus, if a plaintiff alleges "that he advanced a loan of Rs. 1,000 to the defendant at Saharanpur, on May 15, 1975, in the presence of his uncle Khuda Baksh" it would not be sufficient to plead that "the defendant denies that the plaintiff advanced a loan of Rs. 1,000 to the defendant at Saharanpur on May 15, 1975, in the presence of his uncle Khuda Baksh". The main allegation is that the defendant borrowed a sum of money from the plaintiff and if the defendant wants to deny it, he should allege, "the defendant denies that he borrowed Rs. 1,000 or any other sum from the plaintiff". The pleas framed in such words as "the defendant never agreed as alleged" are also evasive. The defect should be removed by adding "or at all" in such cases, just as, in cases relating to definite sums of money, the words,"or any other sum" are often added to make the denial more specific and clear. *See also* the undernoted cases for discussion of case law on the subject.[10]

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9 O.8, R.4.

10 *Gulam Mohd* v. *Mst. Mariyam*, 1984 Raj LW 321; following *Ardeshir* v. *Flora*,

II—Dilatory Pleas

Such pleas must be taken at the earliest possible opportunity, and should have the attention of the court before any pleas on the merits. Such matters should generally be decided by the court before proceeding any further; for instance, the plea that the defendant is a minor and cannot be sued without the appointment of a guardian, or that the plaintiff is a minor and must sue through a next friend, or that a certain person is also a necessary party to the suit, or that the suit is bad for misjoinder of causes of action, or non-joinder of necessary parties, or that the court-fee paid by the plaintiff is not sufficient. It would be convenient to decide these questions and to remove the defects, if any, before proceeding with the trial of the case on merits. These pleas should be raised in a specific and definite form and should not be vague and indefinite. For instance, a plea "that the suit is bad for non-joinder of parties" will not be accepted. The defendant must allege who is the person who should have been added as a plaintiff or as a defendant.[11] Similarly, the plea[12] that "the suit is barred by section 10, C.P.C." will not be accepted without particulars of the previously instituted suit which is said to bar the hearing of the present suit. This may be pleaded in the following way:

"The defendant has, on October 14, 1978, prior to the institution of this suit, filed a suit, against the plaintiff in the court of the Civil Judge at Kanpur (being Suit No. 194 of 1978) for rendition of account, and the particular transaction which is the subject of claim in this suit, is part of that account and is therefore directly in issue in that case. As that suit is still pending, this court cannot proceed with the trial of this suit."

III—Objection in Point of Law

Such an objection should raise a point of substance, and not merely a technical objection to some defect of form.

A 1928 PC 208; *Gomathi Naragam* v. *Palaniswami*, A 1967 SC 868; *G. Veerayya* v. *N.S. Chowdhary*, (1966) 2 SCJ 789; *Ramakrishna* v. *Krishna*, 1970 Ker LT 245; *H.N. Molak* v. *Mohan Singh*, A 1974 Bom 136; *Badat & Co.* v. *East India Trading Co.*, A 1964 SC 538; *Tek Bahadur* v. *Debi Singh*, A 1966 SC 292.

11 *Narain Pandey* v. *Suraj Bhan Lal*, 169 IC 897, A 1937 Pat 414; *Megavernam* v. *Mohammad*, A 1936 Mad 782.

12 *A.C. Sinha* v. *Hindustan Gas Ltd.*, (1984) 88 CWN 949; *Anandan Gupta* v. *Navin*, A 1984 All 387.

The defendant either admits the facts or takes them as proved for the sake of argument, and bases these objections on that supposition. In substance, he means to say that even if the allegations of fact be supposed to be correct, still the legal inference which the plaintiff claims to draw in his favour from those facts is not permissible. If the plaintiff's case depends merely on the correctness or otherwise of the facts alleged by him, and he must succeed, if he can prove those facts, that is no case for an objection in point of law, but it is a clear case for a traverse, or if proof of some additional affirmative facts can destroy the effect of the plaintiff's facts, that is a case for a special defence. For instance, if a plaintiff claims some property as the sister of the deceased, the defendant may deny the fact that the plaintiff is the sister of the deceased; or he may contend that under the personal law to which the parties are subject a sister does not succeed to her brother. The former will be a traverse while the latter will be an objection in point of law, as it can destroy the plaintiff's case without inquiry into her allegation of fact. But if the defendant does not deny the right of a sister to succeed to her brother, his only plea will be a bare denial of the fact that the plaintiff is the sister of the deceased.

An objection in point of law should be framed in definite language thus:

"The defendant objects that the special damage stated is not sufficient in point of law to sustain this suit", or "that the damages claimed by the plaintiff are too remote", or "that the plaint discloses no cause of action for this claim".

Ordinarily these objections are heard and decided at the time of trial, but if the case or any part of it can be disposed off, on the decision of any such objection, the court should try that objection before proceeding to the trial of other issues, or even before the settlement of such issues.[13]

IV—Special Defence

A special defence, as its more suggestive and appropriate name "*plea of confession and avoidance*" shows, differs entirely from a mere traverse. It is one thing for a defendant to deny a contract, and quite another to admit the contract and to allege that he was induced to enter into it by fraud, or that it has been subsequently rescinded. While a traverse

13 O.14, R.2.

merely contradicts and compels the plaintiff to prove the fact, a special defence justifies or excuses, and the burden of proving facts on which such special defence is based, lies on the defendant. Therefore, the rule is that all matters justifying or excusing the act complained of, must be specifically and separately pleaded. The rule is thus enacted in O.8, R. 2, which makes it obligatory for the defendant to incorporate in the written statement :

(a) all matters which show the suit not to be maintainable;

(b) all matters which show that the transaction relied upon by the plaintiff is either void or voidable in point of law; and

(c) all other grounds of defence, not arising out of the allegations of the plaint, but are facts, upon which the defendant wishes to rely, such as fraud, misrepresentation, limitation, release, payment, performance or facts showing illegality.

The purpose is that the defendant must make out his line of defence so that the plaintiff is not taken by surprise and the plaintiff gets an opportunity to meet the pleas raised by the defendant. If this is not done at the time of filing the defence, which is the proper stage, the defendant will not be permitted to take such a plea at later stage unless amendment is allowed during trial.[14] Where at the stage, when issues are framed in the trial court, the counsel for the parties state that no other point of dispute was left out and if there was any other point in the pleadings, it was to be treated as given up or not pressed, the court may not allow a new point to be subsequently raised.[15] In a suit for rent the defendant did not plead that he was not in possession of a part of the premises and the rent should be proportionately reduced. The trial court gave decree for the contractual rent. In appeal the court did not allow him to raise this defence and the defendant had to suffer because of the bad pleading.[16] When no specific plea was raised in the written statement that the defendant was entitled to the benefit of section, 53A of the Transfer of Property Act, the appellate court may not allow such a plea to be raised for the first time because the

14 *Shanti Pd.* v. *Kalinga Tubes*, A 1962 Ori 202.

15 *Wali Singh* v. *Sahan Singh*, A 1954 SC 263; *Goswami Mahalaxmi Uapuaji* v. *Shab Ramchooldas Kalidas*, A 1970 SC 2025.

16 *Surendra Nath* v. *Stephen Court Ltd.*, A 1960 Cal 346.

other party would be taken by surprise.[17] Again the court may not permit a defendant to make out a case of misrepresentation during evidence when the same was not raised in the written statement.[18] Moreover a court will refuse to base its decision on any ground outside the pleadings.[19] When a party denies merely the factum of the contract and does not allege that contract is unenforceable, he cannot be heard to raise subsequently the question of illegality or validity of the contract.[20] A plea of the illegality of consideration will not be heard for the first time during arguments.[1] See also discussion in Chapter VIII "Variance between Pleading and Proof" and Chapter X "Amendment of Pleadings".

A plea of limitation cannot be taken for the first time in appeal.[2] But if a suit is, on the statements in the plaint itself, barred by limitation and no new fact is necessary to substantiate the plea, it can, it appears, be raised even at a later stage of the case, as O.8, R.2, requires only such grounds of defence to be specifically mentioned in the written statement as would, "*raise issues of fact not arising out of the plaint*".[3] Similarly, if a plea does not take the opposite party by surprise, it may be taken at a later stage; so a plea of adverse possession was allowed in appeal when there were sufficient materials on the record and the parties understood and fought out the case as if it involved an issue of adverse possession.[4]

Compound Pleas : A defendant should not confess and avoid when a mere traverse is sufficient. For, he will thus introduce new matters which he may have to prove, instead of putting the plaintiff to prove of his allegations. He can take alternative pleas of traverse and of confession and avoidance to the same claim, and it is not necessary that he should admit a fact before he can be allowed to raise an affirmative plea exempting

17 *Sadhop* v. *Hori Bhora*, A 1973 Ori 21.

18 *Rao Sahab* v. *Ranga Nathgopal Rao Kawakekar*, A 1971 SC 2548.

19 *Trojan Co.Ltd.* v. *Nagappa*, A 1953 SC 235.

20 *Bhupal* v. *Mam Chand*, 1973 ALJ 393, A 1973 All 543.

1 *Nur Ilahi* v. *Mewaz Khan*, 86 IC 683, 26 Punj LR 76.

2 *Babulal* v. *Jalakia*, 14 ALJ 1146, 37 IC 343; *Sheikh Haji Sadat Ali Khan* v. *Janji*, 69 IC 194 Cal; *Secretary of State* v. *Anand Mohan*, 66 IC 287, 34 CLJ 205; *Bhushan* v. *Narendra*, 60 IC 280, 32 CLJ 236.

3 *Panchanan* v. *Apurva*, 63 IC 785 Cal; *Bhushan* v. *Narendra*, 60 IC 280, 32 CLJ 236; *Udhav Singh* v. *Madhav Rao Scindia*, A 1976 SC 744.

4 *Bata Krista* v. *Shebaits of Thakur Jogendra Nath*, 53 IC 639 Cal.

himself from liability. He can always say, "I do not admit the contract, but even if it is proved, the claim is not maintainable because it is barred by limitation, or because the contract is legally void and not enforceable." But when a defendant really means to take both the pleas, he should do so unambiguously. He should be careful not to plead merely a traverse where he ought to plead a special defence, for, if he simply denies that he entered into a contract, he will not be allowed to show that the contract was void in law, e.g., that it was a wager or that it amounted to stifling prosecution.[5]

O.6, R.8, lays down that where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged, or of the matters of fact from which the same may be implied, and not as denial of the legality or sufficiency in law of such contract. But still in some cases the court will itself take notice of the illegality of a contract, if the same appears on the face of the contract or from the evidence brought before the court,[6] e.g., the court can take notice of the illegality of the sale of an occupancy holding even if the defendant does not raise the plea.[7] The same rule will apply to cases of tort also. If a plaintiff pleads that the defendant assaulted him, and the defendant denies this allegation, he cannot prove that he acted in self-defence. In a case of libel, mere denial of the publication will not imply a justification. But in a suit for restitution of conjugal rights, denial of marriage may be held to cover a plea that even if a marriage ceremony was performed, it was gone through without the defendant's free consent.[8]

Setting up Affirmative Case : It is not always wise for a defendant to set up an affirmative case, particularly when the case alleged by the plaintiff is very difficult of proof and the probability is that he will not be able to substantiate it. For example, in a suit for damage to the plaintiff's house by fire said to have been started by the defendant, the plaintiff has to prove by satisfactory evidence that the defendant had started the fire. It is, therefore, wiser merely to deny the allegation against the defendant and

5 *Nur Ilahi* v. *Mawaz Khan*, 7 Lah LJ 86, A 1925 Lah 345, 89 IC 683; *Union of India* v. *Surjit Singh*, A 1979 SC 1701.

6 *Ram Jawai* v. *Gopal Chand*, 64 IC 150.

7 *Mahadev* v. *Mahadavji*, 12 IC 956 Bom.

8 *Soctt* v. *Brown Doering McNab & Co.*, 2 QB 724; *Alice Nary Hill* v. *Clarke*, 27 A 256.

to leave the plaintiff to discharge the heavy burden which lies upon him than to set up an affirmative case that in fact X had started the fire, and thus make the defendant also share the burden of proof to a certain degree. For, if the defendant fails to prove that X started the fire, the court will be more easily inclined to believe, even the somewhat less strong evidence of the plaintiff, against the defendant. Similarly, in a suit for possession based on title, a plaintiff cannot succeed unless he proves his title and it is unnecessary for the defendant to plead his own title or even to set up defects in the plaintiff's title. It is sufficient to deny the plaintiff's title and when the plaintiff attempts to prove his title he can under his plea of denial avail himself of all defects that are disclosed in plaintiff's title.[9] It is, on the other hand, sometimes most desirable to add one's version after denying the plaintiff's version, in order to show clearly what the real point in dispute is. If, for instance, a plaintiff sets out certain clauses in a document as supporting his claim, the defendant might point out other clauses which favour his defence. In each case, a discretion should be exercised by the pleader in this respect. It is ordinarily unnecessary to plead an affirmative case, unless there is a hope of the case being improved thereby. When, however, an affirmative case is pleaded, it should be done clearly and specifically, with such particulars as may be necessary, and should not be indirectly alleged nor should it be left to be inferred from some vague allegations. For example, if in a title suit for possession the defendant wants to plead title in himself in addition to the denial of plaintiff's title, he should definitely assert that he is the owner of the land, giving such particulars of his title as may be necessary.

Frivolous Pleas : Frivolous and untenable pleas should never be raised. They may lead the court to deprive the defendant of the costs or saddle him with compensatory costs under section 35 A, C.P.C. irrespective of the decision on the other issues and may be irrespective of the result of the suit.[10] The law requires that you must make up your mind in the beginning what line you want to adopt and what pleas you want to urge, and must so frame your written statement as to give notice of this to your opponent.

9 *Jagdish Narain* v. *Nawab Said Ahmad Khan*, A 1946 PC 59; *Ram Pheran* v. *Shri Ram*, A 1947 Oudh 174; *Gandhappa Pedammie* v. *Manchikalapudi Subbarao*, (1966) 2 Andh LT 416.

10 *V. Guarnam* v. *Veerangn*, A 1943 Mad 286.

Some Special Defences

Limitation : The plea of limitation is a complete defence to a claim and should always be raised prominently in the written statement. It will be in very rare cases that such a plea, if not taken in the defence, will be allowed to be raised in argument, or in appeal,[11] in view of O. 8, R. 2. If, however, the plea is such that it can be substantiated without any evidence and is apparent on the face of the plaint itself, it may be allowed to be taken at a later stage of the suit.

If the plea of limitation relates not to the whole case but only to a portion of it, that portion should be clearly indicated in the pleading thus : "Thus claim for mesne profits for the year 1976 is barred, etc." or, "so much of the claim as relates to movable property is barred, etc." In such cases the plea should not be raised in the general form that "the suit is barred by, etc." or in the indefinite form that "at least a portion of the claim is barred, etc."

A plea of limitation should be raised in the following form: "The suit is barred by article—, or article—, of the second schedule to Limitation Act, 1963."[12] When the defendant is in doubt as to the exact article applicable, there is no harm in pleading more than one article in the alternative. However, even if no particular article is mentioned, the plea of limitation cannot necessarily be said to be indefinite.[13] In case limitation is pleaded under some special Act, that Act and its relevant section should invariably be referred to.

In some cases, some facts will also have to be briefly stated to explain the plea of limitation. For instance, "the plaintiff has never been in possession of the house at any time within 12 years before the suit, and suit is, therefore, barred by Article 64 of the second schedule to Limitation Act, 1963", or "the defendant has been in adverse possession of the property for over 12 years before the suit, and the suit is therefore barred by Article 65 of the second schedule to Limitation Act, 1963", or "the defendant had denied the plaintiff's title so far back as in 1972, hence the suit for declaration is barred by Article 113 of the second schedule to

11 *Manmohan Das* v. *Bahauddin*, A 1957 All 575.
12 Appendix A, Sch. 1 C.P.C. General Defences.
13 *Jnanendra* v. *Umesh Chandra*, 26 CWN 584, A 1922 Cal 544 (FB).

Limitation Act, 1963". In such cases, the bare plea of limitation without specification of such facts would be indefinite.

The Limitation Act of 1963 has considerably simplified the matter. Suits for possession have, broadly speaking, been divided in two classes. Article 64 applies to suits which are not based on title but on previous possession and when the plaintiff while in possession had been dispossessed. The 12 years period of limitation in this class of cases will start from the date of dispossession. The other class of suits, provided for in Article 65, consists of suits for possession of immovable property or any interest therein where the claim is based on title. For this class of suits also the period of limitation is 12 years but starts from the date when the possession of the defendant becomes adverse to the plaintiff. The Explanation to Article 65 includes within its purview suits which were formerly covered by Articles 125, 127, 138, 140 and 141 of the Limitation Act of 1908. In view of this change in the law, before deciding whether to plead limitation in a suit for possession and fixing the Article to be pleaded if the plea is to be taken up at all, it must first be seen whether the plaintiff has based his claim on title or not. If the answer is in the affirmative, Article 65 will get attracted. If the answer is in the negative and the suit is based not on title but prior possession and dispossession, Article 64 will apply.

Jurisdiction : Jurisdiction of a court has several aspects:

(a) Territorial, or with respect to the place of suing;

(b) Pecuniary or with respect to the grade of court;

(c) Whether the suit lies in an ordinary civil court or in the small causes court;

(d) Whether the suit lies in the civil court or in the revenue court (in respect of agricultural holdings or estate);

(e) Power to take cognizance and determine the given cause: Whether the jurisdiction of the civil court is expressly or impliedly barred (Section 9, C.P.C.);

(i) *Implied bar* : Where the right asserted is not a civil right at all;

(ii) *Express bar* : (A) Many statutes contain a non-obstante clause, such as that the decision or order of any authority under the statute shall

be final or that it shall not be questioned in any court, e.g., the Income Tax Act,[14] the Sales Tax Acts[15] of various States, the rent control statutes [16] and the Administration of Evacuee Property Act, etc.

(B) Some statutes provide that no suit shall lie in any court in respect of any matter cognizable by an authority or tribunal constituted under such statute. In other words, a new right is created by such statute and an exclusive machinery has also been provided by the same statute for the enforcement of that right, e.g., the Industrial Disputes Act.,[4] the Payment of Bonus Act, the Employees State Insurance Act.

In cases (a) to (d) above, it is a dilatory plea, because if the objection succeeds, the defendant does not win the case on the merits, but the plaint may be returned to the plaintiff for presentation to the proper court. In some cases, however this plea results in the dismissal of the suit, e.g., when the suit should have been filed in some special court under a Special Act, but has been filed in the Civil Court [18] or when on the facts alleged the court in which the suit is filed would have had jurisdiction but the allegations being found to be wrong and the court has really no jurisdiction.[19]

The plea of jurisdiction should be raised in the written statement, and in case it involves an objection to territorial [20] or pecuniary [1] jurisdiction of the court, it shall not be heard in appeal or revision unless it has been taken in the trial court, at or before, the settlement of issues. But if it is once taken, the fact that it was not repeated in the first appellate court does not debar the defendant from pressing the plea again in second appeal.[2] The objection to the place of suing can only be entertained by appellate or revisional court if it was taken in the trial court, at or before

14 *Raleigh Investment Co.* v. *G-G-in-C*, A 1947 PC 78.

15 *Dhulabhai* v. *State of M.P.*, (1969) 3 SCR 662.

16 *Brij Roy Krishna* v. *Shaw Bros*, A 1951 SC 115; *Ram Swarup* v. *Shikhar Chand*, A 1966 SC 893.

17 *Premier Automobiles Ltd.* v. *K.S. Wadke*, (1976) 1 SCC 496 (para 10).

18 *Chandrika Misir* v. *Bhaiyalal*, (1973) 2 SCC 474.

19 *Hiralal* v. *Piarey Lal*, A 1933 All 745; *Sitala Din* v. *Mohan*, A 1937 Oudh 183.

20 Section 21, C.P.C.; see also, *Hiralal Patni* v. *Kalinath*, A 1962 SC 199; *Mani Lal Hargun Das* v. *Gangaben Ganeshbhai*, A 1979 Guj 98.

1 Section 11, Suits Valuation Act, 1887.

2 *Firm of Rai Bhahdur Bansi Lal* v. *Ghulam Mahbub*, A 1925 PC 290.

settlement of issues and only if further, there has been a consequent failure of justice.[3] Other kinds of objections, e.g., one to the jurisdiction of a civil court, can of course be entertained at any stage of the suit, provided they are patent on the face of the proceeding.[4] It has also been held that a court will not to refuse to hear a plea of jurisdiction merely on the ground of its being raised at a late stage but the fact may be taken into consideration, in awarding costs.[5]

Facts on which the objection to jurisdiction is based should invariably be set forth in the plea, e.g., "The defendant denies that he resides within the jurisdiction of this court, hence this court has no jurisdiction to try the suit", or "The contract was not made at Bareilly but at Bombay, hence, this court has no jurisdiction, etc.", or "The suit is one cognizable by Small Cause Court, hence, etc.". or "The value of the subject-matter of the suit it above Rs.5,000, therefore, etc." If more than one court have concurrent jurisdiction to try a suit, in order to exclude jurisdiction of one court, the condition of the contract excluding jurisdiction should be specifically alleged[6] (for further discussion on this aspect, *see* heading "Jurisdiction" under Chapter XIII, *ante*).

The plea in a general and vague form such as "This court has no jurisdiction to try the suit" cannot be permitted, as it conveys no definite idea about the exact nature of the objection.

Accord and Satisfaction : If something is given or done by the defendant, to or for the plaintiff, which the latter accepts upon a mutual agreement that it shall be a discharge of a certain claim, the plea is called that of "accord and satisfaction". The agreement is the "accord" and the thing given or done in performance of it is "satisfaction". Mere accord without satisfaction is however no defence.[7] For example an agreement to execute a mortgage for a simple bond debt is only an accord and is no

3 *Korpilan Uneen's daughter Pathumma* v. *Korpilan Uneen's son Kuntalam Kutty*, A 1981 SC 1683.

4 *Nindhi Lal* v. *Mazhar Husain*, 7 A 230; *Sidheshwar* v. *Harihar*, 12 B 155; *Sayad* v. *Nana*, 13 B 424; *Velayudam* v. *Arunchala*, 13 M 273.

5 *Girja Kuer* v. *Shiva Parsad*, A 1930 Pat 160, 16 PLT 103.

6 *Road Transport Corp.* v. *Kirloskar Brothers Ltd.*, A 1981 Bom 299.

7 *Lachmin Das* v. *Baba Kali Kamliwala*, 44 A 258, 64 IC 990, 20 ALJ 65, A 1922 All 13 DB; *Karam Chand* v. *Dunlop Rubber Co.*, 103 IC 86 Lah.

defence to suit on the bond, but if the agreement is performed, e.g., the mortgage-deed is executed by the defendant in favour of the plaintiff, it is a "satisfaction" and is a good defence to a suit on the original bond.

Accord and satisfaction may be by giving and accepting a bond or a pronote or by doing work or by delivering any goods or other property in lieu of the plaintiff's claim, or by payment of a portion of debt and remission of the rest. 'Accord' or an agreement to accept may be incapable of proof under section 92, Evidence Act, but if satisfaction has been made under the agreement it can be proved and the provision of section 92 will not provide a bar as they will not be attracted.[8]

Payment or Adjustment : In a suit for money, the defendant is entitled to plead discharge by payment or adjustment either wholly or in part. The mode and the time of the alleged payments must be specified in the plea. It is unnecessary to allege those payments for which the plaintiff has himself given credit. Under Section 91, Contract Act, even a payment made by a third person may be pleaded as a defence to the suit of the promisee, but payment to a third person is no defence unless that person had, or had been held out to the debtor, by the creditor, as having the authority of the creditor to receive the payment. In the latter case, the authority, or facts implying it should be pleaded.[9]

A payment or adjustment may be pleaded in the following form:

"The defendant pleads a payment of Rs. 400 to the plaintiff, on June 21, 1984, towards the bond in suit," (it is unnecessary to add, as is often done, that the plaintiff has dishonestly failed to credit the same in his claim), or "In addition to the payments credited by the plaintiff in the account appended to the plaint, the defendant has made several payments of a total amount of Rs. 6,000, particulars of which are given below—

1. Paid in cash on June 2, 1980—Rs.1500.

2. Paid by price of a cooler purchased by the plaintiff from defendant on August 3, 1980—Rs, 2000.

3. Paid in cash on December 12, 1980—Rs. 2500."

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8 *Collector of Etah* v. *Kishori Lal*, 1930 ALJ 1193.

9 *Muhammad Khaleef* v. *Les Tanneries Lyonnaises*, A 1926 PC 34, 49 M 435, 1926 MWN 485.

"The defendant paid the rent for the year 1984, on June 4, 1985, to Innayat Ali, a *karinda* of the plaintiff who had been held out by the plaintiff, as having the authority of the plaintiff to collect rent from the tenants."

Sometimes when payment is not made in cash, the plea is so badly drafted that it approaches a plea of set off which can not be tried without payment of an *ad valorem* court-fee. For instance, a defendant sells a cooler for Rs. 2000 to the plaintiff on the agreement that the price would be credited towards a bond held by the plaintiff. When the plaintiff brings a suit on the bond without giving credit for this sum, the defendant pleads: "The defendant sold a cooler for Rs. 2000 to the plaintiff but the latter has not given credit for the price in this suit" or "The defendant is entitled to a deduction of Rs. 2000 on account of the price of a cooler which the plaintiff had purchased from him." The chief element which would make this a plea of payment is omitted, viz., the agreement of the plaintiff to credit the price towards this bond debt. The plea should be framed thus :

"On February 20, 1981 the plaintiff purchased a cooler from the defendant for Rs. 2000 and agreed to credit the price towards the debt due to him under the bond in suit. The defendant, therefore, claims credit for the amount and consequent proportionate reduction in the interest claimed by the plaintiff", or more shortly, thus :

"The defendant pleads payment of Rs. 2000 towards the bond in suit by the price of a cooler purchased by plaintiff from him on 'February 20, 1981', which the plaintiff agreed to credit towards the bond."

A plea of payment or adjustment is not the same as a plea of set off. Because payment or adjustment is always made in whatever manner before the date of filing written statement and as soon as it is made, the debt is discharged to that extent; while in a case of set off the defendant's dues remain outstanding and they have yet to be adjusted by the order of the court. In short, payment or adjustment refers to part or full satisfaction of the plaintiff's debt, by act of the parties, while for the plea of set-off, the court has to adjudicate the matter and pass order for part or full satisfaction of the debt.[10]

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10 *Damodar Patnaik* v. *Biswanath Raju*, (1972) 1 CWR 798; *Town Municipal Council* v. *Murkul Mahalingapa*, (1975) 1 Karn LJ 379.

Estoppel : This is also one of the most abused pleas taken in defence. It really arises only in a small fraction of cases in which it is pleaded. Any and every act or omission or mere silence of the plaintiff is pleaded as an estoppel against him. "The defendant has been in possession for a long time without the plaintiff's interference and the plaintiff is now estopped from ejecting the defendant", or "The defendant was recorded as a tenant in the settlement records 8 years ago and the plaintiff never stirred to have the entry corrected, he is, therefore, estopped from ejecting the defendant now as a trespasser, etc.", are pleas too often found in written statements. Estoppel is eminently a matter of pleading and if it is not set up in the pleadings or in the issues it cannot be availed of later.[11] It is indeed a mixed question of law and fact and must be specifically pleaded with definite allegations.[12] The plea of estoppel can be raised by both the plaintiff and the defendant and the onus of establishing the fact from which estoppel arises rests upon the person pleading it.[13] The requirements of the law of estoppel must be carefully studied, and unless each element of estoppel can be established, one should not think of pleading estoppel as a defence.

If one wants to rely on estoppel, he must set up such plea specifically by making the necessary averments.[14] The particular act, omission, conduct or deed which is alleged to constitute an estoppel, and the change which it has caused in the defendant's position, should be clearly specified in a plea of estoppel.[15] Unless the estoppel operates against the whole suit, the defendant must also specify the allegations which the plaintiff is estopped from making. Such pleas as "The suit is barred by section 115, Evidence Act", or "the plaintiff is barred by the principle of estoppel from preferring this claim, or from denying the defendant's title" should never be set up. The following is a specimen of a correct plea of estoppel :

"The plaintiff is estopped from denying the defendant's title to the house because, on August 20, 1982, he negotiated the sale of it by one Abdulla to the defendant and thus made the defendant believe that it

11 *Pappajyinal* v. *Alamelu*, A 1928 Mad 467.
12 *Associated Publishers Ltd.* v. *Bashyam*, A 1961 Mad 114 (FB).
13 *Mitra Sen* v. *Janki R. Kaur*, A 1924 PC 213.
14 *Manikya* v. *Lakshmi*, 63 MLJ 319, 139 IC 465.
15 *Kanhailal* v. *Bhaiyalal*, 16 NLJ 248.

belonged to the said Abdulla, and upon that faith the defendant purchased it from the said Abdulla on payment of a price of Rs. 50,000."

Promissory Estopel: Where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal relationship between them and to be acted on accordingly then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relationship, as if no such promise or assurance had been made by him, but, he must accept their legal relationship subject to the qualifications which he himself has so introduced.[16] Though the doctrine has been variously described as 'equitable estoppel', 'quasi-estoppel' and 'new estoppel', it is a doctrine evolved by equity in order to prevent injustice. The doctrine of promissory estoppel has also been applied against the Government. Since the doctrine of promissory estoppel is an equitable doctrine it must yield when equity so requires.[17] In the absence of pleadings and proof regarding erroneous or fraudulent representation on the part of the transferor, the benefit of this doctrine cannot be invoked.[18]

Res-judicata : The plea of *res judicata* should be specifically pleaded and if not raised it will be deemed to have been waived.[19] It is not enough to say that the suit is barred by *res judicata* or by section 11, C.P.C. Particulars should be specified, thus, "The plaintiff's claim is barred by the decree in Suit No. 194 of 1978 between the present plaintiff and Munna Lal, the father of the present defendant, from whom the defendant claims to have inherited the house in dispute, passed on May 20, 1979 by the Civil Judge at Meerut" or "the plaintiff had brought a suit for the same

16 Halsbury's Laws of England - edition Vol.15 - page 174.

17 *Intrans System Private Ltd.* v. *State of Kerala*, A 1996 Ker 161; *State of Rajasthan* v. *Mahavir Oil Industries*, A 1999 SC 2302.

18 *Mahipat Missir* v. *Ganpat Sah*, A 1963 Pat 277; *Bijieshari Bakash Singh* v. *Gajadhar*, A 1941 Oudh 123; Central *London Private Ltd.* v. *Hightrees House Ltd.*, 1956 (I) All ER 256; *Motilal Badmapat Sugar Mills Co. Ltd.* v. *State of U.P.*, A 1979 SC 621; *Union of India* v. *Godfrey Philips India Ltd.*, A 1986 SC 806; *Vasant Kumar and Radhakishen Vora* v. *Board of Directors of the Port of Bombay*, A 1991 SC 14.

19 *Sansar Chand* v. *Dinanath*, 155 IC 571 All; see also *Mayur Travels* v. *Mercury Travels India Ltd.*, 1994 (2) DLT 64 (Del); *Abdul Latif Sahib* v. *Shaik Dastagir Sahib*, 1993 (2) APLJ (HC) 169, 1993 (3) Andh LT 56 (AP).

relief, as is claimed in the present case against Munna Lal deceased, the father of the defendant, through whom the defendant claims the house in dispute. The suit (being No. 194 of 1978) was decided against the plaintiff on May 20, 1979 by the Civil Judge at Meerut. This suit is, therefore, barred by Section 11, C.P.C." In a case where copies of the judgment or pleadings of the previous suit had not been filed, the High Court ruled that it should have been stated what the issues were, what was the decision on them and how the decision operated as *res judicata.*[1]

Bar of O.2, R.2 : Copy of plaint in previous suit should also be filed in order to show identity of cause of action.[2] The proper test for deciding whether the provisions of O.2, R.2, apply is to see whether subsequent suit is founded on the same cause of action.[3]

Bar of Insolvency Act : Section 28 (2) of Provincial Insolvency Act, provides that after an order of adjudication no creditor of the insolvent can commence any suit against him without the leave of the court.[4] Where this is applicable it should be specifically pleaded.

Acquiescence : This is a good defence, specially in a suit for some equitable relief such as a mandatory injunction. Mere silence of the plaintiff, however, does not amount to acquiescence. Acquiescence which will deprive a party of his legal rights must amount to a fraud and the following are the elements necessary to constitute such frauds: (1) defendant or the party pleading acquiescence must have made a mistake as to his legal rights, i.e., must have acted in a *bona fide* but mistaken belief of his right; (2) he must have spent money or must have done some act on the faith of such belief; (3) the plaintiff or the party possessing the legal right must know of the existence of his own legal right which is inconsistent with the right claimed by the defendant; (4) he must also know of the defendant's mistaken belief of his right; and (5) the plaintiff must have encouraged the defendant in his expenditure of money or in the other act which he has

1 *Kailashnath* v. *Chandrabhan*, 1935 AWR 500, 156 IC 970; *Gurbux Singh* v. *Bhooralal*, A 1964 SC 1810, (copy of judgement necessary).

2 *Parimal* v. *P.K.Sen*, A 1985 Ori 286; following, *Gurbux Singh*, supra.

3 *State of Maharastra* v. *National Construction Company*, (1996) 1 SCC 735, A 1996 SC 2367.

4 *C. Sriramamutti* v. *Official Receiver*, A 1957 AP 692; *Official Receiver* v. *Jugal Kishore*, A 1963 All 459; *Damodar* v. *Banwarilal*, A 1960 Cal 469.

done, either directly or by abstaining from asserting his legal right.[5] It is not essential to find all the five test literally applicable in every case and the real test is "whether on the facts of the particular case, the situation has become such that it would be dishonest or unconscionable for the plaintiff to continue to seek to enforce it".[6] When the landlord did not raise any objection for 7 years against the tenant putting the building for a different use he cannot make use of the fact of different use as one of the grounds for eviction;[7] Where the landlord admitted knowledge of the sub-tenancy for four years and did not bring a suit within that period there would be a presumption of acquiescence.[8] The defendant should plead full facts establishing the elements constituting "acquiescence". It is not sufficient to plead boldly that "The plaintiff's claim is barred by the principle of acquiescence," or "The plaintiff acquiesced in the defendant's act and cannot therefore sue now".

The proper plea would be somewhat as follows :

"The defendant built the house at considerable expense in the presence of the plaintiff, on vacant land, in the honest belief that it has been allotted to him at the partition, and the plaintiff, while knowing that the said land had been allotted to him and that the defendant was acting under the said honest belief, did not stop him. He is, therefore, estopped by the principle of acquiescence from having it demolished now."

Waiver: Whenever a party having a right to insist upon something or other being done, does not insist upon that being done, and with a knowledge that it has not been done, goes on dealing in the matter, just as though everything has been duly done, the natural inference from his conduct is that he has waived or dispensed with the doing of it, in which case, of

5 *Willmott* v. *Barber*, (1880) 15 Ch D 96; *Jai Narayan* v. *Jafar Beg*, A 1926 All 324 (DB), 24 ALJ 355; *Chotu* v. *Inayatullah*, 19 CWN 191; *Budh Singh* v. *Parbati*, 4 ALJ 556; *Beni Ram* v. *Kundan Lal*, 21 A 496; *Kazim* v. *Ram Sarup*, A 1929 All 877; *Amritsarya* v. *Diwan Chand*, 114 IC 70, A 1929 Lah 625; *Kanhaiya Lal* v. *Hamid Ali*, 7 OWN 271, 122 IC 774; *Mahal* v. *Rana*, A 1938 Lah 88, 177 IC 198; *Dan Bahadur Singh* v. *Teelwand Singh*, 167 IC 870, A 1937 Oudh 226; *Narayan* v. *Sankaram*, 168 IC 842, A 1937 Mad 158; *Abdul Kader* v. *Upendralal*, 40 CWN 1370, A 1936 Cal 711; *Masooma Bibi* v. *Mohd Said*, A 1942 All 77.

6 *Shaw* v. *Applegate*, 1978 (1) All ER 123.

7 *D.C.Oswal* v. *V.K.Subbiah*, A 1992 SC 184.

8 *Mahabir* v. *Anant Ram*, A 1966 All 214.

course, he cannot afterwards raise the objection that it was not done. Delay is not waiver, inaction is not waiver though it may be evidence of waiver.[9] For waiver there must be intentional or voluntary abandonment of a known right.[10] It may either be express or implied from conduct but its basic requirement is that it must be an intentional act being fully informed as to his rights.

Illegality : Illegality of a contract should be pleaded along with the facts showing the illegality. Therefore, it will not be enough to plead that the contract is legally void in point of law but facts rendering it void must be pleaded, e.g., that it was in the nature of a wagering contract or that it was without consideration. But if the illegality or invalidity of a contract follows from the facts alleged in the plaint itself, they need not be repeated in the written statement. Where a transaction is shown to the court to be illegal, the court can take a notice and refuse relief even if the illegality is not pleaded by the defendant.[11]

Justification : A plea of justification is usually raised in a suit for libel or slander. Unless there is a strong hope of establishing the justification, it is better not to plead it but to tender an apology, for an unsuccessful attempt at justification a libel naturally aggravates the original wrong offence, and the judge is inclined to award, in such cases a much higher amount as damages than he would if an apology were offered. In a suit for malicious prosecution, a plea of a reasonable and probable cause may sometimes be easier to prove than one of the truth of the charge, but that would be possible only where the facts alleged in the prosecution were not asserted to be within the personal knowledge of the complainant defendant. Full particulars will also have to be given. The plea must be a justification of the exact charge, and definite and unequivocal words should be used. If a specific charge is justified by a plea of truth, it is sufficient simply to say so, but if the charge is a general one, instances must be given as particulars to justify the charge.

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9 Per Lord Bowen in *Selwyn* v. *Garfit*, 1887-38 Ch.D. 273.

10 *Krishnadas* v. *S*, A 1977 SC 1691.

11 *Narayana* v. *Ramalingan*, A 1933 Mad 187, 145 IC 599; *Saibalani Devi* v. *Phanindra Mohan Mozumdar*, A 1965 SC 1364.

Laches : Laches or delay in filing a suit, however long, is no defence unless it amounts to waiver, abandonment or acquiescence.[12] Acquiescence, properly speaking, relates to inaction during the performance of an act, while laches relates to the delay after the act is done. Delay can certainly be a good evidence of acquiescence or waiver, but what should be pleaded as a defence should be the acquiescence, waiver or abandonment and not the delay which is only an evidence of it.

Transfer from Ostensible Owner *or* Fraudulent Transfer to Defeat Creditors : *Sections* 41, or 53A, *Transfer of Property Act* : A defence under these sections can be raised only by setting up in the written statement a definite and clear plea satisfying all the terms of the section.[13] Even if one ingredient is left out, no notice can be taken of the plea. The defendant should definitely plead that he had taken the transfer for value, that he has done so from a person who was the ostensible owner, and that he had done so in good faith believing that such person had the power to transfer. A bold plea that the defendant is protected by section 41 or 53A is not good, as it would amount to pleading law.

V—Set-Off

Legal Set-Off : A defendant to a suit for recovery of money cannot only defend that suit but can also claim a set-off in respect of any claim of his own, and if his claim exceeds that of the plaintiff, he can make a claim for a decree for the amount in excess.[14] Such a plea of set-off will be tried as if the defendant had brought a suit and will be determined even if the plaintiff's suit is dismissed or withdrawn.[15] There are certain conditions under which a claim by way of set-off is allowed.[16] They are as follows:

(1) The sum claimed must be ascertained;

(2) It must be legally recoverable, implying *inter alia* that it must not be barred by limitation;

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12 *Murarilal* v. *Balkishan*, 95 IC 636, A 1926 Nag 416.

13 *Sheogobind* v. *Anwar Ali*, 116 IC 779, A 1929 Pat 305; see also, *Abdul Shakoor* v. *Arji Papa Rao*, A 1963 SC 1150; *Varunagiri* v. *Raja Kishore*, A 1983 Orissa 107; *Kukaji* v. *Basantilal*, A 1955 MB 93, *Illikkal Devaswom* v. *Pottakkatti Narayanan Raghavan*, A 1966 Ker 96 (FB).

14 O.8, R.6 & O.20, R.19.

15 *Bansidhar* v. *Lalta Prasad*, A 1934 All 543, 1934 ALJ 293, 150 IC 343; *Moideen* v. *R.M.P. Chettyar Firm*, 152 IC 552, A 1934 Rang 160.

16 *Jamnadas* v. *Beharilal*, A 1941 Nag 258; O.8, R.6.

(3) It must be recoverable by the defendant, or by all the defendants if more than one;

(4) It must be recoverable from the plaintiff, or all the plaintiffs if more than one;

(5) The claim must not exceed the pecuniary limit of the jurisdiction of the court in which the suit is brought. It is, however, open to give up part of his claim in order to bring it within the said pecuniary limit, of course, in such case the rest of the amount cannot be claimed subsequently as it will be barred by O.2, R.2.

(6) Both parties must fill the same character in the defendant's claim as they fill in the plaintiff's, e.g., no set-off for money claimed by a defendant in a personal capacity will be allowed in a suit against him as an executor. The illustrations to O. 8, R.6 show that even a joint debt and a separate debt cannot be set off against each other.

The condition that the sum claimed must be "ascertained" is important. It excludes all claims for unliquidated damages and mesne profits, the amount of which is not ascertainable until the court determines it.[17] But the mere fact that a simple arithmetical calculation is necessary to arrive at the sum which the defendant should recover is no ground for holding that the sum is unascertained. For example, interest may be calculated according to the contractual rate. A plaintiff sued for the balance of price of certain articles sold. The defendant pleaded that this transaction formed part of a number of transactions between the parties in which there were payments to be credited on both sides, and, at the date of suit, a definite known balance was due to the defendant. *Held* that this was a claim for an ascertained sum.[18] A set off can be preferred in recovery proceedings initiated at the instance of a company which is being wound up.[19]

Equitable Set-Off : In addition to the legal set-off, equitable set-off of even unascertained sums, as damages, is also allowed, provided that both the cross-demands arise out of one and the same transaction or are

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17 *Kishorchand* v. *Madhowju*, 4 B 407.

18 *Firm Ram Sarup Radhakishen* v. *Harprasad*, 22 ALJ 844.

19 *Maruti Udyog Ltd.* v. *Blue Star Ltd.*, A 1995 P&H 45 (DB); *The Official Liquidator of High Court of Karnataka* v. *Lakshmikutty*, A 1981 SC 1483.

so connected in the nature and circumstances that they can be looked upon as parts of one transaction.[20]

For example, if A sues B for the price of 120 bales out of 200 agreed to be supplied by him, B may claim, by way of set-off, damages for non-delivery of the remaining 80 bales. In a suit for salary by a servant, the master can claim to set-off damages sustained by him by reason of the plaintiff's neglect and misconduct.[1] In a principal's suit for accounts against his agent's surety, the latter can set-off the agents dues.[2] In a suit by a seller for unpaid purchase money, the buyer can claim set-off for the mesne profits of the land sold.[3] So, in a suit by an heir against a co-sharer for his share of the property. the latter can set-off the government revenue paid by him.[4] In mortgage suit sums are allowed to be set-off which are found due to the mortgagor on accounting.[5]

A claim of set-off must be specifically made in the written statement, and no claim can be made unless the defendant files a written statement.[6] should be raised after the defence to the plaintiff's claim. It should give all the particulars of the set-off, the amount claimed, the cause of action for the amount, the person to whom and by whom it is due, and the date on which it became due. The whole amount due to the defendant must be claimed, otherwise O.2, R.2, will bar the defendant's right to bring a separate suit for the portion relinquished.[7]

After stating all the particulars of the claim of set-off, the defendant must end as follows:

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20 *Apaji* v. *Noor Mohammad*, 1936 AMLJ 10; *Nathmal Bhairon Bux & Co.* v. *Kashi Ram*, A1973 Raj 271; *Mackinnon Mackenzie & Co. (Pvt) Ltd.* v. *Anil Kumar Sen*, A 1975 Cal 150, 78 CWN 860.

1 *G. Chisholm* v. *Gopal Chunder*, 16 C 711; (see however, *Victoria Mills Co.* v. *Brij Mohan*, 29 A 362, (where the master was not allowed to set off a month's salary in lieu of notice).

2 *Kalanand* v. *Sri Prasad*, 17 CWN 1050; 19 IC 901, 19 CLJ 152.

3 *Sakhamuri* v. *Nimmaraju*, A 1948 Mad 430, 1948 MWN 260, 1948 MLJ 290.

4 *Ramdhan* v. *Permanand*, 19 CWN 1183.

5 *Sheo Saran* v. *Mahabir*, 32 C 576; *Parasuram* v. *Venkatachalan*, 25 MLJ 56; *Nathan Prasad Shah* v. *Kali Prasad Shah*, A 1926 Pat 77 (DB).

6 *C. Simon* v. *Arogiasami*, 25 IC 361, 16 MLJ 122.

7 *Nawbut* v. *Mahesh*, 32 C 654 (659); *Kathersa* v. *Abdur Rahim*, A 1942 Mad 580.

"and the defendant claims to set-off that sum against the plaintiff's claim in this suit" adding, if necessary, "and prays for judgment in his favour for the amount of his claim which may be found to be in excess of the plaintiff's claim".

Court-fee must be paid on the valuation of the claim of set-off,[8] both legal and equitable.[9] It is payable on the whole amount claimed by the defendant and not only on the amount claimed in excess of the plaintiff's claim.[10] It has been held that if court-fee is not paid on the written statement, the court should not demand it but should refuse to entertain the claim [11] as it is not a case of deficient, but of no court fee. The Patna High Court has, however, taken a more lenient view and held that court-fee could be accepted at any stage.[12]

A plea of set-off should be distinguished from one of adjustment. In the latter case the plaintiff's claim is alleged to have been paid or adjusted prior to suit. In the former the adjustment is desired after the written statement.[13] A plea of adjustment is nothing else but a plea in the nature of payment. It cannot form the subject-matter of a separate suit like a set-off or a counter-claim. As to court-fee on a claim for equitable set-off, it has been held in some cases[14] that no court fee is payable; but a different opinion has been taken in other cases.[15] Court-fee is not required in a

8 Section 1, Article 1, Court Fees Act.

9 *Shiromani Sugar Mills* v. *Sugan Chand*, A 1938 All 552; *Ratanlal* v. *Madari*, 1950 ALJ 706.

10 *Jugal Kishore* v. *Bankey Bihari*, A 1935 Pat 110; *Girdharilal* v. *Surajmal*, A 1940 Nag 177, 190 IC 651.

11 *Muthu Erulappa* v. *Vunuku*, 36 IC 957.

12 *Jugal Kishore* v. *Bankey Bihari*, A 1935 Pat 110.

13 *Chandra Dutt Tiwari* v. *Shanti Ram*, A 1967 Pat 358; *Haji Shivji & Co.* v. *Haji Dev Raj & Co.*, ILR 1963 Guj 822; *Durga Prasad* v. *Sadashiv*, A 1969 Ori 171; *Town Municipal Council* v. *Murkul Mahalingappa*, (1975) 1 Kam LJ 379.

14 *Madan Mohan* v. *Bohra Ramlal*, 34 ALJ 421, A 1934 All 115; *Basheshwar Nath* v. *Grindlay & Co.*, 171 IC 649, A 1937 Lah 73; *Gopal Das* v. *Jhingur Pd.*, 1964 ALJ 21 SC.

15 *Laxmidas Dayabhai Kabrawalla* v. *Nanabhai Chunilal Kabrawalla*, A 1964 SC 11; see also, *Shiromani Sugar Mills Ltd.* v. *Seth Sugni Chand Hashmat Rai & Co.*, A 1938 All 552; *W. Wilrow* v. *Mahadeo Govind Mehendale*, A 1943 Bom 227; *Rattan Lal* v. *Madari*, 1950 ALJ 706; *Sadasheo Krishnarao Buty* v. *Nathu Bala Mahar*, A 1943 Mad 314; *Lakshmi Narayan Sukhani* v. *Kamakhya Narayan Sukhani*, A 1954 Pat 30.

claim by defendant for improvements, in a suit for tenant's ejectment,[16] But in Madras and Nagpur a contrary view has been taken.[17]

A party is not bound to claim a legal set-off but may bring a separate suit for the recovery of money claimed by him,[18] but an equitable set-off should always be pleaded in the first suit.[19]

VI—Counter Claim

The expression 'Counter Claim' earlier found no express mention in any of the provisions of C.P.C.[20] But by amendment made by Central Act, 1976 provision for counter-claim has been expressly made in O. 8, R. 6A to 6G. A counter-claim need not unlike a set-off, be for an ascertained sum of money but may even be for damages.

If the amount due to the defendant is found to be less than the amount due to the plaintiff, a decree in favour of the plaintiff, after adjusting the defendant's claim, has to be passed. In such a case the defendant's plea will be purely one of set-off. If, on the other hand, the amount found due to the defendant is more than the plaintiff's claim, a decree for the excess amount has to be passed in favour of the defendant treating it to be a counter or cross-claim.[1] A Counter-claim can be filed after the written statement has been filed in the case.[2] Where the cause of action has

16 *Solemn* v. *James*, 1936 AMLJ 60.

17 *Sitharam* v. *Ramanuj*, A 1933 Mad 208, 142 IC 719; *Girdhari Lal* v. *Surajmal*, A 1940 Nag 177, 190 IC 651.

18 *Sutrame* v. *Anugodu*, A 1925 Mad 830.

19 *Ameenammal* v. *Meenakshi*, 60 IC 226, 12 LW 173; *V.R. Subramaniyam* v. *B. Thayappa*, A 1966 SC 1034, (1961) 3 SCR 663.

20 See *Laxmidas Dayabhai* v. *Nanabhai Chunnilal*, A 1964 SC 11, (counter claim treated as a plaint in a cross suit).

1 *Rai Harendranath* v. *Rai Somendranath*, A 1942 Cal 559; *Laxmidas Dayabhai Katrawalla* v. *Nanabhai Chunilal Kabrawalla*, A 1964 SC 11; see also, *Shiromani Sugar Mills Ltd.* v. *Seth Sugni Chand Hashmat Rai & Co.*, A 1938 All 522; *W. Wirlow* v. *Mahadeo Govind Mehendale*, A 1943 Bom 227; *Ratan Lal* v. *Madari*, 1950 ALJ 706; *Sadasheo Krishnarao Buty* v. *Nathu Bala Mahar*, A 1943 Nag 314; *Lakshmi Narayan Sukhani* v. *Kamakhya Narayan Sukhani*, A 1954 Pat 30.

2 *Ramsewak Kashinath* v. *Sarafuddin*, A 1991 Ori 51; *Mahendra Kumar* v. *State of M.P.*, A 1987 SC 1395; *Parvathamma* v. *K.L. Loknath*, A 1991 Kant 283, *Mangulu* v. *Prafulla*, A 1989 Ori 50 (DB); *Datta Bandu Saddle* v. *Sridhar Payagonda Patil*, A 1992 Bom 422.

arisen after the filing of the written statement, counter-claim is not entertainable.[3]

It is not necessary that the counter-claim must be of the same nature as that of the plaintiff and arise out of the same transaction. It is not necessary that the counter-claim under O.8, R.6A must satisfy the conditions which govern the set off under O.8, R.6A counter-claim cannot exceed the pecuniary jurisdiction of the Court. There is no restriction regarding the territorial jurisdiction of the Court.[4] A counter-claim is not restricted to money suits only. It can be filed in a suit for specific performance of contract.[5] In a suit for injunction, a counter claim for possession under O.8, R.6A (1) can be entertained.[6] O.8, R.6D provides that even if the suit of the plaintiff is stayed, discontinued or dismissed the counter claim may nevertheless be proceeded with.[7]

The counter-claim is to be treated as a plaint and governed by the rules applicable to the plaints. It goes without saying that court fee as on a plaint must be paid, on any plea of counter-claim. But it has been held that a statutory notice required to be served before institution of a suit is not required by implication before preferring a counter claim.[8]

To resume, the following are some important points of difference between set off and counter-claim :

1. Set off is a plea in defence, a shield and not a sword while counter-claim is a weapon of offence. The *sine qua non* of the plea of the counter-

3 *Prem Narayan* v. *Ram Vilash*, A 1992 MP 29; *Srikanth* v. *State Bank of India*, 1995 (2) ALT 746 (AP).

4 *Datta Bandu Sadale* v. *Sridhar Payagonda Patil*, A 1992 Bom 422.

5 *Kavindra Jain* v. *Amrit Lal*, A 1992 M.P. 31; *Shiv Kali Bai* v. *Meera Devi*, 1990 MPJR 412 (MP); *Suman Kumar* v. *St. Thomas School & Hostel*, A 1988 P&H 38; *Neelam Singh* v. *Vijai Narain Singh*, A 1995 All 214, 1995 ALJ 1064.

6 *Gurbachan Singh* v. *Bhag Singh*, 1996 (1) SCC 770, A 1996 SC 1087.

7 *Jamnadas* v. *Behari Lal*, A 1941 Nag 258; For distinction between set-off and counter claim, see *Hyderabad Roller Mills Co.* v. *Vallabh Das*, (1964) 1 An LT 223; *T.A.M. Sanmukham Chettiar* v. *Shamsul Khan*, ILR (1966) 2 Mad 302; *Sarasvati Oil Mills* v. *State of Gujarat*, (1967) 18 STC 163 Guj.

8 *Himachal Fruit Growers Co-operative Society* v. *Upper India Preservers Ltd.*, A 1984 HP 8; *Suman Kumar* v. *St. Thomas School & Hostel*, A 1988 P&H 38 (a counter-claim may be converted into plaint).

claim is that the defendant should have an independent right to agitate the same in an action of his own.[9]

2. A set off arises only in an action for money, whereas a counter-claim can be made in any suit whether it is for money, injunction, specific performance or for declaration.[10]

3. In a set off both the parties must fill the same character as they fill in the plaintiff's suit. In other words, the set off must be of the same nature as the claim of the plaintiff or it must arise out of the same transaction. There is no such restriction in a counter-claim.[11]

4. The set off must be pleaded in the written statement but not afterwards unless permitted by the Court. A counter claim can be raised even after the filing of the written statement.[12]

Limitation for Set Off or Counter-Claim : A set off or counter-claim must be legally recoverable. So far as set off is concerned, it is a weapon of defence and as such it is sufficient if the amount claimed was not time barred on the date of institution of the suit.[13] Some authorities go further and hold that so far as equitable set off, as distinguished from legal set off is concerned, even time barred claims may be permitted,[14] though other decisions make no distinction in this regard between legal and equitable set off.[15] However a counter claim and even a legal or equitable set off to

9 *Tam Subramaniam Chettiar* v. *Shanmugham*, 1966 (I) MLJ 200.

10 *Gurbachan Singh* v. *Bhag Singh*, A 1996 SC 1036; *Jagmohan Chawla* v. *Deva Redasami*, A 1996 SC 2222.

11 *Datta Bandu* v. *Sridhar Paya Gowda*, A 1992 Bom 422.

12 *Mahendra Kumar* v. *State of M.P*, A 1987 SC 1359; *Datta Bandu* v. *Shridar*, A 1992 Bom 422; *Santhi Rani Das Dewanjee* v. *Dinesh Chandra*, A 1997 SC 3985.

13 *Rai Harendranath* v. *Rai Somendranath*, A 1942 Cal 559; *Uma Prasad* v. *Shiva Kant*, A 1939 Pat 567; *Praggi Lal* v. *Maxwell*, 7 All 284; *Najan Ahmad* v. *Salemahomed*, A 1923 Bom 113; 77 IC 943 (a detailed judgment of D.F. Mulla, J.); *Govindji Jewat & Co.* v. *C.S. & W. Mills*, A 1968 Ker 310 (DB); *Munshi Ram* v. *Radha Kishan*, A 1975 P & H 112; *Maheshwari Refinery* v. *M.S.S.I.C. Ltd.*, A 1974 Mad 39; *Aiyappan Pillai* v. *Narayanan*, A 1956 TC 239.

14 *Lakshmi Narayan* v. *Mst. Ganeshi*, A 1945 Oudh 229; *Sheo Saran* v. *Mahabir*, 32 Cal 576; *Abdul Majid* v. *Kulsam*, A 1925 Cal 1146 (DB).

15 *Vyravan* v. *Deivasikamani*, A 1917 Mad 258, 32 IC 80; see also, *Bhupendra Narain* v. *Bahadur Singh*, A 1952 SC 201.

the extent it exceeds the amount due to the plaintiff,[16] must not be time barred on the date of filing written statement making such claim. Under an Allahabad High Court amendment of O.20, R.19, no decree can be passed on any type of set off unless the claim thereto was within limitation on the date on which the written statement was presented.

16 *Narasimha Rao* v. *Sree Raja Srinivasa*, 42 Mad 823.

Chapter XVI

APPEALS IN GENERAL

Right to Appeal : The canon of law that 'There is remedy for every wrong or wherever a right exists, there is a remedy for its infringement", though applicable to civil suit is not applicable to appeals. Under section 9 C.P.C. a person who has a grievance of civil nature, has a right to institute a suit, unless its cognizance is either expressly or impliedly barred, to seek a remedy in the proper court. There is no such inherent right to file an appeal against an adverse decision.[1] The right to appeal can only be exercised on the basis of some statutory provision, may it be a statute or some rules or other provision having the force of a statute.[2] The right of appeal is, therefore, described as the creature of the statute.[3] If there is such a provision the right to appeal becomes a vested right from the time of the first commencement of the action. Any subsequent change in law cannot affect that right, unless that law has expressly been provided to take effect retrospectively.[4]

The Supreme Court in the case of *Garikapati*[5] laid down a number of principles with respect to right of appeal with reference to subsequent changes in law. Broadly speaking, the right to appeal was held to be not a mere matter of procedure, but a substantive right. It necessarily implied that all rights to appeal continued as they were and the aggrieved party was entitled to take the dispute to higher courts according to the law prevailing on the date of the institution of the suit. In that sense, appeal is a continuance of the suit, except that the dispute is now before a higher

1 *Anant Mill Co* v *State of Gujarat*, A 1975 SC 1234; *Garikapati* v. *Subhash*, A 1957 SC 540; *Tara Vati* v. *State of Haryana*, 1994 (2) Punj LR 761 (FB); *Lagandeo Singh* v. *Satyadeo Singh*, A 1992 Pat 153 (DB); *Ghansham Singh* v. *Bhola Singh*, A 1923 All 490 (2) (FB), 74 IC 411; *Ishwardas* v. *State of Haryana*, A 1975 P & H 29.

2 *Ohene Moore* v. *Akesseh Tayee*, A 1935 PC 5; *Hem Singh* v. *Basant Das*, A 1936 PC 93; see also *National Sewing Thread Co. Ltd.* v. *James Chadwick & Bros.*, A 1953 SC 357.

3 *Gangabai* v. *Vijaykumar*, A 1974 SC 1126.

4 *State of Bombay* v. *Supreme General Films Exchange Ltd.*, A 1960 SC 980; *Kasibai* v. *Mahadu*, A 1965 SC 703.

5 *Garikapati* v. *Subhash*, A 1957 SC 540.

court or authority who has the power to go into the correctness or otherwise of the decision appealed against.[6]

Provisions of Law Governing Appeals: It is not that every judgment, decree or order of every court or authority is appealable. For that purpose the relevant provision of the Code or other law has to be looked into. Section 96 C.P.C. itself contains an exception in the opening words, "save where otherwise expressly provided in the body of this Code or by another law for the time being in force".

The provisions with respect to appeals as given in C.P.C. are :

Appeals from Original Decrees are provided for in sections 96 to 99, while the form, the grounds of appeal, and other procedure including admission, interim orders and final orders are given in O.41. They are generally called 'First Appeals'.

Appeals from Appellate Decrees are provided for in sections 100 to 103 and the corresponding procedure is in O.42. They are called 'Second Appeals'. The scope for second appeal is restricted in view of the amendment in section 100 C.P.C., and the appeal would lie only if the case involves a substantial question of law.[7] Formerly when a Second Appeal was decided by a single judge of the High Court, a further Appeal lay to a Division Bench of the High Court. It was called a Special Appeal or Letters Patent Appeal. Now by section 100 A inserted by C.P.C. (Amendment) Act 1976, they have been abolished all over the country. The question of fact cannot be interfered in second appeal.[8]

Appeals from Orders are dealt in sections 104 to 106 while O.43, R.1, gives details of the appealable orders. Under R.2, the procedure for hearing of such appeals is the same as given in O.41.

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6 *Ram Chand* v. *Ram Swarup*, A 1952 All 654; *Shyam Lal* v. *Takhatmal*, 1957 MP 98; *Kanwar Singh* v. *Om Kant*, A 1978 JK 22.

7 See *Kehar Singh* v. *Yashpal Singh*, A 1990 SC 2212; *Annapoorani Ammal* v. *G. Thangapalan*, (1989)3 SCC 287; *A.K. Mukherjee* v. *Pradip Ranjan Sarbadhikary*, A 1988 Cal 259; *Sabira Khatun* v. *Syeda Fatima Khatoon*, A 1995 Gau 105; *Annapurna Barik Dei* v. *Inda Bewa*, A 1995 Orissa 273; *Ranjit K. Debnath* v. *R.K. Jadav*, (1985) 89 CWN 151 (on when a finding of fact may be treated as legally erroneous); *Kshitish Chandra* v. *Santosh Kumar*, 1997(3) LW 220 (SC), A 1998 SC 3063; *Rama Vilasam Granahachala* v. *N.S.S. Karayogam*, 2000 (3) LW 10 SC; *Panchagopal Barue* v. *Vinesh Chandra*, A 1997 SC 1041.

8 *India Hobby Centre (P) Ltd* v. *Kwality Ice Cream Ltd.*, 1995 All HC 3694 (Cal) (DB); *Kashibai* v.. *Parvatibai*, (1956) 6 SCC 213 at p. 218.

Appeals to Supreme Court are governed by section 109. It provides (in accordance with article 133 of the Constitution) that subject to the provisions of Chapter IV of Part V of the Constitution and rules made by the Supreme Court, an appeal shall lie to the Supreme Court from any judgment, decree or final order in civil proceedings of a High Court, if the High Court certifies that the case involves a substantial question of law of general importance and that in the opinion of the High Court the said question needs to be decided by the Supreme Court. This is apart from any appeal that may be admitted by the Supreme Court by special leave granted by itself under Article 136.

Jurisdiction of Appellate Court how Governed : The above provisions do not deal with the question of jurisdiction of an Appellate Court. They only provide for the right to appeal. For filing appeals and their entertainment one has to look into various Civil Courts Acts prevailing in different States, such as the Bengal, Agra and Assam Civil Courts Act. However, the general pattern appears to be that an appeal from the decree of Civil Judge Junior Division (earlier known as Munsif or Sub-Judge or Subordinate Judge) or a Civil Judge Senior Division upto a certain valuation will lie to the District Judge, while an appeal from the decree of a Civil Judge Senior Division over a certain valuation will lie to the High Court. So far as second or special appeal go they can be filed in the High Court but only on the grounds mentioned in section 100 (as stated in section 101) and only in cases other than those mentioned in section 102.

Who has the Right to Appeal : Section 96, 100 & 104 of the Code relating to right to appeal only say that an appeal shall lie, without indicating as to who has the right to appeal. However, the general rule of law is that a party to a suit who was arrayed on the opposite side, including his legal representatives,[9] who is adversely affected by the decision[10] may file the appeal enlisting his grievances in the grounds of appeal. This would not cover the cases of all the persons aggrieved by the order. The real test is whether the decision, if left unchallenged, would or would not operate

9 *Indian Bank Ltd.* v. *Seth Bansiram Jashamal*, A 1934 Mad 360; *Shah Zahirul Haque* v. *Sayed Rasid Ahmad*, A 1935 Pat 261; *The Province of Bombay* v. *Western India Automobile Association*, A 1949 Bom 141.

10 *Hafiz Mohammad Fateh Nasib* v. *Swarup Chand Hukum Chand Firm*, A 1942 Cal 1; *Pulla Subbaramiah* v. *Palagani Balarami Reddy*, A 1949 Mad 91;

as *resjudicata* between the aggrieved person on the one hand and any other party to the suit on the other, in respect of the same subject-matter in any future dispute. If it does such an aggrieved person may, though not a party to the proceedings in the court below may prefer an appeal with the leave of the appellate court and such leave should be granted if he would be prejudicially affected by the judgment.[11] Ordinarily a co-plaintiff or a co-defendant has no right of appeal against a co-plaintiff or co-defendant, but such a right may accrue if there was a triangular fight, and the court in order to determine the matter in dispute had also to determine the rights of the plaintiffs or the defendants, as the case may be, *inter se*.[12] See also under the heading "*who may appeal*" in Chapter VII".

Order 41 Rule 11 : Before drafting the grounds of appeal the counsel should convince himself that the right to appeal still exists or that it has not been lost by (i) lapse of limitation (ii) by waiver through agreement,[13] or (iii) by estoppel or any other act or conduct express or implied, of the party who has the grievance against the decree or order. The counsel should draft the grounds with such skill as to enable him to successfully cross the hurdle of admission stage, particularly in border line cases. Since one of the purposes of law is to discourage unnecessary litigation, the Appellate Court has been armed with the discretionary power to dismiss an appeal summarily after hearing the appellant without issuing notice to the other party.

Appeals from Orders

What is an Order : An order has been defined in section 2 (14) of the C.P.C. as 'the formal expression of any decision of a Civil Court

Heersingh v. *Veerka*, A 1958 Raj 181; *Raja Ram* v. *Moolraj Singh*, 1961 ALJ 473; *Union of India* v. *Pearl Hosiery Mills*, A 1961 Punj 281.

11 *Jatav Kumar* v. *Golcha Properties Ltd.*, A 1971 SC 373, (1970) 3 SCC 573; (case under Companies Act but the principle relating to suits was referred to and relied on), followed in , *Gaon Sabha* v. *Dy. Director*, 1982 All CJ 133 (holding that even where the Pradhan of the Gaon Subha was not formally authorised by the Sabha to take legal proceedings he can do so for protection of Gaon Sabha property in the interest of the village community of which he is a member).

12 *Koodi* v. *Baboo*, A 1959 Raj 127; *Nirmal Singh* v. *Zmir Uddin Khan*, A 1935 All 984; see also, *N. Venkateswaralu* v. *B. Lingayya*, A 1924 Mad 689, 83 IC 960.

13 *Narain Singh* v. *Muhammad Faruq*, ILR 1 All 267 (269) (FB); *Gajendra Singh* v. *Durga Kumari*, A 1925 All 503 (FB); *Mohammad Mia Pandit* v. *Osman Ali*, A 1935 Cal 239.

which is not a decree'. It is only such orders as are covered by section 104 and O. 43, R. 1 of the Code, against which an appeal would lie. Since section 104 saves the appeals provided for in any other law for the time being in force, an appeal would also lie from any order which has been made appealable under such law. A second appeal from the order of the first Appellate Court is barred by sub-section (2) of that section.[14]

A remand order passed by an Appellate Court against which no appeal was filed under O.43, R.1 (U) can subsequently, not be questioned before the same Appellate Court in the appeal that may be filed against the decision rendered on remand.[15] It can, however, be questioned in a court superior to the court which had passed the earlier remand order.[16]

An Indirect Course for Appeals : Section 105 of the Code lays down another course for agitating the correctness of an order in appeal. Under sub-section (1) of that section a party, while appealing from the decree, may question, in the grounds of appeal, any error, defect or irregularity in any order affecting the decision of the case. In a way this permits an appeal from all orders, whether otherwise appealable or not, but the two conditions given in the section must be fulfilled. One is that the order questioned in appeal must have affected the decision, while the other is that a clear objection in this behalf must have been taken in the grounds of appeal.

Court to which Appeal Lies : An appeal from an order lies to the same court which has jurisdiction to entertain an appeal against the decree in the suit. Before filing an appeal it should be looked into whether the order is appealable, does it amount to a decree as defined in section 2(2) or an order under section 2(14) and under which provision should the appeal be filed and whether an appeal, at all lies.

Appeals from Orders in Execution : Orders in execution proceedings, if they are passed between the parties to the suit or their

14 *Gopesh Chandra Aditya* v. *Benode Lal Das*, A 1936 Cal 424; *Natabar Das* v. *Brajakishor*, A 1999 Orissa 33; *Robert Punyali Salve* v. *Diocesan Trust*, A 1996 Bom 39 (DB); *New Kenilworth* v. *Orissa State Financing Corporation*; A 1997 SC 978.

15 *Pritam Singh* v. *Addl. Director of Consolidation*, 1978 ALJ 186.

16 *U.P. Electricity Supply Co.* v. *J.N. Chatterji*, A 1972 SC 1201; see however, *Y.B. Patil* v. *Y.L. Patil*, A 1977 SC 392.

representatives and relate to execution, discharge or satisfaction of the decree, will be appealable as decrees under section 96 of the Code.[17] If the order is one passed under O.21, R.34, or R.72, or R.92 of the Code, it will be appealable as provided for in O.43 The other orders may be of collateral nature and may not be appealable.[18]

17 *Adaikappa* v. *Chandra Sekhar*, A 1948 PC 12.
18 *Keshavdeo* v. *Radha Kishan*, A 1953 SC 23.

Chapter XVII

APPEALS, REQUIREMENTS OF

Memo of Appeal : In the formal part are included, the heading of the case, an introductory statement of the appeal giving particulars of the decree or order against which the appeal is directed, and the valuation of the appeal. Court cannot allow by amendment to convert an appeal against one decree into an appeal against another decree.[1] The material part consists of the grounds of appeal. Relief sought in the appeal is also generally written in the memorandum.

After the name of the court is given the number of the appeal and the year in which it is filed. As the number is noted by the officials of the court, a blank space is left for it. Then follow the names and addresses of the parties to the appeal. The name of the appellant is given first and then that of the respondent. It should also be indicated against the name of the parties what character each filled in the lower court, i.e., whether he was a plaintiff or a defendant, or an applicant or an opposite party, thus :

AB, son of, etc. *(Plaintiff) Appellant*

versus

CD, son of, etc. *(Defendant) Respondent*

Or

AB, son of, etc. *(Decree-holder) Appellant*

versus

CD, son of, etc. *(Judgment-debtor) Respondent*

Introductory Statement : After the names of the parties an introductory statement giving the particulars of the decree or order appealed from (viz. its number and date, the court which passed it and the name of the presiding officer), should be written in some such form as the following:

"The above-named appellant appeals to the court of....., from the decree of *(name of presiding officer* (.....Civil Judge (Junior

1 *Mohammad Idris Haider* v. *Md. Habibur Rahman*, A 1948 Pat 97.

Division) at *(place)*..... in suit No. .....of *(year)* ..... passed on the *(date)* ..... and sets forth the following grounds of objection to the decree appealed from namely—"

Sometimes this is written in the form of a heading, thus :

"Appeal from the decree of *(name of the presiding officer)* ..... Civil Judge (Senior Division) at *(place)*..... in suit No. ..... of *(year)* ..... passed on the *(date)* ....." and the grounds of appeal follow with the heading "Grounds of Appeal".

Wherever the High Court has prescribed forms of headings of appeal from decrees and orders, the same should be adopted.

Value : Though there is nothing in the Code to require that the valuation of an appeal should be written in the memorandum of appeal, yet as *ad valorem* court-fee is very often payable, and the pleader's taxable fee is calculated on the value of the appeal, and also, as sometimes an appeal is preferred only against a portion of the decree, it is proper to enter the valuation of the appeal in the memorandum. This is generally written after the introductory statement, and before the grounds of appeal.

Grounds of Appeal : O.41, R.1 lays down four things:

(a) Form of appeal, (b) Its presentation, (c) Documents to be filed, and (d) Grounds of objection.

In the grounds of objection against a finding of fact it has to be shown, how the decision arrived at by the lower court is against the weight of evidence, how the facts and circumstances require it to be altered and make it erroneous.[2] Errors of law may also be pointed out. The grounds should be consistent with the case put up in the Lower Court. No new plea, not taken in the pleadings and on which no issue was framed nor evidence was led, should be raised.[3]

An appellant is not entitled, as of right, to be heard in support of any ground of objection not taken in the memorandum of appeal,[4] or taken

2 *Chandra Kishore* v. *Deputy Commissioner*, A 1949 PC 207.

3 *Shanker Lal* v. *The New Mirflasilco*, A 1940 PC 97; *Rani* v. *Santa Bala Debnath*, A 1971 SC 1028.

4 *Swaminatha* v. *Embramsa*, 98 IC 328, 51 MLJ 639; *Raja Jwaleshri* v. *Babu Parchand*, A 1945 PC 13; *Biddhichand* v. *Khichri*, A 1946 Nag 135; *Roshan Lal* v. *State*, A 1971 All 210.

but given up at the admission of the appeal,[5] though, of course, the court can, in its discretion, allow him to argue any such ground.[6] Where an objection was neither taken in the grounds of appeal nor in the lower court and the appellant seeks to raise it at the hearing, it should not normally be allowed by the court.[7] The Court may refuse to hear a new plea which went to the root of the opposite party's case.[8] The Court would ordinarily refuse to allow a plea of *res judicata* not taken in memorandum of appeal though raised in lower court.[9] A point not taken in the lower court cannot be argued in appeal unless it is a pure question of law or a point which goes to the root of the case, e.g., a question of jurisdiction or *res judicata*, or that the plaint discloses no cause of action or the written statement no ground of defence, but the point is ordinarily allowed to be argued only if it can be decided on the materials on the record. The mere fact that the materials are all on the record and the answer is plain or that the omission was due to an oversight, is, however, no ground for permitting a new point to be argued.[10] In a case in which the appellant claimed full interest on the ground that the agreement about its payment was not penal as held by the lower court, the High Court refused to listen to the plea that, conceding the agreement to be penal, the appellant must get some compensation under section 74, Contract Act.[11] But in some cases a plea of limitation which was neither raised in the lower court nor in the grounds of appeal is allowed to be argued at the hearing,[12] but not when its determination involves an investigation into questions of fact.[13] Therefore, it is necessary

5 *Hazura Singh* v. *Kishen Singh*, A 1933 Lah 447.

6 O.41, R.2; *Mt. Kalka* v. *Choudhry Ganga*, A 1925 Oudh 435 (DB), 12 OLJ 206 (a legal point covered by a Privy Council ruling which was not published when the appeal was filed allowed to be taken).

7 *Bhagwan Singh* v. *Ujagar*, A 1940 Pat 33; *Bodordoja* v. *Ajijuddin*, 57 C 10; *Govardhan Das* v. *Corporation*, A 1970 Cal 539 (542); *Gokal Chandra Bhadras* v. *Chintamani Bhadras*, 1971 CLT 890.

8 *United Brokers* v. *Alagappa*, A 1948 Mad 391, 1948 MLJ 178, 1948 MWN 182.

9 *Banchanidhi Kar* v. *Udekar*, A 1949 Pat 214; see also, *Kanta Subbarao* v. *Pokuri Sri Ramalu*, A 1970 AP 258.

10 *Ram Kinkar* v. *Tufani*, 133 IC 428, 1930 ALJ 1601, A 1931 All 35, 53 A 65; *Raja Ram* v. *Din Dayal*, 1971 MPLJ 172; *N. Appanna* v. *T. Jamuna Bai*, 1971 (1) APLJ 202.

11 *Kanshi Ram* v. *Prem Singh*, A 1926 Lah 11, 89 IC 879.

12 *Dolu* v. *Muhammad Nathu*, 94 IC 251 Lah.

13 *Teju* v. *Ralla*, 94 IC 457 Lah.

that the appellant's pleader should, before framing the grounds of appeal, carefully consider on what possible grounds he can attack the decree or order of the lower court, and should not omit any ground which he can reasonably take. Ordinarily, a critical scrutiny of the judgment of the lower court itself suggest the grounds to the pleader, but, he should normally ask for copies of other papers, as well, such as pleadings, applications, documentary and oral evidence before undertaking to draft the grounds of appeal.

What Grounds Can be Taken : The general rule is that any mistake committed by the lower court in weighing the evidence, any mistake in the view of law entertained by the lower court, any misapplication of law to the facts of the case, any material irregularity committed in the trial of the case, any substantial error or defect of procedure, and the defect, error or irregularity of any interlocutory order passed in the case,[14] whether the same was appealable or not (except an appealable order of remand), may be made a ground of attack in the memorandum of appeal. A ground taken but not pressed in the first Appellate Court may not be allowed to be revived in second appeal.[15] A plea that permission under Sec. 92 CPC for institution of suit has not been obtained,[16] plea of novation of contract,[17] an objection as to misjoinder of causes of action,[18] a plea of *resjudicata* not raised in written statement, [19] the plea that the plaint was signed by some incompetent person,[20] cannot be allowed to be raised for the first time in appeal. A party cannot be allowed to raise a new plea for the first time in appeal.[1] A defendant can question the propriety of *ex parte* proceedings in an appeal from the decree.[2] Against an *ex parte* decree, he can either apply under O.9, R.13, or file an appeal. But a plaintiff

14 Section 105, C.P.C.

15 *Narayan* v. *Behari Lal*, A 1926 Nag 160; *Bhulan Shaw* v. *Tarunbala*, A 1985 Cal 450.

16 *Guru Nanak Education Trust* v. *Balbir Singh*, A 1995 P&H 290.

17 *K.M. Madhava Krishnan* v. *S.R. Swami*, A 1995 Mad 318 (DB).

18 *Danesh Chandra* v. *Dina Nath*, A 1992 All 115.

19 *Deva Ram* v. *Ishwar Chand*, A 1996 SC 372.

20 *Clara* v. *Sylvia*, A 1985 Bom 372 (DB).

1 *Godhan* v. *Ram Bilas*, 1995 ALJ 1923, A 1995 All 357.

2 *Syed Mazhar* v. *Sheikh Rafiq*, A 1925 Oudh 645; contra, *Sadhu* v. *Kuppan*, 30 M 54, 10 MLJ 479.

cannot question the propriety of an order setting aside an *ex parte* decree, in an appeal from the decree ultimately passed.[3]

The general rule besides being subject to sections 100, 101 and 102 is further subject to two conditions : (1) That the mistake of the lower court should be material, *i.e.* it should be such as affects the decision, and (2) that the objection taken must be such as arises from the pleadings and evidence in the lower court.[4]

(1) *The mistake should be material.* If the lower court has come to a wrong finding on a question of fact or law, but the decision of the lower court is not based upon it, and the case would not be affected even if this wrong finding be reversed, the finding is immaterial and need not be challenged in appeal. But where though the point was not really material, yet the lower court has taken it into consideration in coming to its decision and it has influenced the judgment, an objection should be taken in the grounds of appeal that the lower court committed an error in basing its decision on a fact which was not material. If, again, there are two issues, both of which have been decided against the appellant, the appellant must attack both the findings, although if one is found in his favour, the other becomes immaterial. For instance, in a suit by an alleged lessor against an alleged lessee, the lessee denies that he is a tenant and also pleads that the alleged tenancy has not been determined by a proper and valid notice, the lower court finds against the defendant on both the points. Here, although, the defendant is entitled to succeed if he only proves that no valid notice was served upon him, yet he should attack the adverse finding on the issue of tenancy also, unless of course, the finding is not open to objection, or the appellant chooses to submit to it. When a finding is obviously correct and unimpeachable it is wiser not to attack it. Similarly, no irregularity, error or defect, which does not affect the merits of the case or the jurisdiction of the court, is material in appeal,[5] and it should not be set up in the grounds of appeal.

(2) *The objection taken must be such as arises from the pleading and evidence in the lower court, i.e.*, the appellant cannot make out an

3 *M.S. Mahommed* v. *Collector of Toungoo*, 102 IC 379, 5 R 80.

4 *Nuzur Ally* v. *Ojoodhyaram*, 10 MLJ 540.

5 Section 99, C.P.C.

entirely new case in appeal[6] or a case inconsistent with that set up by him in the lower court.[7] He cannot even raise a plea inconsistent with his statement of the case in the trial court at the commencement of the trial.[8] Where plaintiff claimed a property on the ground of his adoption by the last owner and defendant claimed title on the ground of a gift or will from the latter, and both courts in India found against defendant's title, he was not allowed by the Privy Council to found his case on possession.[9] As observed by the Privy Council in a much earlier case,[10] it is absolutely necessary that "the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made" and that "it will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of cause is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove". Although this passage speaks of "the plaintiff" it will apply to any party to the cause. Undernoted are some other cases in which new points were not allowed to be argued before the Privy Council[11] or the Supreme Court.[12]

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6 *Indur* v. *Radha*, 19 C 507, 19 IA 90; *Annamalay* v. *Pitchu*, 28 M 122; *Sripat* v. *Rai Harirar*, 26 CWN 739, A 1922 PC 51, 31 MLT 38; *Budh* v. *Kawalnain*, 19 IC 430; *Phulram* v. *Ayub Khan*, 49 A 52; *Ram Autar* v. *Beni Madho*, 102 IC 3 (Oudh); *Jiwan Ram* v. *Hussain*, 102 IC 631 Lah; *Mangtu* v. *Secretary of State*, A 1940 Pat 161, 187 IC 727; *Basdeo* v. *Jugrai*, A 1948 Oudh 247, 1948 OWN 156; *Karter Singh* v. *Union of India*, A 1971 SC 2020; *K.L. Selected Coal* v. *S.K.Khanson*, A 1971 SC 437.

7 *Illahi* v. *Sher Ali*, 26 A 331; *Iqbal* v. *Wasi Fatima*, 45 A 53, 24 ALJ 920; *Devki Durrani* v. *Abdul Rashid Bakshi*, 1979 Kashmir Law Journal 37.

8 *Muhammad Mashuq Ali* v. *Hurunissa*, 114 IC 113, A 1929 Oudh 209; *Sodhi Lal Singh* v. *Fazal Din*, A 1933 Lah 1045.

9 *Nataraja Pillai* v. *Subbaraya*, A 1949 PC 43.

10 *Eshenchunder Singh* v. *Shamachuru*, (1866) 11 MIA 7.

11 *Albert West Nead* v. *Kind*, A 1948 PC 156; *Paul Couvreur* v. *M.G. Shapiro*, A 1948 PC 192; *Brijlal* v. *Govind Ram*, A 1937 PC 192.

12 *New Marine Coal Co.* v. *Union of India*, A 1964 SC 152; *U.C. Bank* v. *Employees Union*, A 1953 SC 437 (para 7); *Afzal Ullah* v. *State of U.P.*, A 1964 SC 264; *Makhan Singh* v. *Puniab*, A 1964 SC 1120; *M.P.Shreevastava* v. *Veena*, A 1967 SC 1193, (1967) 1 SCR 147; *Iyyappan* v. *Dharmodayam Co.*, A 1966 SC 1017; *Karpagathachi* v. *Nagarathinathachi*, A 1965 SC 1752.

A plea not taken up in the plaint nor embodied in issue is thus not permitted to be taken,[13] but a plea though not specifically put in issue in the lower court, may be permitted to be taken in appeal if the issue were wide enough to cover it, and all the documents relating to the plea were before the court so that no question of surprise or prejudice to the other party could be said to arise.[14] To this general rule however, there are certain well-recognised exceptions.[15] For instance, an objection regarding the irregularity of procedure or the jurisdiction of the lower court, or an objection of *res judicata* or limitation,[16] or any other pure question of law,[17] may be raised in the appeal, provided that the objection appears on the record as it stands and no fresh evidence is necessary to substantiate it,[18] but ordinarily not if fresh evidence would be necessary,[19] nor if a new

13 *Pirthi Singh* v. *Raja Muhammad Ali*, 13 OLJ 126, 94 IC 188, A 1926 Oudh 427 (DB); *Balkaran* v. *Dulari*, 97 IC 292, 24 ALJ 920; *Gaur Shankar* v. *Keshabdeo*, 27 ALJ 304, 114 IC 881, A 1929 All 148 (DB); *Behari* v. *Chhote*, A 1933 All 911; *Motiram Nihalchand* v. *Bisheshar Nath*, 171 IC 816, A 1937 Pesh 97; *Gopalsingh* v. *Mutual Indemnity and Finance Corpn.*, 170 IC 983, A 1937 All 535; *Kotah Match Factory* v. *State of Rajasthan*, A 1970 Raj 118.

14 *Thakur Sheo Singh* v. *Rani Raghubans Kunwar*, 32 IA 203, 27 All 634, *Parbhu Narain* v. *Jitendra Mohan*, A 1948 Oudh 307.

15 *Jadunandan* v. *Bechan*, A 1929 All 442, 116 IC 870.

16 *Byom Kesh* v. *Madhabji Meta Masu*, A 1939 Pat 421; *Town Municipal Council* v. *Labour Court*, A 1969 SC 1335, (1969) 1 SCC 873; *State Bank* v. *V.A.Bhide*, A 1970 SC 196, (1969) 2 SCC 419 (para 19).

17 *Krishnabai* v. *Savalaram*, 29 BLR 60, 41 B 37, A 1927 Bom 93; *Lallusingh* v. *Ramnandan*, 1930 ALJ 156, A 1930 All 136; *Annappa* v. *Krishna*, A 1936 Bom 412; *Krishna Prasad* v. *Secretary of State*, A 1936 Cal 774; *State of M.P.* v. *D.H. Bhiwandiwala*, A 1971 MP 65; *Babu Kalingarayar* v. *Rajan*, A 1978 Mad 192; (1978) 1 MLJ 67; *Chittore Subanna* v. *Kudappa*, A 1965 SC 1325; *Raghubans Narain* v. *U.P.Govt.*, A 1967 SC 465.

18 *Ahsanulla* v. *Huri Churn*, 20 C 86, 19 IA 191; In re, *Subbiah Thevar*, A 1936 Mad 700; *Pappa Ammal* v. *Panchavarnam Ammal*, A 1936 Rang 260; *Kokhiram* v. *Chaman*, 160 IC 1096; *Gurditsingh* v. *Sherkhan*, A 1936 Lah 448; *Yakub* v. *Kariman*, 66 IC 466; *Allan* v. *District Board of Manbhum*, 5 Pat LJ 359, A 1920 Pat 324 (DB), 38 IC 749; *Gandappa* v.*Girimallappa*, 19 Bom 331; *Fakirchand* v. *Ananda*, 14 C 586; *Sayamma* v. *Punam*, 35 BLR 850, A 1933 Bom 413; *Shiam Pratap* v. *Baisini*, A 1940 All 353; *Chittori Subamna* v. *Kudappa Subama*, A 1965 SC 1325; *Raja Ram* v. *Din Dayal*, 1972 MPLJ 172.

19 *Shyamlal* v. *Sundarlal*, A 1937 All 661; *Secretary of State for India* v. *Ganesh Narayan*, A 1937 Bom 456; *Sunil Kumar* v. *Sisir Kumar*, A 1940 PC 30; *United*

right entirely different from that claimed in the trial court is sought to be set up.[20] The Court may thus refuse to allow the government to take a plea that the contract was not binding on it unless it was executed in the manner laid down in the provisions of the Government of India Act, (corresponding to Article 299 of the Constitution), when it was not taken in defence in the trial court.[1]

A new plea involving questions of fact cannot be taken by a party[2] or even by a court *suo muto*.[3] A new plea that the sale consideration was too low, not allowed to be raised for the first time in second appeal.[4] When the defendant appellant had failed to take a plea in his written statement that the suit was not maintainable as no power of attorney executed by plaintiff No. 1, in favour of plaintiff No. 2, was produced before court and no issue was struck on the point, no such plea was allowed at the time of hearing of first appeal.[5] The High Court in second appeal may, in order to do substantial justice, permit a plea not urged in the plaint to be taken when the defendant's own document support it and when it had already been raised in the lower Appellate Court without objection.[6] Although a plea of limitation may have been taken in the written statement and in the grounds of appeal, if no issue is directed to bear upon the question before the trial judge and the point has not been argued at the trial, it may not be permitted to be argued in appeal.[7] The mere fact that the point was left out by inadvertence or that there are sufficient materials on the record for decision may not always be accepted as a good ground for allowing a new objection.[8] Where plaintiff had several opportunities to

Comercial Bank v. *Employees*, A 1953 SC 437 (para 7) *Kesharilal* v. *Lalbhai Mills*, A 1958 SC 512.

20 *Pappa Ammal* v. *Panchavarnam Ammal*, A 1936 Rang 260 (second appeal).

1 *Secretary of State* v. *Yadavgir*, A 1936 Bom 19, 160 IC 505, 60 B 42.

2 *Sita Ram* v. *Ganesh Prasad*, 101 IC 683, 4 OWN 380; *Basdeva* v. *Shantanand*, 50 CLJ 513, A 1929 PC 266, 57 MLJ 771; *Manra Khan* v. *Parmanand*, 18 NLJ 149, A 1936 Nag 185.

3 *Lajpat Rai* v. *Sohan*, A 1929 Lah 432, 11 Lah LJ 91.

4 *Godhan* v. *Ram Bilas*, A 1995 All 357.

5 *Bhanwar Lal Tatar* v. *Ahmad Khan*, A 1977 Gau 27.

6 *Indrasan* v. *Kabutra*, A 1929 Pat 237.

7 *Virayya* v. *Adenna*, A 1930 PC 18; *Gulab Rao* v. *Manjoolabai*, A 1928 Nag 203, 10 IC 293 (affirmative plea of prescription not permitted for first time in appeal).

8 *Ram Kinkar* v. *Tufani*, A 1931 All 35, 1930 ALJ 1601; *Sharifa Begum* v. *Court of*

amend the plaint and did not include the new plea sought to be raised and the plea raised not only a question of law but also one of fact, he was not allowed to take it in second appeal.[9]

New Grounds Which Can be Taken : The following pleas have been permitted in the circumstances of the case to be advanced for the first time in appeal :

A plea of jurisdiction[10] or a plea of estoppel affecting jurisdiction[11] based on facts on the record;[12] a question purely one of law,[13] an objection about maintainability of suit;[14] a plea that the suit fell under section 92 C.P.C.[15] or a plea that the suit was not instituted by all persons who got consent;[16] a plea of limitation apparent on the face of the record;[17] and not depending on fresh evidence;[18] a plea of *res judicata* which could be decided from the record before the court,[19] (but not a plea of limitation or *res judicata* which could not be determined without further evidence;[20])

Wards, A 1940 Lah 475; *Chander Kail Bhil* v. *Jagdish Singh Thakur*, A 1977 SC 2262, (1977) 4 SCC 402; *Siddu Venkappa Devadiga* v. *Ranga S. Devadiga*, A 1977 SC 890.

9 *Tukaram* v. *Madhorao*, A 1948 Nag 293.

10 *Rammayya* v. *Subbrayadu*, 13 M 25; *Ramnath* v. *Harimati*, 50 IC 322; *Khudmukhtar Bank* v. *Bhagwandin*, A 1935 Oudh 325, 1935 OWN 487; *Ramaswamiah* v. *Poddatur Coop. Building Society*, A 1937 Mad 112; *Nathu* v. *Jewal*, 1934 ALJ 488, A 1934 All 893; (first time in Letters Patent Appeal); *Ram Rup* v. *Manager, Court of Wards*, 11 OWN 193, A 1934 Oudh 55; *Brij Mohan* v. *Chandrabhagabai*, A 1948 Nag 406; *Chief Kwame Asante* v. *Chief Kwame Tawai*, A 1949 PC 171; contra see however, *Kadir* alias *Kadu* v. *Koleman*, 39 CWN 876, 62 Cal 1088, 61 CLJ 342.

11 *Mahabir* v. *Narain*, 1931 ALJ 715, A 1931 All 490.

12 *Abdulla Shah* v. *Mohammad Yakub*, 1938 Lah 558.

13 *Additional I-T Commissioner* v. *East Coast Floor Mills Pvt. Ltd.*, A 1994 SC 1514.

14 *Nagabhushamma* v. *Seethamma*, 18 Mys LJ 409; *N. Appana* v. *T. Jamuna Bai*, (1971) 1 APLJ 202.

15 *Sukhumal* v. *Uttamchand*, A 1937 Sind 230, 171 IC 334.

16 *Mulchand* v. *Har Kishandas*, A 1941 Sindh 88, 194 IC 461.

17 *Ramchand* v. *Dewanchand*, A 1933 Lah 1044; *Lachmi* v. *Ram Rup*, A 1944 PC 24; *Benugopal* v. *P. Gopala*, A 1946 Mad 459; *Madhav Prasad* v. *Chandravarkar*, A 1949 Bom 104, 1950 BLR 747.

18 *Ramanand* v. *Nand Kishore*, A 1937 Lah 290, 174 IC 837.

19 *State of Punjab* v. *B.D. Kaushal*, A 1971 SC 1976; *Sha Shivraj* v. *Edakappatti*, A 1949 PC 302; *Khairati Mal* v. *Mohni Devi*, A 1984 P&H 288.

20 *Jagdish* v. *Kour Hari*, A 1936 PC 258; *Ikramullah Khan* v. *Rahim Bux*,

a plea of *res judicata* arising subsequently from the final decision of a former suit after the decree appealed from,[1] or in fact any legal plea not depending on disputed facts;[2] a claim of title by adverse possession, if such a case arises on facts stated in the pleadings and the other party is not taken by surprise,[3] but not if the facts are not mentioned and the plea is not put in issue,[4] or where there is no evidence and the plea cannot be decided without remand;[5] a plea that the plaintiff being an undischarged insolvent the suit is not maintainable, when there was admission of the plaintiff on record.[6]

A plea in second appeal that pre-emption suit must fail as all that was sold could not be pre-empted;[7] or as the suit did not include all the property sold;[8] a plea of absolute privilege in a defamation case;[9] a plea that plaintiff is not entitled to interest on certain transactions;[10] a plea that suit is barred by section 47, C.P.C.;[11] plea of absence of notice to quit and termination of tenancy in suit for ejectment;[12] legality of the sale of a religious office;[13] invalidity of a lease, though the suit originally was based

A 1934 All 770; *Gurrab Jaggarao* v. *Gopinath*, A 1958 Ori 58; *Banarsi Das* v. *Kashi Ram*, A 1963 SC 1165; *Syed Abdul Latif* v. *Kundo Mal*, A 1972 Raj 284; *Kattar Gadda* v. *Kattar Gadda*, A 1965 Oudh 177 (FB).

1 *Rangayya* v. *Ramayya*, A 1941 Mad 815.

2 *Radhabai* v. *Gopal*, A 1944 Bom 50; *Badri Narayan* v. *Beni Madho*, A 1945 Pat 186; *Purban Pvt. Ltd.* v. *Deb Kumar Shaw*, A 1978 Cal 33.

3 *Kassim* v. *Hazra*, 60 IC 165, 32 CLJ 151; *Satyendra* v. *Sashi*, 48 IC 448; *Mt. Batisa* v. *Rajaram*, A 1926 Pat 192.

4 *Rajna* v. *Musaheb Ali*, A 1935 Oudh 387, 1935 OWN 423.

5 *Natha* v. *Sri Ram*, A 1938 Lah 128; *Kishun Pd.* v. *Subbratan*, 1937 AWR 718, A 1937 All 696.

6 *Periaswami Servai* v. *Alagu Servai*, (1975) 2 MLJ 421.

7 *Abdul Hafiz* v. *Manohar Lal*, 183 IC 604, 139 Oudh 233.

8 *Sitla Sahai* v. *Sri Ram*, 185 IC 10, 1939 AWR 291 PC.

9 *Madhab* v. *Nirod*, A 1939 Cal 477.

10 *Ramanna* v. *Abdul*, A 1939 Rang 42.

11 *Sat Narain* v. *Chandra Mohan*, A 1940 Oudh 27; see however, *Ram Rup* v. *Manager, Court of Wards*, A 1934 Oudh 55, 11 OWN 193; *Mahangu Singh* v. *Jhumaklal*, 18 NLJ 110.

12 *Dhondu* v. *Madhavrao*, 18 B 110; *Sahebdin* v. *Gouri Shankar*, 185 IC 25 Oudh; *K. Narayanan* v. *A. Kundan*, A 1949 Mad 127, 1947 MWN 775, 1947 (2) MLJ 559; see however, *Batakala Budhia Patro* v. *Duryasi Dandasi Patro*, A 1978 Ori 103.

13 *Kuppa* v. *Dorasami*, 6 M 76.

on an alleged forfeiture of tenancy;[14] an objection that a document is compulsorily registerable[15] or an objection as to the validity of presentation for registration[16] or an objection as to the evidence being irrelevant;[17] an objection to the frame of suit when patent on the record,[18] e.g., a plea regarding validity of a contract;[19] a plea that the lease was really a sale.[20]

In a suit for possession on the ground of an alleged sale dismissed on defendant's plea that the transaction was a mortgage, the plea to claim relief on the basis of mortgage;[21] when a party confined his case in the trial court to section 20 of the Limitation Act, 1908, a case under section 19 of the Act, if supported by evidence on record.[22] Where the plaintiff's case, based on the allegation that the consideration for the *Khatas* in suit was cash, was found not to be true, the plaintiff was allowed in second appeal to prove what the real consideration was and to ask for a decree on the basis that the consideration was past debt. In view of the custom in the country of generally describing in the bonds, existing liability as cash consideration, the High Court held that the plaintiff's plea in appeal did not amount to a new case.[1]

New Grounds Which Cannot be Taken : The following pleas were in the circumstances of the case not allowed to be taken for the first time in appeal:

An objection of a formal defect which could have been cured if the objection had been taken in the lower court,[2] e.g., that of defect of parties,[3]

14 *Lakshminarayan* v. *Packiri*, 88 IC 392.
15 *Krishna Prasad* v. *Secretary of State*, A 1936 Cal 774.
16 *Braq Raza* v. *Akbari*, A 1940 Oudh 152.
17 *Muthu* v. *Panchayammal*, A 1943 Mad 749.
18 *Kishen* v. *Sham Lal*, 109 IC 867; *Ganga Ram* v. *Mathura*, A 1932 All 510, 54 A 65.
19 *Krishnaji* v. *Secretary of State*, A 1937 Bom 440.
20 *Thakur Govindji* v. *Thakur Rangji*, 1963 ALJ 587.
21 *Kimatrai* v. *Gokaldas*, A 1930 Sindh 98.
22 *Satgurnath* v. *Brahma Dutta*, A 1937 Oudh 391; *Bajyahari* v. *Tarachand*, A 1948 Nag 308; see however, *Girdharilal* v. *Ranoo*, A 1944 Nag 37.
1 *Kastur Chand* v. *Manak Chand*, A 1943 Bom 447, 45 BLR 837; see however, *Kotah Match Factory* v. *State of Rajasthan*, A 1970 Raj 118 (DB) (held new ground).
2 *Dharam Das* v. *Shamma Sundrai*, 3 MIA 229; *Paramsiva* v. *Krishna*, 14 M 498.
3 *Chandranath* v. *Janki*, A 1933 Pat 270; *Moti Lal* v. *Yusuf Ali*, 1972 MPLJ 187;

non-joinder of a member of a joint Hindu family,[4] or objection to the frame of a suit,[5] or about absence of cause of action,[6] want of notice of suit against a public officer,[7] or a municipal committee,[8] a plea of O. 2, R. 2,[9] a plea that the suit was cognizable by Small Cause Court,[10] a plea that sale for arrears of cost was without jurisdiction as certificate required by Section 4 Bihar and Orissa Public Demands Recovery Act had not been filed;[11] a plea in second appeal that no appeal should have been entertained from a preliminary decree after a final decree had been passed and that all parties were not joined in the first appeal;[12] a plea of estoppel;[13] a plea of novation of contract;[14] a plea of absence of notice before cancellation of a security bond.[15]

In a mortgage suit defended on the ground of want of legal necessity and thrown out on the single issue of legal necessity, the plea that the defendant were not born on the date of the mortgage and could not therefore dispute its validity;[16] the plea of legal necessity;[17] the plea of want of registration of firm;[18] in a suit for setting aside a gift on the ground of

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Aftab Ali v. *Nawab Begum*, A 1973 All 511.

4 *Bachu* v. *Nalumi*, A 1935 Pat 476.

5 *Giraj* v. *Sanka Prasad*, 1937 OWN 1169, A 1938 Oudh 33.

6 *Makarram* v. *S. Hardat Singh*, A 1941 Pesh 59.

7 *Narainderen* v. *Ramdas*, 8 WR 425; *Charu Chandra* v. *Sindhendu*, A 1948 Cal 150, 52 CWN 112.

8 *Municipal Committee* v. *Chatri Singh*, 1 A 269.

9 *Maung Pe* v. *Ma Lon Ma Gale*, 8 ALJ 739, 13 BLR 464, 14 CLJ 15, 11 IC 497; *Amar Singh* v. *Tulsi Ram*, A 1949 Nag 195.

10 *Sampat* v. *Bhujang*, A 1927 Nag 120.

11 *Lachmi Kant* v. *Remeshwar*, A 1948 Pat 104.

12 *Sibnarain* v. *Abdul Gani*, 94 IC 417 Cal.

13 *Sudhamoyee Basu* v. *Bhujendra Nath*, A 1955 Cal 713; *Jado Singh* v. *Bishunath*, 196 IC 984; *Kumar Prativa Nath* v. *Benod Behari*, 61 CLJ 75; *Gopal* v. *Jaganath*, 37 BLR 471; *Jacob* v. *Co-operative Society*, A 1940 Lah 193, but if necessary facts have been pleaded and proved, the defence of estoppel which is only an inference from such facts may be pleaded in appeal; *Madan Gopal* v. *Sundaram*, A 1940 Rang 172; *Municipal Board* v. *Sukhdeo Prasad*, A 1981 All 386.

14 *Shivajiram* v. *Gulabchand*, A 1941 Nag 100.

15 *O. A. Narayanswami* v. *S A. Narain Ayangar*, A 1943 Mad 288.

16 *Ram Ratan* v. *Kapil Deo*, A 1923 All 20 (DB).

17 *Nagar* v. *Khase*, A 1925 All 440.

18 *Mohammad Ali* v. *Karji*, A 1945 Pat 286; see however, *Lokram Das* v. *Tharumal*, 184 IC 88, A 1939 Sind 206.

coercion and fraud the new plea that the gift was revocable under Hanafi Law;[19] when a sale-deed was attacked in the lower court for want of consideration, a plea that it was not *bona fide*;[20] in a rent ejectment suit the defendant alleged title as mortgagor and fought on the issue of plaintiff's title, the plea of insufficiency of notice to quit;[1] a plea of improper attestation of a mortgage-deed,[2] or an objection about execution or registration when opposite party might have adduced evidence if raised in the trial court;[3] a plea of protection under section 41, Transfer of Property Act.[4]

In a suit for release of property attached in execution of a decree against the manager of a family on the ground that it belonged to the plaintiff separately by partition with the judgment debtor, the new plea, in appeal, that the decree was passed against the manager in his individual capacity and therefore the joint family property could not be attached;[5] the plea that the suit is not maintainable for partial partition;[6] where the defence in the lower court was that a *kabuliyat* was never executed, a plea that it was not enforceable against the appellant;[7] the plea of want of attestation in a gift deed relied upon by the defendant;[8] plea that document is inadmissible either as not duly proved[9] or for lack of proof of loss of its original;[10] plea of irrevocability of licence;[11] after dismissal of a mortgage

19 *Mufid-un-nissa* v. *Yusuf*, 101 IC 697 Oudh.

20 *Pragnarain* v. *Fatima*, 147 IC 952, 10 OWN 1186.

1 *Hanumantram* v. *Shankarlal*, 95 IC 573, 28 BLR 513 (DB); *Bodordoja* v. *Ajijuddin*, 57 C 10; *Krishan Prasad* v. *Adyanath*, A 1944 Pat 77; *Mathura Singh* v. *Mirza Jamal*, A 1973 Pat 43.

2 *Budh Singh* v. *Jawalnain*, 19 IC 430 All; *Raja Venkatra* v. *Kamisetti*, 101 IC 498 Mad.

3 *Siandra Ara Amina Begum* v. *Hasan Ara*, 1935 OWN 871; *Chajju* v. *Ghulam*, A 1939 Lah 459.

4 *Fakirappa* v. *Rudrappa*, 137 IC 367, 32 Bom 255, 34 BLR 354; *Shankar Rao Ramrao Maural* v. *Sumati Bhikali Khiste*, A 1977 Guj 178.

5 *Ram Chand* v. *Ramanand*, 68 IC 227, 3 Lah LJ 392.

6 *Thakar Singh* v. *Ujagar Singh*, 18 IC 583 Punj; *Nagur Pichai* v. *Rakkappa*, A 1927 Mad 528.

7 *Kunji Singh* v. *Raj Kumar Singh*, 11 IC 940.

8 *Lalta Prasad* v. *Nasir Khan*, 56 IC 179 All.

9 *Krishna Kumar Sinha* v. *The Kayastha Pathshala*, A 1966 All 570.

10 *Krishnapal* v. *Mt. Mitzan*, A 1934 Lah 271.

11 *Chevaber* v. *Dharmodayan Co.*, A 1966 SC 1017.

suit against sons for want of legal necessity, a plea for a personal decree;[12] after dismissal of a suit based on title as donee, the plea of title as heir;[13] on dismissal of a suit based on heirship, the plea of title in own right independent of heirship;[14] a plea that plaintiff should have sued in a representative capacity;[15] after dismissal of suit on the ground that there were nearer reversioner than the plaintiff, the plea that under a family custom plaintiff was entitled to share with the nearer reversioner;[16] a plea that a family arrangement was bad for vagueness.[17]

In a suit for damages for breach of contract to purchase goods, the plea that the resale by plaintiff was unauthorised;[18] the question when an agency must be held to have terminated within the meaning of Art. 89, Limitation Act 1908;[1] in a suit for declaration of adoption by a widow alleging permission by the husband dismissed for want of proof of permission, the plea that adoption was valid as having been assented to by the *Sapindas*;[2] in a case in which the question was whether a transfer was made during the pendency of a suit, the question of active prosecution of suit raised for the first time before the Privy Council;[3] the plea of invalidity of adoption when in the lower court the fact of adoption alone was contested;[4] a plea of forfeiture of tenancy by denial of title not raised in the plaint;[5] a plea that the ejectment suit was bad for partial ejectment;[6] where in the lower court defendant pleaded ex-proprietary right, a plea of

12 *Munshi* v. *Mangat*, 31 IC 706 All; *Budhan* v. *Jagannath*, 34 IC 757, 3 OLJ 214; *Gajadhar* v. *Ambika Prasad*, 41 CLJ 450, A 1925 PC 169 (in this case application of amendment of plaint made before the Privy Council was also refused).

13 *Mehran* v. *Rahimi*, 102 IC 426, 28 PLR 181; *Jhumman* v. *Husain*, 7 OWN 1058, A 1931 Oudh 7.

14 *Kaladevi* v. *Khalarai*, A 1949 Pat 124.

15 *Guljarkhan* v. *Husein Khan*, A 1937 Bom 476.

16 *Mahomad Idris* v. *Barulan*, 132 IC 541, 8 OWN 716.

17 *Manjunatha* v. *Mukambika*, 1937 MWN 162.

18 *Firm Dinanath* v. *Ramjidas*, 7 LL J 114, A 1927 Lah 249.

1 *Kinattinkara* v. *Manavikrama*, A 1928 Mad 906, 109 IC 332 (DB).

2 *Ramarao* v. *Srinivas*, 7 Mysore LJ 270.

3 *Parmeshri Din* v. *Ram Charan*, A 1937 PC 260.

4 *Tamanna* v. *Parappa*, A 1945 PC 111.

5 *Darbar Saheb* v. *Bare Lal*, A 1936 Pat 275.

6 *Jogendra Nath* v. *Nistarini Dasi*, A 1939 Cal 1486.

adverse possession [7] a plea about prescription of title to deity's property;[8] a plea of statutory charge under section 55(6)(b) Transfer of Property Act, where a plea of contractual charge could not be proved;[9] a plea of contributory negligence.[10]

Where in a suit for possession defendant pleaded agreement to sell in his favour and the suit was decreed, the plea that defendant was a tenant and entitled to notice to quit;[11] where in the lower court defendant had pleaded misrepresentation, a plea of mutual mistake;[12] a plea of abatement when it involved a question of fact about the presence of heirs or when the defendant was aware of the presence of widow, was not allowed to be raised for the first time in appeal.[13] An objection that an order of the trial court impleading the respondent as defendant was wrong;[14] in a suit for specific performance of a contract to sell made by the manager of a joint family contested by a junior member on the plea of want of necessity and other pleas on merits, the plea that he was not a proper party to the suit;[15] when both master and servant were sued for malicious prosecution as principals, a plea in second appeal that the master was vicariously liable as his servant had acted in the course of his employment;[16] when a party was sued as a surety, the plea that he was a co-obligor;[17] when defendant unsuccessfully pleaded title by adverse possession in a suit for rent, the plea of irrevocable licence;[18] when party's object was to have the question of title decided, a plea of possessory title in second appeal.[19] A plaintiff, whose suit for compensation for acts contrary to a

7 *Paras Ram* v. *Raj Kumar*, 27 ALJ 549, A 1929 All 498.
8 *Sudha* v. *Supreshwar*, A 1972 Ori 145.
9 *M.R.R.M. Chettyar* v. *S.B.M.S.I. Chettyar Firm*, 195 IC 9, A 1941 PC 47.
10 *Kali Krishna* v. *Municipal Board*, A 1943 Oudh 140.
11 *Kasemali* v. *Bahajuddin*, A 1949 Assam 22.
12 *Soorath Nath* v. *Bhabashankar*, 33 CWN 626, A 1929 Cal 547 (DB).
13 *Kader Bux* v. *Salimuddi*, 50 CLJ 543; *Jagannath* v. *Narayan*, A 1965 Pat 300.
14 *Daw Aye* v. *U. Kwe*, 154 IC 465, A 1935 Rang 23.
15 *Madiraju* v. *Somu*, 125 IC 549 Mad.
16 *Raghunath* v. *Moti Ram*, A 1933 Nag 299.
17 *Vaiyapuri* v. *Seetharama*, 1934 MWN 118, A 1934 Mad 659.
18 *Puran* v. *Mansukh*, 126 IC 584, A 1933 All 632.
19 *Budhulal* v. *Ram Sahai*, A 1932 Oudh 244, 9 OWN 553; *Nataraja Pillai*, v. *Subbaraya*, A 1949 PC 43.

statute is dismissed, cannot in appeal get a decree for compensation under the statute.[20] An objection that execution was not maintainable as the petitioner was insolvent was not heard in appeal.[1] In a suit for damages on the basis of a resale, the plaintiff was not allowed to claim damages on the basis of market price.[2] In a suit for eviction of tenant, when the defendant claimed ownership, a plea that he was *theka* tenant was not allowed.[3]

In a suit for mandatory injunction for demolition of construction and possession of land, the plea in second appeal that Municipal Board could not grant fresh lease to the plaintiff was not allowed.[4] In a case, a decree for partnership debt was passed against partners A and B jointly and was realised from A. Then A brought a suit against B for the amount paid by him, alleging that the debt was of the time prior to his becoming a partner. He was not allowed in appeal to claim contribution.[5] In a suit for ejectment on the basis of a lease, the defendant was not allowed to raise the plea that the lease was for manufacturing purposes and six months' notice was necessary.[6] In a case where properties were alleged to be private properties, the Supreme Court did not permit the argument that properties were partly of a trust and partly private.[7]

A Hindu husband's divorce petition based on the ground of non-resumption of cohabitation though one year had passed from the date of decree of restitution for conjugal rights passed on the wife's suit, the wife pleaded in defence that cohabitation was actually resumed but that she had again been turned out of his house by the petitioner after two days. This plea was disbelieved by the courts. In the Supreme Court for the first time she sought leave to amend her written statement for pleading that the husband had with the intention of ultimately having divorce allowed the wife to obtain a decree for restitution of conjugal rights knowing fully well that this decree he would not honour and thereby misleading the wife and

20 *Prabhu Dayal* v. *Commissioner of Arrah Municipality*, A 1935 Pat 105.
1 *Pedda* v. *Darur*, A 1944 Mad 425.
2 *Tikaram Chand Bhag Chand* v. *Kakhan Lal Din Dayal*, A 1937 Lah 842.
3 *Serajul Islam* v. *Bhubaneshwar Mullick*, A 1975 Cal 253.
4 *Nand Kishori Devi* v. *Sahdeo Ram Chaurasia*, 1981 ALJ 1198.
5 *Meyappa* v. *Palaniappa*, A 1949 Mad 109, (1947) 2 MLJ 259.
6 *C. Maskerlich* v. *Stewart & Co.*, A 1970 SC 839.
7 *Goswami Sri Mahalaxmi Valmji* v. *Shah Ranchoddas Kali Das*, A 1970 SC 2025.

the court and that he could not be allowed to take advantage of his own wrong. It was also argued, as "usual", on her behalf that the plea had not been taken earlier due to mistake of her lawyer and she should not suffer for the same. The Supreme Court rejected the prayer as this new case was inconsistent with her earlier defence on facts. However, she was allowed to canvas a purely legal plea, though not taken in the courts below, that section 9 of the Act was void as the remedy of restitution of conjugal rights was violative of the right to privacy and human dignity, guaranteed by Article 21 of the Constitution.[8] The plea was, however, negatived on merits.

A mixed question of fact and law is not normally allowed to be raised for the first time in appeal unless exceptional circumstances exist.[9] (*See also* Chapter VIII & X *ante*)

Abandoned Point : Ordinarily a point abandoned,[10] or waived,[11] by a party at the trial or first appeal, cannot be taken up in appeal, or in second appeal unless it is a pure question of law.[12] In a mortgage suit the plaintiff alleged that the cause of action arose in 1905. By an amendment he changed this date to 1894 and claimed his suit to be within limitation from the dates of certain payments. The payments were disbelieved and the suit dismissed as barred by time. He was not permitted to urge in appeal that 1905 was the correct date of his cause of action.[13] When a point of fact was conceded by the appellant's counsel in the lower court, the second Appellate Court will decline to hear arguments thereon,[14] but a concession by him on a question of law will not preclude his client from urging contrary view in appeal.[15]

8 *Saroj Rani* v. *Sudarshan*, (1984) 4 SCC 90 (para 9 & 12), A 1984 SC 1562.

9 *Mst. Jagir Kaur* v. *Jaswant Singh*, A 1963 SC 1521; *M. Satyanarayana* v. *Yelloji Rao*, A 1965 SC 1405; *Ram Gopal Chaturvedi* v. *State of M.P.*, A 1970 SC 158, (1969) 2 SCC 240 (para 4).

10 *Fakira* v. *Brij Lal*, 39 IC 381, 120 PLR 1917; *Govinda Rao* v. *Balu*, 16 B 586; *Sheo Tahal* v. *Lal Narain*, 124 IC 413; *Bargo* v. *Narain Prasad*, 13 Luck 167, 1937 OWN 229, A 1937 Oudh 243; *Ambika* v. *Rameshwar*, A 1946 Oudh 221.

11 *Gyan Chandra* v. *Durga Charan*, 7 C 318.

12 *Napu* v. *San Bibi*, A 1931 Mad 632, 131 IC 461.

13 *Pancham* v. *Ansar Husain*, A 1926 PC 85, 24 ALJ 731, 1926 MWN 520, 48 A 45.

14 *Kannepalli* v. *Sri Palahani*, A 1945 Mad 256.

15 *Sadashiva* v. *Govind*, A 1945 Bom 351.

Subsequent Events [16]: It is now well settled that where it could be shown that the original relief has become inappropriate or that it was necessary to give relief to shorten litigation, subsequent events might be taken into consideration.[17] For example, where plaintiff sued for demolition of a building but was given only a declaration that he was the reversionary heir of a man whose widow died during the pendency of the appeal, the Appellate Court gave plaintiff a decree for demolition.[18] In another case, where the suit for ejectment was dismissed under the provisions of the Calcutta Rent Act, but before the hearing of the appeal the Act ceased to operate and its restrictions against ejectment were consequently removed, it was held that the Appellate Court had power to decree ejectment.[19] The decision of the lower court was altered in the light of legislative changes made since that decision.[1] Such supervening events, as may result in creation or extinction of rights by Legislative enactments during the pendency of appeal, have to be taken into consideration in deciding the appeal.[2] However, the rights which could have been pleaded or enforced before a suit was finally adjudicated by the first court, could not be pleaded as of right for the first time in appeal.[3] However, for considering subsequent events it is not permissible for the court to allow fresh evidence in second appeal.[4]

Rules for Drafting Grounds of Appeal : The next question is how such grounds of objection should be framed. The following rules are deducible from O.41, R.1(2):—

16 *Also see* Chapter VIII, under heading 'Subsequent Events'.

17 *Shadi Singh* v. *Rakha*, A 1994 SC 800; *Ramesh Kumar* v. *Kesho Ram*, A 1992 SC 700; *Mathura Pd.* v. *Mohd Umar*, A 1965 All 402.

18 *Anandamoyee* v. *Sheeb Chunder*, 2 WR (PC) 19.

19 *Suresh Chandra* v. *Kanti Chandra*, A 1928 Cal 436, 47 CLJ 530 (DB).

1 *A.S. Krishna* v. *M. Sundaram*, A 1941 PC 5; *Qudrat Ullah* v. *Municipal Board, Bareilly*, A 1974 SC 396.

2 *Mithilesh Kumari* v. *Prem Behari Khare*, A 1989 SC 1247; *P.V.P.R.V.R. Veerappa Chettiar* v. *V.A.R. V.V.R. Sivagami Achi*, A 1942 Mad 291; *Shyam Manohar* v. *Pt. Anandi*, A 1943 Oudh 271, 1943 OWN 93; *Mahendra Ramayya* v. *Mahendra Govinda*, (1966) 1 An. LT. 424, (1966) 1 An. WR 352; *Punjab Co-operative Bank* v. *Amrik Singh*, A 1966 All 216; *Permanand* v. *Abdul Qader*, A 1973 Raj 303: *Bishwanath Chatterjee* v. *A.K. Sarkar*, A 1972 Cal 52.

3 *Tahurdin* v. *Jalaldin*, A 1944 Lah 319 (FB); *Md. Mustafa* v. *Mansoor*, A 1977 All 239, (1977) 3 ALR 147.

4 *Thakkar Anandji Parshottumdas* v. *Dharamshi Kalabhai*, A 1972 Guj 70.

(1) Grounds of objection should be written distinctly and specifically.

(2) They should be written concisely.

(3) They must not be framed in a narrative or argumentative form.

(4) Each distinct objection should be stated in a separate ground and the grounds should be numbered consecutively.

These rules are simple, but important. They must be carefully observed. Any failure to follow these rules may result in an irreparable injury, for, if any memorandum of appeal is not drawn up in accordance with them, the court may reject the appeal.[5]

First Rule : *Each grounds of attack must be specifically and distinctly stated.* No ground of appeal can be permitted in a general or vague form, such as "the judgment of the lower court is contrary to law, facts and equity". The particular point on which the lower court has erred in law, the particular finding of fact which is wrong, and the particular view taken by the lower court which is opposed to equity must be clearly and distinctly specified. If any objection is not distinctly and specifically taken, the court may not permit it to be argued, even if the point be a very important one.

Second Rule : *The ground should be drawn up concisely, i.e.,* without any unnecessary detail and in brief language. The following ground of appeal will be violative of this rule : "The plaintiff's witnesses have fully proved that the plaintiff is the legitimate son of Ramnath. The defendant's evidence to the contrary, which attempted to prove that the plaintiff was the son of Ramnath by a concubine, was not reliable, and the lower court has committed a mistake in preferring it to the plaintiff's evidence and has come to a wrong finding that the plaintiff is not the legitimate son of Ramnath". The correct form of taking this objection would be "Because the finding of the lower court that the plaintiff is not the legitimate son of Ramnath is against the weight of evidence on the record".

Third rule : *The grounds of objection should contain no narrative or argument* : Facts of the case, or facts constituting an objection should not be narrated, but the objection itself should be distinctly and concisely

5 O.41, R.3.

formulated, and set out in the memorandum. To say that "the defendant had received full consideration for the bond in suit" and that "the defendant's story that he received only Rs.200 out of Rs.400 is false", is to narrate facts, and not to set up a ground of objection. If it is intended to challenge the finding of the lower court that the defendant received only Rs.200 out of Rs.400 on account of the consideration of the bond, it should not be done by the grounds of appeal as formulated above, but by a distinct objection in the following form: "The finding of the lower court that the defendant had received only Rs. 200 out of the consideration of Rs. 400 is against the weight of evidence (*or*, is not supported by the evidence on the record)" *or* "Because the lower court wrongly placed the burden of proving the passing of full consideration on the appellant."

To refer to the evidence or rule of law which a particular objection is supported or to adduce reasons in support of any objection is to state argument, and it should not be done.[6] However, a memorandum of appeal, more like a writ petition and unlike a plaint, is directed to challenge the correctness and validity of the view taken by the inferior court and as such is bound to refer to law and cannot be confined to a bare recital of facts and must, therefore, give reasons as well. But only points raised need be indicated in distinct concise paragraphs and not arguments or narrative elaborating those points.

If the factual controversy or the course of litigation be complicated and it be necessary to allude to it at some length in order to explain the grounds of appeal in one or a few prefatory paragraphs before starting the grounds of appeal the same may be separately stated in one or a few prefatory paragraphs before starting the grounds of appeal.

Forth Rule : *Each distinct objection should be stated separately and only once.* The same objection should not be stated in different forms or language at more than one place nor should one objection be covered by another. In other words, the objection would be mutually exclusive, and should not, overlap each other. The following grounds of appeal are defective :

1. "Because the respondent has not proved that he is the owner of the land or that he has been in possession within 12 years.

6 *Vythilinga* v. *Sankaralinga*, 68 MLJ 218.

2. Because the suit was barred by limitation."

Objection No. 1 consists in fact of two objections, and objection No. 2 is included in the latter part of objection No. 1.

A slight change would make the grounds of appeal unobjectionable, thus:

1. Because the lower court has failed to appreciate that the respondent had failed to prove his title to the land in suit.

2. Because the lower court has failed to appreciate that the respondent had failed to prove his possession within 12 years of the suit (*or* that the suit was barred by limitation).

The usual practice is to begin an objection with the word "that" or "because". Each separate objection should be serially numbered.

Second Appeals : An amendment to section 100 C.P.C. by Central Act 104 of 1976 lays down that the High Court shall admit a second appeal only if it is satisfied that a substantial question of law arises for decision. In view of this provision it is desirable to formulate one or a few substantial questions of law immediately after the grounds of appeal. It is, however, not a correct practice to do away with "grounds of appeal" and to describe the grounds themselves as "substantial question of law". Specification of grounds of law may be stated in addition, only for the convenience of the court. The latter should moreover be still more precise and concise, than grounds of appeal, and should be formulated in the form of questions, each question starting with the word "whether".

Relief : Though it is nowhere expressly provided in the Code that the relief sought by an appeal should be stated in the memorandum of appeal, and though the absence of a prayer for relief does not appear to be fatal, and the court is bound to exercise its powers under section 107, C.P.C. and to give to the appellant such relief as it thinks proper, yet it is the established practice, which is a very proper practice, to mention in the memorandum the relief sought by the appeal. The court-fee to be paid, depends both on valuation and on the relief sought by the appeal, which would often govern the former. Besides, the appellant, may be only one of the several persons against whom a decree has been passed, and may be interested in having only so much of the decree reversed as is against him,

or he may relinquish a part of his claim, in which case he will have to pay court-fee on the claim he wants to assert in the appeal.[7] The relief would generally be to set aside the decree apppealed against, but sometimes this alone may not be sufficient, and a further relief may have to be added. For instance, in an appeal by a defendant against a decree passed against him, it may be sufficient to say that the decree be set aside and the suit be dismissed but in an appeal by a plaintiff whose suit has been dismissed it will be necessary to add "and the plaintiff's suit be decreed for, etc."[8] It is not, however, necessary to claim the relief with the same precision and details as in the plaint.

Signature : A memorandum of appeal need not be signed by the appellant himself. It may be signed by him or by his pleader but if there are several appellants and they have no pleader, it must be signed by all of them. It is not required to be verified.

Certificate: Some High Courts, by their special rules, require a certificate of counsel filing the appeal. For example, the High Court at Allahabad requires that if, in any second appeal presented by an advocate, the ground is taken that there is no evidence or admission to support the decree, the advocate, shall certify under his hand that he has examined the record and that, in his opinion, such ground is well founded in fact. Such certificates are endorsed at the foot of the memorandum of appeal.

Who May Appeal : Any party to a suit adversely affected by a decree can appeal from the decree, but a person whose name does not appear as a party cannot appeal as of right[9] nor can a *pro forma* defendant from whom plaintiff has derived his title.[10] But if a *pro-forma* defendant's interest with reference to the subject-matter of the suit have been prejudiced, he can appeal.[11] A person not arrayed as a party may also appeal with the leave of the appellate court if he would be prejudically affected by the judgment.[12] If the party is dead, his legal representative

7 *Karamchand* v. *Jullunder Bank*, 102 IC 705, 9 Lah LJ 293; *Sah Ramchand* v. *Pannalal*, 27 ALJ 547, A 1929 All 308.

8 O.41, R.1.

9 *Sadhumal Khazanamal* v. *Debi Chand*, A 1937 Lah 347.

10 *Nirmal Singh* v. *Zamir Uddin*, A 1937 All 368, 1937 AWR 260.

11 *Hafiz Muhammad* v. *Sarupchand*, A 1942 Cal 1.

12 *Jatan Golcha* v. *Golcha Properties*, (1977) 3 SCC 573.

can prefer an appeal.[13] If he has been declared insolvent, the receiver can prefer or maintain the appeal.[14] If he is a minor, his guardian *ad litem* or next friend in the suit can alone appeal on his behalf and no one else has a right to do so.[15] If the guardian or next friend is dead, the minor can file the appeal through another guardian. If, for any other reason, a person other than the guardian *ad litem* wishes to file an appeal on behalf of a minor, he must present, with the memorandum of appeal, an application to remove the guardian *ad litem* and appoint himself in his place.[16] In the application, grounds for removal should be clearly shown, e.g., collusion or negligence. Where a *benamidar's* suit was dismissed and he released the property in favour of the real purchaser, the latter can file an appeal.[17] Where a decree is against the firm, one of its partners can appeal.[18] In all such cases when a new person figures as an appellant or as appellant's guardian, next friend or legal representative there should be a note in the memorandum of appeal alleging the right by which such new person files the appeal, or an application may be attached explaining the matter. An affidavit is also usually filed to substantiate the allegations. In Calcutta High Court the practice is to file a separate application, affidavit alone is not considered sufficient.[19] Where an appeal was filed by a *vakil* having power of attorney from the legal representative of a deceased party, but the appeal was filed in the name of the dead person, it was held that there was no proper appeal.[20] A stranger held by the court as representative of a judgment debtor for the purpose of execution of decree can appeal.[1] A party cannot file an appeal from a finding, which may be against him, if the decree or the final order in the case is in his favour.[2] The adverse

13 Section 146, C.P.C.

14 *Manoharlal* v. *Diwan Singh*, 18 IC 922.

15 *Chedi* v. *Lachmi*, 13 AWN 161.

16 *Punjaji* v. *Ramanand*, 122 IC 445, A 1930 Nag 177; *Latafat Ali Khan* v. *Md. Yar Khan*, 124 IC 474, 1930 ALJ 771; *Raj Behari* v. *Dr. Mahabir Prasad*, 1956 ALJ 45.

17 *Sivaswami* v. *Marudaiya*, 1939 MWN 962, 50 LW 429.

18 *Mahadeo Firm* v. *Kunjilal*, 1939 ALJ 1016, A 1940 All 81, 1939 AWR (H.C.) 814.

19 *Sanat Kumar* v. *Tarapada*, A 1948 Cal 36, 51 CWN 290.

20 *Surajmal* v. *Raghunath*, 117 IC 257, A 1929 Nag 261.

1 *Guduri* v. *Devabhaktum*, A 1943 Mad 381.

2 *Deva Ram* v. *Ishar Chand*, (1995) 6 SCC 733; *Secretary of State* v. *Saminatha*, 37 M 25; *Ma Lan* v. *Ma Mya*, 179 IC 946, A 1939 Rang 59.

finding in such a case will not ordinarily be *res judicata* against him, hence he need be under no apprehension, but if the facts of a case are so peculiar that such a finding would operate as *res judicata* it has been held that an appeal from such finding may be permissible.[3] Where two suits are tried and the issues involved in both are the same the losing party should prefer separate appeals against the decision in both suits, for failure to file appeal against one may have the effect of *res judicata* in the other[4] save in exceptional cases.[5]

Where there are several plaintiffs or several defendants and a decree is passed *on a ground common to all such* plaintiffs or defendants, any one of such plaintiffs or defendants may appeal from the whole decree[6] and in such an appeal the entire decree can be varied or reversed,[7] but in such a case all of them will be necessary parties.[8] But where one of the appellant dies and the appeal abates against him for failure to bring his heirs on record within limitation, O.41, R.4 did not permit variation of the decree against the deceased party.[9] When land of appellants was acquired under the Land Acquisition Act and on the reference made, compensation was enhanced, but the appellants filed

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3 *Hara Chand* v. *Bhola Nath*, 39 CWN 567.

4 *Sheodan Singh* v. *Daryao Kumar*, A 1966 SC 1332; *Avtar Singh* v. *Jagjit Singh*, A 1979 SC 1911; *Pravamma* v. *Suwati*, A 1970 Mys 81; *Premier Tyres Ltd* v. *The Kerala State Road Transport Corporation*, A 1993 SC 1202 (*Narhari* v. *Shankar*, A 1953 SC 419, distinguished); *Bhagwan Sahai* v. *Dursa Kuer*, A 1963 All 210 (FB); see however, *Radha Krishna* v. *Ram Niranjan*, A 1985 Pat 289 (one second appeal enough against judgment in two cross appeals).

5 *Ramagya Pd* v. *Murli Pd.*, A 1974 SC 1320; *Gurappa* v. *Gangavva*, A 1984 Kam 198.

6 O.41, R.4; see also, *Karan Singh* v. *Pratap Chand*, A 1964 SC 1305.

7 *Ramayan Pd.* v. *Mst Gulab Kuer*, A 1967 Pat 35; *Hanuman* v. *Shakeru*, A 1972 Raj 176; *Devi* v. *Vidyadhar*, (1971) 37 CLT 456; *Chief Secretary* v. *Abdul Gani Dar*, 1977 Kashmir LJ 145; *Parbhawati Devi* v. *Mehendra Narain Singh*, A 1981 Pat 133; *Mahabir Pd* v. *Jage Ram*, (1971) 1 SCC 265.

8 *Narayan Pillai* v. *Krishna Pillai*, A 1966 Ker 317.

9 *Rameshwar Pd.* v. *Shyam Behari Lal Jagannath*, A 1963 SC 1901, 1964 ALJ 109; *Sri Chand* v. *Jagdish Pd. Kishan Chand*, A 1966 SC 1427, (1966) 3 SCR 451; *Jagat Ram* v. *Sohan Singh*, A 1973 P&H 440; *Mahabir* v. *Laxmi Devi*, A 1975 Pat 279; *Habibandi* v. *Ram Mohan*, A 1977 MP 187; *Shyam Narayan* v. *Ganesh Rai*, 1978 AWC 165; *Sita Ram* v. *Fatingan*, A 1981 All 37.

appeal for further enhancement and one appellant died during pendency of appeal and appeal qua his share abated, it was held that the appeal for remaining appellants would be heard as shares of appellants were defined and ascertained.[10] It is not permissible under O.41, R.4 for only one of the several plaintiffs in a suit under section 92 C.P.C., to prefer an appeal, as all the persons to whom permission has been granted can sue or appeal only jointly and they cannot be regarded as several plaintiffs,[11] but one of several joint owners who were plaintiffs may file an appeal.[12] A person, who has adopted an order of the court and acted under it, cannot, after he has enjoyed a benefit under it, appeal from it, e.g., a party accepting costs of an amendment,[13] or costs awarded on restoration of a suit,[14] cannot appeal from the amendment or restoration, but withdrawal of pre-emption money from court by the vendee does not deprive him of his right to appeal from the pre-emption decree,[15] nor does paying and satisfying the decree appealed from,[16] nor does filing a plaint in another court debar a plaintiff from appealing against the order of its return.[17]

Who Should be Added as a Respondent : It is not necessary that all the parties to the decree should be made parties to the appeal. The appellant must implead as respondents all those persons who would be affected by the success of his appeal. He is at liberty to confine his appeal to one out of several person who would ordinarily be affected, and in that case, he may implead only that person.[18] For instance, A sues B and C for money due on a bond, and the suit is dismissed. In appeal, if A prays for a decree against B alone, he need not make C, a respondent to the appeal. But if A and B obtain a joint decree against C, and C appeals, he

10 *Sher Singh* v. *Union of India*, A 1980 Del 37.
11 *Muhammad Ishaq* v. *Muhammad Husain Khan*, 100 IC 838; *Mohshan Ali Khan* v. *Muloo*, 24 A 694; *Dharm Singh* v. *Bakshi*, 92 IC 315.
12 *Shripad Balwant* v. *Nagu*, A 1943 Bom 301.
13 *Sohanlal* v. *Dharimal*, 109 IC 819, A 1928 Lah 813.
14 *Poduri* v. *Mohammad Azam*, 110 IC 528 Mad; *Gadde Benkatarayudu* v. *Anumolu Chinna*, 58 MLJ 137.
15 *Mehdi* v. *Mt. Nadran*, 111 IC 814, A 1929 Lah 137.
16 *Ishar Das Dharam Chand* v. *Buta Mal Durga Das*, 115 IC 67, A 1929 Lah 42 (DB).
17 *Ramchandra* v. *Mohan Lal*, 121 IC 668 Nag.
18 *Narain Das* v. *Sheodin*, A 1926 All 234 (DB), 24 ALJ 300; *Madhusudan* v. *Satish Chandra*, A 1926 Cal 512, 91 IC 620 (DB).

must make both A and B respondents. If several plaintiffs sued for ejectment and the suit was dismissed, one of them can appeal.[19] Similarly if a joint declaratory decree has been passed in favour of several plaintiffs it is not competent to the defendant to prefer an appeal impleading only one of such decree holders as respondent.[20] If an appeal is filed by the defendant and one of the respondent decree-holders dies and his heirs are not brought on record, the whole appeal abates as it is not possible to proceed with it in the absence of the deceased decree-holder.[21] If any party who would be affected by the result of the appeal has died after the decision of the lower court but before the institution of the appeal, his legal representative should be impleaded as respondent and the facts may be mentioned in the memorandum of appeal or in a separate application. If the guardian of a minor respondent has died before appeal, an application should be made for appointment of a new guardian. Such application should be made as in a suit. In case the legal representatives are not impleaded but the appeal is of such a nature that it can proceed without them, e.g., when the interest of the deceased was separate and defined,[1] if the court passes a decree after hearing the appeal on merits the decree will not be invalid.[2] If decree cannot be passed without them, e.g., in a partition suit,[3] or when the deceased was one of the plaintiffs in a suit for specific performance of a contract,[4] or when the suit is for accounts and partition of partnership property,[5] the entire suit will abate. If some of the heirs are added, they may be held to represent all, if the mistake is *bona fide*, because of ignorance of all the heirs.[6] A defendant who has remained *ex parte* shall be impleaded as party in appeal, if he is a necessary party.[7]

19 *Rambir* v. *Bataiya*, 1962 ALJ 868.

20 *Feroze* v. *Secretary of State*, A 1928 Lah 947, 111 IC 692; *Ramdas* v. *Ram Anuplal*, A 1949 Pat 90.

21 *State of Punjab* v. *Nathu Ram*, A 1962 SC 89.

1 *Mt. Jainath* v. *Danpal Singh*, A 1947 Oudh 164.

2 *Mohammad Naina* v. *Muhammad Hehiya*, A 1933 Mad 218, 145 IC 765.

3 *Malobai* v. *Gaus Md.*, A 1949 Nag 91; *Pulla Madduleti* v. *Rahiman*, A 1949 Mad 199, (1947) 2 MLJ 587, 1947 MWN 542; *Udairaj* v. *Bijaipal*, 1962 ALJ 282.

4 *Aziz Khan* v. *Bhola Nath*, A 1945 All 21.

5 *Kunjbiharilal* v. *Ayodhya Prasad*, A 1947 Oudh 17.

6 *Dhondu* v. *Waman*, A 1945 Bom 126; *Ram Das* v. *Dy. Director*, A 1971 SC 673, (1971) 1 SCC 460 (case under O.22, R.4); *Barmeshwor Pd.* v. *Baba Kuer Raj*, A 1964 Pat 116; see also, *Padmaram* v. *Suraj*, A 1961 Raj 72.

7 *Asst. Commissioner HR & C.E.* v. *S.S. Vara Prasada Rao*, 1994 (2) ALT 190 (AP).

In a suit against a firm to which partners are also impleaded it is not necessary to implead legal representatives of a deceased partner as O.30, R.4, applies to appeal also.[8] If a decree holder respondent assigns the decree to a third person, it is not necessary to implead the latter. It is for him to apply to be brought on the record and if he does not and leaves the case to be defended by the original decree-holder he will be bound by the decree.[9]

If a decree proceeds on a ground common to all the plaintiffs or all the defendants, it is open to any one of such plaintiffs or defendants to appeal from the whole decree (O.41, R.4.) The question whether in such cases, it is necessary to join the remaining plaintiffs or defendants as *pro forma* respondents is one on which there has been divergence of judicial opinion. In some cases the view was taken that this was necessary,[10] while in other cases the opposite view has been taken that the decree could be passed without their being parties.[11] It has been held that in such cases the *pro forma* defendants could be impleaded under O.41, R.20. However, sub-rule (2) expressly provides that no respondent shall be added under this rule (O.41, R.20) after the expiry of the period of limitation for appeal unless the court for reasons to be recorded allows that to be done on such terms as to costs as it thinks fit.[12] Thus in any case to take no risks, the remaining plaintiffs or defendants, as the case may be, should be impleaded as *pro forma* respondents.

The mere fact that any party is not before the court will not, however, prevent the court from doing full justice in the case, and from passing any order it thinks equitable and just. Where in a suit by A and B against C for ejectment, the court passed a decree refusing the ejectment on the basis of a compromise and A alone appealed on the ground that compromise

8 *Savalaram* v. *Himatlal*, A 1944 Bom 350; *Upper India Cable Co.* v. *Balkishan*, (1984) 3 SCC 462.

9 *Banke Behari* v. *Raghubarlal*, 1930 ALJ 1034.

10 *Sorukhan* v. *Jan Mohd.* A 1928 Lah 43 (DB); *Balkaran* v. *Malik Namdar*, A 1924 All 873; *Namak* v. *Ahmad Ali*, A 1946 Lah 399.

11 *Ranbir Singh* v. *Bataiya*, A 1963 All 79; *Anant Lal* v. *Debi Prasad*, A 1959 Pat 258; *Brijmohan Lal* v. *Rajkishore*, A 1959 Punj 1417; *Narsingh Das* v. *Bhairon Das*, A 1961 Raj 81.

12 *Abrar Husain* v. *Ahmad Raza*, 167 IC 405, A 1937 All 82.

was not legal as court's permission had not been obtained and the court held that this contention was right, it was held that the decree must be set aside both in favour of A as well as B.[13] But no order can be passed against a person who is not a party to the appeal and who is not on the record.[14] If the order the court proposes to pass is likely to affect any party to a decree who is not a party to the appeal, such party being thus "interested in the result of the appeal" the court can implead him under O.41, R.20, or under its inherent powers. This can be done in second appeal even if the party was not impleaded in first appeal.[15] The court has inherent power under section 151 C.P.C. even to implead the legal representatives of a respondent who had been dead before the appeal was filed.[16] But it has been held that a successful party against whom a right of appeal has become time barred is not interested in the appeal and should not be impleaded.[17] In the case of *Labhu Ram* v. *Ram Pratap*[18] all the case law on the point has been fully and carefully reviewed. In a case for partition the appellant failed to implead the heirs of a co-sharer who had died after the decree and the High Court held that if the decree was found to be bad, then in order to avoid the anomaly of the continuance of the decree against them, they should be added.[19] If a party is not impleaded and the omission is due to an oversight, and the party was not a contesting party in the suit, the court may exercise its powers under O.41, R.20, and implead the omitted party,[20] but it cannot implead a person against whom the appeal has abated.[1] A person who was party to

13 *Ramrup* v. *Kalapanth*, A 1948 All 33.

14 *Chatumal Rangjhomal* v. *Abdul Hameed Khan*, 173 IC 862, A 1937 Sindh 312.

15 *Kishanlal* v. *Kanhaya Lal*, 1938 BMLJ 91.

16 *Alabhai* v. *Bhura*, 171 IC 536, A 1937 Bom 401.

17 *Chokalingam* v. *Shathai*, A 1937 PC 252, 6 Rang 29; *Thadhi* v. *Abdul Hussain*, 31 SLR 468; *Rakka* v. *Arulayi*, 169 IC 318, A 1937 Mad 228; *Alabhai* v. *Bhura Bhava*, 171 IC 536, A 1937 Bom 401; *Teja Singh* v. *Kartar Kaur*, A 1937 Lah 180; *Bisambhar Deo* v. *Hit Narayan*, 160 IC 976, A 1936 Pat 49; *Attar Singh* v. *Devi Sahai*, 169 IC 186, A 1937 All 243; see however, *Rameshwar* v. *Ajodhia*, 195 IC 761, A 1941 Oudh 580; *Suraj Prakash* v. *Santlal*, A 1940 Pat 137.

18 A 1944 Lah 76.

19 *Beas Singh* v. *Baldeo*, A 1928 Pat 343, 7 Pat 510.

20 *Jalaldin* v. *Karim Baksh*, 11 LLJ 523, A 1930 Lah 295.

1 *S. Krishnaswami* v. *Sankarappa*, A 1935 Mad 175, 1935 MWN 398, 41 LW 111, 213 IC 278.

the suit but was not impleaded in appeal, should not ordinarily be impleaded by the court after limitation for the appeal has expired,[2] though where the omission was due to a clerical mistake in the copy of the decree, the omitted party may be added after limitation,[3] If, however, the respondent to be added is only a *pro forma* respondent who is supporting the appellant there can be no objection to his being added even after the period of limitation.[4] The Appellate Court can transpose parties if ends of justice require it even after limitation.[5]

Appeal by Indigent Persons : A person desiring to file an appeal as an indigent person must present an application for being allowed to do so.[6] The application should show that he is not possessed of sufficient means to enable him to pay the court-fee on the memorandum of appeal and should, for this purpose, contain a schedule of all movable or immovable property belonging to the applicant, with the estimated value thereof. An application for leave to appeal as indigent person can be allowed to be amended in the same way as a memo of appeal.[7] The application should be accompanied by the memorandum of appeal written on plain paper, and copies of the judgment and decree required under the rules to be filed with an appeal.[8] It should be presented to the court by the applicant in person. Such applications are governed by the same provisions as applications to sue as an indigent person, and must, therefore, be duly signed and verified. A defect or omission in verification can be allowed to be corrected.[9] If the applicant had been allowed to sue as an indigent person in the lower court, that fact should be mentioned in the application.[10]

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2 *Hayat v. Mutali*, A 1938 Lah 35, 40 PLR 273, 10 RL 67; *Shangara* v. *Imam Din*, A 1940 Lah 314.

3 *Shantilal* v. *Hiralal*, A 1941 Lah 402.

4 *Ramrattan* v. *Fazal Haq*, A 1939 Lah 346.

5 *Bhubneshwar Prasad* v. *Sidheswar*, A 1949 Pat 309.

6 O.44, R.1.

7 *Bihari Sahu* v. *Sudama Kuer*, A 1938 Pat 209, 10 RP 632.

8 *Rajammal* v. *Parthasarthi*, 165 IC 471, A 1936 Mad 600.

9 *Bishan Lal* v. *Kishan*, 169 IC 894, A 1937 Nag 108.

10 *Subodh Chandra* v. *U.C. Bank Ltd.*, A 1941 Cal 659; *Girwarlal* v. *Lakshminarain*, 26 All 329; *Vishwanatham* v. *Satyanandam*, A 1937 Mad 161; *T.C. State* v. *John Mathews*, A 1955 Tr-Co 209 (FB).

Appeals by indigent person differ from suits by indigent person in this important respect that while, in the latter, there is only one document, the petition, and if it is dismissed, the applicant has to bring a separate suit on payment of court fee, whereas in the case of appeal there are two separate documents, viz., the petition and the memorandum of appeal, so that if the petition is rejected, the memorandum is still pending and it can be entertained under section 149 C.P.C. on the applicant paying the necessary court-fee. The court may reject the application but in respect of appeal itself grant time for payment of court-fees and reject the appeal on non-payment.

Under Article 130 of Limitation Act 1963, the period of limitation for such applications is only 30 days for appeal to other courts and 60 days for the High Court, irrespective of the fact that the limitation for the regular appeal may be longer. However, the time for obtaining copies of judgment and decree will be excluded.

Cross Objection : A respondent's cross-objection under O.41, R.22, should be drawn up in the same form as a memorandum of appeal, except that instead of appeal it shall be headed as cross-objection, but the case-title of the cross-objection shall be the same as that of the appeal, thus:

"AB, etc. *Appellant*

versus

CD *Respondent*

Cross-objection under O. 41, R.22, on behalf of CD respondent, to a portion of the decree appealed from :

Grounds of Objection." :

or

"CD, the above named respondent, takes a cross-objection under O.41, R.22, to a part of the decree appealed from in this case, and sets forth the following grounds of objection to the said part of the decree, viz.—"

A cross-objection can be filed within one month of the service of notice of the hearing of the appeal. If a notice is first issued informing the respondent of the filing of appeal and calling upon him to enter appearance and afterwards another notice of hearing issued, limitation is reckoned

from the service of the latter.[11] The respondent should state in the petition of objection the date on which such notice has been served upon him. If the objection is filed beyond one month, an application should be made stating the reasons of delay and praying for permission to allow the objection to be filed. A cross objection can be filed even before the service of notice.[12] When both parties file appeals against a decree and the appeal of one cannot be entertained as it is barred by limitation, it may, according to one view, be treated as a cross-objection to the other appeal,[13] but a contrary view has been taken on the ground that when an appeal is time barred, the court is bound to dismiss it under section 3 of the Limitation Act and cannot consider it by treating it as a cross-objection.[14] If the respondent has privately served copies of his cross-objection on the parties affected by it, written ackowledgments of such parties should be filed with the cross-objection.

O.41, R.33, is wide enough to empower the Appellate Court to give relief not only as between the appellant and the respondent, but also between respondent and respondent. As a general rule a respondent can prefer a cross-objection against the appellant only. In exceptional cases, however, such as where the relief sought against the appellant is intermixed with relief granted to the other respondents so that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and other respondents, or in a case where the objections are common as against the appellant and co-respondent, a cross-objection can thus be directed against other respondents also.[15] A cross-objection cannot, however, be directed against

11 *Lalta Baksh* v. *Phoolchand*, 1939 OWN 530.

12 *Lablu Ram* v. *Ram Pratap*, A 1944 Lah 76, 213 IC 278; *Dasrulal* v. *Narayan*, A 1937 Nag 105, 170 IC 93.

13 *Balkishna* v. *Mt. Javri*, 1939 MLR 746.

14 *Mohd.Sarwar Khan* v. *Ghafoor Beg*, A 1944 Pesh 7; *Ram Sarup* v. *State of Rajasthan*, A 1973 Raj 157.

15 *Dhangir* v. *Madan Mohan*, A 1988 SC 54; *Pannalal* v. *State of Bombay*, A 1963 SC 1516; see however, *Nirmala Bala* v. *Bala Chand*, A 1965 SC 1874 (in which Pannalal's case decided by a larger bench not noticed); *Ajit Singh* v. *Shyamlal*, (1984) 1 TAC 431 P & H; see also, *Gopal* v. *Meenakshi*, A 1941 *Mad* 402; *Vadlamudi* v. *Ravipati*, A 1950 Mad 379 (FB); *Kenhmarekkar Haji* v. *Tharakkaparambil Muhammad*, 1972 KLJ 8; *Budhan* v. *Lala Harbans Lal*, A 1973 All 63; *Pathumma Bibi* v. *Raj Krishna Menon*, A 1975 Ker 91.

a person who, though a party to the decree, is not a party to the appeal,[16] nor can the court implead such person as party to the appeal for the purpose of hearing such cross-objection.[17] If both parties appeal against the decree of the trial court, and both appeals being dismissed, the plaintiff alone prefers a second appeal from the decree passed on his appeal and the defendant does not prefer any appeal from the decree passed on his appeal, the question whether the defendant can file a cross-objection so as to attack the decree of the first appellate Court passed on *his* appeal is the subject of conflicting opinions.[18]

A cross-objection should be valued as an appeal and court fee should be paid accordingly. There is no specific provision in the Code regarding a respondent being allowed to file a cross-objection without court-fee on the ground that he is an indigent person but it seems clear that an indigent respondent can file a cross-objection without court-fee.[19] If an appeal is withdrawn or dismissed for default, the cross-objection does not fail but must be determined,[20] but if the appeal is rejected for non-payment of court-fee, the cross-objection fails.[1]

In a cross-objection the respondent can take such objection as he could have taken by way of a separate appeal.[2] If he had no right to prefer an appeal, he cannot file a cross-objection either. For instance defendant takes a plea in his written statement that the court-fee paid by the plaintiff is deficient by Rs.1,000. Court holds that deficiency amounts to Rs.70 only. Plaintiff has a right of appeal against this decision under section 6 A of the Court Fees Act. But the defendant has no right to file an appeal and to contend that deficiency amounts to Rs.1,000 and not to

16 *Paratap Chand* v. *Chunilal*, A 1940 All 225, 1940 ALJ 161; also see. *Anil Kumar Gupta* v. *Municipal Corporation of Delhi*, A 2000 SC 659 (relied on *Ravindra Kumar Sharma* v. *State of Assam*, A 1999 SC 357, (1999) 7 SCC 435.

17 *Rajendra* v. *Moheshata*, A 1926 Cal 533, 91 IC 649 (DB).

18 *Debi Chand* v. *Parbhulal*, 2 ALJ 694 (No); *Hardhan* v. *Gokhul*, A 1924 Pat 775 (Yes); also see *Anil Kumar Gupta* v. *Municipal Corporation of Delhi*, A 2000 SC 659.

19 *Narayan* v. *Hiralal*, 144 IC 217, A 1933 Nag 158.

20 O.41, R.22 (4).

1 *Kashiram* v. *Ranglal*, A 1941 Bom 242, 195 IC 894; G.P. *Mehra* v. *K.K. Mehra*, 1959 ALJ 201.

2 O.41, R.22.

Rs.70 only. Therefore, he cannot raise this point by way of cross-objection in plaintiff's appeal.[3] Cross-objection cannot be allowed to be filed against the order of court disallowing interest from the date of decree based on an award because against such an order no appeal lies under section 39 of Arbitration Act 1940,[4] (now section 37 of Arbitration and Reconciliation Act, 1996). No cross-objection can lie on a question of costs[5] or against an order returning the plaint for presentation to proper court.[6]

Even if no cross-objection is filed, the person who could have filed cross-objection has a right to say that finding of lower court should have been given in his favour.[7]

3 *Kulsumunnissa* v. *Khursandei Begum*, 1953 ALJ 702.

4 *Union of India* v. *Builders Union*, A 1981 Ori 188; see also. *Fertiliser Corporation* v. *D.I. Management*, A 1984 Del 533 (para 49).

5 *Krishneshwari* v. *Ramesh*, A 1965 A 228.

6 *T. Shivlal* v. *Balaram*, A 1976 AP 78.

7 *Tej Kumar Jain* v. *Purshottam*, A 1981 MP 55; *Virdhachalam Pillai* v. *Challean Syrian Bank*, A 1964 SC 1425, *N. Rly. Co-operative Society* v. *Ind Trib*, A 1967 SC 1182.

Chapter XVIII

APPLICATIONS OR PETITIONS

According to their dictionary meanings "applications" and "petitions" are inter changeable terms. But in practice, the expression, "Petitions" is normally used to indicate formal applications for seeking a remedy provided by law. The two may be classified into :

(1) Applications under the provisions of the Code of Civil Procedure.

(2) Petitions under other Statutes.

(3) Petitions under the Constitution.

Drafting and Contents of Applications/Petitions : The general rule of drafting in respect of all the applications and petitions is that they should contain all the particulars required to be alleged by law giving the material facts in support of them. They should be precise as well as concise and should not contain any irrelevant matter. They should be drafted after looking into the provisions of law so that no relevant detail is omitted. In cases where the law does not specify any particulars, the counsel should first find out from the statute what facts he is required to establish, in order to entitle his client to the relief claimed and then assert the relevant facts and circumstances. As far as possible the grounds on which the application is based should be stated in the words of statute under which the application is made. It will not be advisable to use a different language or substitute words used in any provision, though the meaning may be the same. A few applications are also required to be *verified or supported by an affidavit, or both*, and so no mistake in this behalf should be committed.

Every application should contain the name of the court, the number and cause title of the suit or other proceeding, followed by the names of applicant and opposite party and the provision of law under which it is made. However, recital of a wrong provision is not necessarily fatal if the application does lie under some other provision.[1]

Applications under C.P.C.

Applications under the Code have to be made from stage to stage. An application is required for permission to sue or appeal as an indigent

1 *Muthuswami v. Ramalinga*, A 1958 Mad 366.

person, though the former is combined with the plaint itself while the latter is separate from the memorandum of appeal. If there is a minor defendant, an application for appointment of a guardian *ad litem* supported by an affidavit has to be made. If an interim relief is sought, such as the issue of an interim injunction or attachment before judgment, or the appointment of a receiver, again an application supported by an affidavit has to be made. The defendant, if he desires to contest such an application, as he generally does, has to file a reply controverting plaintiff's allegations supported by a counter affidavit. There may be other applications such as for issue of a commission, or for serving interrogatories, or discovery and inspection. Applications are also made for adjournment, for amendment of pleadings or of issues, for leave to file a document after the stage thereof has passed, and so on and so forth. If a suit, appeal or application is dismissed for default or is allowed *ex parte* an application would be made for recall of such order.

Applications in Execution : After a decree is put into execution, a variety of applications, depending upon the mode of execution by which satisfaction of decree is sought, have to be made by the decree-holder. The judgment debtor, too, may file objections under section 47 or under some rule of O.21 as may be necessary. Even a third party may do so. The forms of some important applications with relevant law in the foot notes have been given in Part II, *post* (Precedents) and they may be looked into. However, applications given by way of Reference, Review or Revision, which provide remedy to the aggrieved party are separately dealt with below.

Reference

The provision for reference has been made in section 113, and O.46. It may be made *suo motu* or on the application of any of the parties. The conditions are :

(a) there must be a suit or appeal pending in which the decree is not subject to appeal or further appeal; or

(b) a pending execution of such a decree; and

(c) a question of law or usage having the force of law, arises in such suit, appeal, or execution on which the court concerned entertains a reasonable doubt; or the court is of opinion that an Act, Ordinance or

Regulation or of any provision thereof relevant to the case is invalid or inoperative, but there is no decision of the High Court or the Supreme Court thereon.

The court, in such a case may draw up a statement of the facts of the case and the law point on which doubt is entertained and after recording its opinion make a reference to the High Court.

Object of a Reference : The object of this provision is to bring before the High Court difficult questions of law direct from the lower court, otherwise than through the regular channel of appeal.

Reference on a Party's Request : The party who makes a prayer to the court for reference must state in the application the facts of the case as well as the question of law which arises in the case, quoting the authorities for and against the point which makes the question of a doubtful nature. The law point should be such on which two equally good views are possible. A reference cannot be made on hypothetical questions of law.[2]

If there is a good case for reference, it is improper to turn down the request of the party.[3] If the conditions mentioned in the proviso to section 113 are satisfied, then the subordinate court is bound to state the case setting out its opinion and the reasons therefore.[4] However, if determination of validity of Act is not necessary for the disposal of a case, the court need not make a reference under this proviso.[5]

Review

As provided in section 114 and O.47 the remedy of review is also available in a limited manner. Any person who considers himself aggrieved by a decree or order from which an appeal lies but no appeal has been filed,[6] or by a decree or order from which no appeal is allowed or by a decision on a reference from a Court of Small Causes, may make an application for review of the judgment to the court which passed the decree or order on any of the following grounds :

2 *In the Matter of District Munsif, Chittor*, A 1970 AP 365.

3 *M S Oberoi* v. *Union of India*, A 1970 Punj 407.

4 *Ranadib Choudhri* v. *Land Acquisition Judge, 24 Parganas*, A 1971 Cal 368.

5 *Geevarghese George* v. *K R Abraham*, A 1979 Ker 237.

6 *Thungabhadra Industries* v. *Government of A.P.*, A 1964 SC 1372; *Hari Singh*

(i) the discovery of new and important matter or evidence which, after the exercise of due diligence, was not, within his knowledge or could not be produced by him at the time when the decree was passed or order made, or

(ii) some mistake or error apparent on the face of the record, or

(iii) any other sufficient reason.

The Code of Civil Procedure does not give power to the court to review its decision *suo motu*, application by the aggrieved party is necessary.[7] A second review petition is not barred where earlier review petition has not been dismissed on merit, but on some technical ground.[8] Although strictly speaking O.47 may not be applicable to Tribunals but the right of review is available to the aggrieved persons on the restricted grounds mentioned therein if application is filed within the period of limitation.[9]

Effect of Appeal on Review : There have been cases in which, after filing an application for review, an appeal has also been preferred. If the appeal is heard and decided, the appellate decision will prevail, and the application for review will fail. Even where the Supreme Court dismissed the special Leave Petition *in limine* it operated as a final order and when the Maharashtra Administrative Tribunal reviewed its order thereafter the Supreme Court characterised the Tribunal's exercise of power as audacious and without any judicial discipline.[10]

First Ground for Review : The first ground relating to discovery of new and important matter or evidence will depend upon the facts and circumstances of each case. However, the new and important matter should be such as, if produced at the appropriate time might have changed the

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v. *S. Seth*, A 1996 Delhi 21; see also, *Santi Kumar Jain* v. *Anil Kumar Datta*, A 1996 Cal 4; *Devaraj Pillai* v. *Sellayya Pillai*, A 1987 SC 1160.

7 *Grindlays Bank* v. *Central Goverment Industrial Tribunal*, A 1981 SC 606; *Kumaran Vaidyar* v. *K.S.Venkateshwaran*, A 1992 Ker 2; *Chandrabhan M.Dhariya* v. *V.M Thakkar*, 1994 (1) Guj LR 291 (Guj).

8 *Abhijit Tea Co.Pvt.Ltd.* v. *Terai Tea Co.Pvt. Ltd.*, A 1995 Cal 316.

9 *K.Ajith Babu* v. *Union of India*, A 1997 SC 3277.

10 *State of Maharanhtra* v. *Prabakar Bheemaji Ingle*, 1996 (3) SCC 463; *Gobabandhu Biswal* v. *Krishna Chandra Mohanti*, A 1998 SC 1872; *Abbai Maligai Partnership Firm* v. *K. Santakumaran*, 1998 (7) SCC 386.

decision, and it should have existed at the time of hearing of the case. It is not open to a person to say that merely because he has found some additional evidence to support his case; the judgment should be reviewed. He would have to prove that after exercise of due diligence he failed to produce the evidence or that it was not within his knowledge.[11] This discovery should be by the party and not by the court, and a mere error of law is not such discovery.[12]

Second Ground for Review : The second alternative ground is some mistake or error apparent on the face of record. This will include cases of error both of fact and law. What is an apparent error may differ from case to case or from one judge to another. The test should be that no error would be apparent unless it was self evident. It should not require any elaborate argument to establish it and there could reasonably be no two opinions entertained about it.[13] An error apparent on the face of the record must be such an error which must strike on mere looking at the record. The court should not be required to look into other evidence.[14] In the expression "error apparent on the face of it" the emphasis is on the word "apparent" and not on the word "error".[15] The error should be such as can be found out from the record. If there is such an error, the review petition must be allowed. It is beside the point how the error crept in.[16] However, a mere failure to interpret the law correctly is not an error apparent on the face of record.

A power of review is not to be exercised merely on the ground that the decision is erroneous on merits, or a point has not been dealt with in a correct prospective.[17] In a Bombay case the State claimed privilege in respect of certain documents. This objection was disallowed before the

11 *State of Gujarat* v. *Dr. B.J. Bhatt*, (1977) 18 GLR 173.

12 *Dewan Singh* v. *Gulab Singh*, 77 CWN 566.

13 *Thungabhada Industries* v. *Government of A.P.*, A 1964 SC 1372.

14 *Meera Bhanja* v. *Nirmala Kumari Choudhury*, A 1995 SC 455, (1995) 1 SCC 170; *Naresh* v. *Gopal Chandra Banerjee*, A 1994 Gau 37; see also, *Mahendra Kumar* v. *Delhi Trading Co.*, 1986 All LJ 116.

15 *Registrar University* v. *Dr. Ishwari Prasad*, A 1956 All 603.

16 *Jamuna Kuer* v. *Lal Bhadur*, A 1950 FC 131.

17 *A.T.Sharma* v. *A.P. Sharma*, A 1979 SC 1047; *Chandramall Chopra* v. *State*, A 1986 Cal 111; *Sunil Puri* v. *Modi Spinning and Weaving Mills Ltd.*, A 1995 Delhi 203.

stage of evidence. This decision was held to be open to review.[18] When an important point of law was not brought to the notice of the court during hearing of appeal by mistake of counsel this would amount to an error apparent on the face of record.[19] A misconception by the court as to the nature and scope of the concession alleged to have been made by a party's counsel will be a good ground for review.[20] So also an erroneous statement of fact in the judgment as to whether a particular thing happened before it.[21] Any statement recorded in a judgment cannot be called in question by way of appeal. The remedy is by way of review.[22] A statement in a judgment about any concession made by a party or his pleader cannot be challenged by the evidence of counsel. If the party wants to make out that the concession was not so made or there was a misconception by the Court, the only procedure is to apply for a review before the same Judge and not to controvert it by evidence or affidavit.[1]

A judgement based upon a ruling which was subsequently overruled cannot be reviewed on that ground.[2] The fact that the judgment sought to be reviewed was overruled in another case subsequently is no ground for reviewing the said decision.[3] Similarly, if a ruling has not been brought to the notice of the judge, it also cannot form a ground for review.[4] A subsequent change in legislative enactment is also not a good ground.[5] Where a statute was amended subsequent to the judgment giving retrospective effect to the amendment by means of a deeming provision, it was held that an application for review was maintainable. A second appeal

18 *State of Maharashtra* v. *S.B.Mahajani*, A 1970 Bom 306.
19 *Y.Venkannachowdhery* v. *Special Deputy Collector*, A 1981 AP 232; distinguished, *A.T.Sharma* v. *A.P.Sharma*, A 1979 SC 1047.
20 *M.M.B Catholics* v. *M.P.Athanisuis*, A 1954 SC 526.
21 *Bank of Bihar* v. *Mahabir Lal*, A 1964 SC 377.
22 *P.J. Issack* v. *Appsons Pharmaceuticals*, A 1999 Kerala 6 (DB).
1 *Narasimha* v. *Andhra Bank*, A 1957 AP 773; *Morammar & Co.* v. *Mar Poulose*, A 1954 SC 5267; *Sha Md.Co.* v. *Jawahar Mills Ltd.*, A 1953 SC 98.
2 *Amrit Lal* v. *Madho Das*, ILR 6 All 292; *Debala Mukerjee* v. *Surjit*, (1977) 81 CWN 1007.
3 *Shanti Devi* v. *State of Haryana*, 1999 (5) SCC 703.
4 *Abdul Sadiq* v. *Abudul Aziz*, ILR 21 All 152.
5 *Gyani* v. *Ningappa*, A 1928 Bom 308, 30 BLR 669, 111 IC 633 (DB); *Raja Satrunji* v. *Md. Azmat Khan*, (1971) 2 SCC 200; *A.C. Estates* v. *Serajuddin & Co.*, A 1965 SC 935; *Mohammed Asmat Asim Khan* v. *Raja Satranji*, A 1963 All 541(FB).

was decided in ignorance of a notification staying the appeal. The application for review was held to be not maintainable though the mistake was rectified under High Court's inherent jurisdiction.[6] There is thus distinction between a mere erroneous decision and a decision vitiated by error apparent, and review cannot be sought merely as an excuse for re-hearing arguments.[7]

Third Ground for Review : The third alternative ground for entertaining review is "For any other sufficient reason." These words though seemingly of very wide import comprise only grounds which are at least analogous to those specified immediately previously.[8]

In the ultimate result the court has to come to the conclusion that the reason given is sufficient on the facts and in the circumstances of each case.[9] Once the case has been fully argued on merits and decided on merits, no application for review lies on the ground that it should have been argued differently.[10] But omission to frame a material issue on account of which plaintiff failed to adduce evidence in support of a material fact may provide a sufficient reason for the court to review its judgment.[11]

Revision

The High Court can exercise power of revision *suo motu*, or on the application of an aggrieved person under section 115 of the Code. It can also exercise under Article 227 of the Constitution, power of superintendence over all courts and tribunals within its territorial jurisdiction, but the power is both of a judicial and administrative nature. Article 226 also gives the court a power of judicial interference with orders passed in judicial or quasi-judicial proceedings by all subordinate courts and tribunals. Under this Article the High Court may by a writ of certiorari quash an

6 *Bahadur* v. *Bachai*, A 1963 All 186.

7 *Chandrakanta* v. *S.K. Habib*, A 1975 SC 1500; *Anath Basak* v. *Raghunath*, (1984) 88 CWN 804; *Thungabathra and Co.* v. *Government*, A 1964 SC 1372.

8 *Chajju Ram* v. *Neki*, A 1922 PC 112; *Hari Shanker* v. *Anath Nath*, A 1949 FC 106; *M.M.B. Catholicos* v. *Athanasius*, A 1954 SC 526 (538); *Nidhi Pandi* v. *Brahmanand Padhi*, 1973 (1) CWR 601; *Rajamony* v. *Mohammad*, 1978 KLT 417; *Chockalingam* v. *Chidambaram*, 1960 II MLJ 327.

9 *Jwala Prasad* v. *Jwala Bank Ltd.*, ILR 1961 All 309 (FB); *Shivdeo Singh* v. *State of Punjab*, A 1963 SC 1909; *Manohar Lal Verma* v. *State of M.P.*, A 1970 MP 131.

10 *Bhagwati Singh* v. *Deputy Director Consolidation*, A 1977 All 163.

11 *Suraj Bhan* v. *Padam Chand*, 1979 ALJ 524.

order which has been passed without jurisdiction or in excess of jurisdiction or which suffers from a manifest error.

Comparison of Powers u/s. 115 and Article 227 : The power of revision under section 115 and the power of superintendence under Article 227 are quite distinct. The scope of power under section 115 is limited and it can only be exercised when the conditions given therein are fulfilled while the power under Article 227 is not circumscribed by statutory conditions but only by well established principles of judicial self restraint and extends to tribunals as well. Under both the provisions the powers are discretionary and it is for the High Court to see whether the facts and circumstances of a particular case call for interference in the interest of justice. It may be noted that any person invoking such power or calling for High Court's interference must come with clean hands and place before the High Court all the essential facts and correctly.

Power u/s. 115 of the Code : The High Court can entertain a revision under section 115 of the Code of Civil Procedure if—

(a) a case has been decided by a court,

(b) the court is subordinate to the High Court, and

(c) the decision is one from which no appeal lies.

It is further necessary for the High Court to satisfy itself before interfering that the subordinate court—

(i) has exercised jurisdiction not vested in it, or

(ii) has failed to exercise jurisdiction so vested in it, or

(iii) has acted in the exercise of its jurisdiction illegally or with material irregularity.

What is Illegality and Material Irregularity : It would appear that there are three conditions for entertaining an application for revision as given in the first part of the section. If these conditions are satisfied, the High Court may interfere with the orders of the subordinate court on any one of the three alternative grounds given in the second part.

On the first two grounds it may be mentioned that the expression "jurisdictional" error in this context is widely interpreted[12] and in a recent

12 *H.M. Trivedi* v. *V.B. Raju*, A 1973 SC 1602; see also, *Anisminic* v. *Foreign Compensation Commission*, (1969) 2 AC 147; *Fireman* v. *Ellis*, (1978) 3 WLR 1, C.A.

case even an order issuing a fresh commission without setting aside the report of Commissioner appointed earlier has been held to be patently illegal and as such without jurisdiction.[13]

So far as the third ground goes, the court would be deemed to have acted illegally if it has committed a breach of any provision of law. While some error of procedure during the trial of the case would not amount to illegality and would be a mere irregularity, it would be material irregularity if it has affected the ultimate decision.[14] A mere wrong decision on a question of fact or law does not call for interference unless the lower court acted illegally and with material irregularity.[15]

The words 'illegally' and 'material irregularity' do not cover either errors of fact or of law. They do not refer to the decision arrived at but only to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with in letter and spirit.[16] Unless the lower court is shown to have committed breach of any provision of law or committed any error of procedure which was material and might have affected the ultimate decision the order cannot be interfered with.[17] It is not open to the High Court under section 115 C.P.C. to reappreciate the evidence unless it finds that the court below had committed an error of jurisdiction or acted with material irregularity affecting its jurisdiction.[18]

It has been held that order of the court to pay deficient court- fee , if erroneous, results in failure of the court to exercise jurisdiction, the High Court can interfere in the revision.[19] If the trial court proceeded with the

13 *Premnanda* v. *Yogananda*, 1985 Ker LT 144.

14 *Venkatagiri Iyengar* v. *The Hindu Religious Endowments Board Madras*, A 1949 PC 156; *Kesho Rao* v. *Radha Kishan*, A 1953 SC 23; *Jagdish Pal* v. *Ganga Prasad*, A 1959 SC 492.

15 *Rasi Singh* v. *Ram Prasad*, A 1971 Pat 156; see also, *Chandrana Bros* v. *Jalaji Laxmi*, A 1985 Kant 33.

16 *Narayan Sanaji* v. *Shesrao*, A 1948 Nag 258; *D.L.F. Housing & Construction Co. Pvt. Ltd* v. *Sarup Singh*, A 1971 SC 2324; *Bhojraj Kunwarji Oil Mills* v. *Yogiraj Sinha*, A 1984 SC 1894; *Keshar Deo* v. *Radakrishaan*; A 1953 SC 23; *Dinaraj* v. *Nammi Stella*, 1968 (I) MLJ 390.

17 *Jahiri Singh* v. *Sukhpal Singh*, A 1989 SC 2073.

18 *Kempiah* v. *Chikkaboramma*, A 1998 SC 3335.

19 *Fakir Chand Makhandas* v. *Sri Jagadguru Shankracharya*, A 1970 Guj 145.

case in the absence of a necessary party, it was held to amount to illegality.[1] A wrong decision on the question of limitation does not however call for interference in revision.[2] An order rejecting report of the *Amin* is not revisable.[3] Award of costs is in the discretion of the court, cannot be interfered in revision.[4]

What is a 'Case Decided' : One of the requirements for entertaining a revision, as already pointed out is that the "case" should have been "decided". In *Chattrapal Singh* v. *Raja Ram* [5] it was observed by Mahmud J., "The word 'case' should be understood in its broadest and most ordinary sense, unless there were specific reasons for narrowing its meaning. It would thus include both a suit as also the proceedings during the course of the suit as well as afterwards". This view is now the accepted view of all courts.[6] However, an order passed merely for the progress of a proceeding is not an order deciding a case, e.g., an order of discovery or production of evidence[7] or an order rejecting an application for cross-examination of the deponent of an affidavit.[8] In respect of interlocutory orders, the court has to see in each case the nature and the effect of the order on the rights of the parties and to determine whether the order amounts to a decision of a case or it is merely an interlocutory order in the sense that it does not finally dispose of the rights of the parties.[9] "Case-decided" means even a part of the case, as such if the conditions of Sec. 115 are satisfied even the interlocutory orders are revisable.[10] Where

1 *Hardeva* v. *Ismail*, A 1970 Raj 167 (FB).

2 *Additional Director Consolidation of Holding* v. *Raghwat Singh Gurbachan Singh*, A 1970 P&H 554; *Ittyavira Mathai* v. *Varkey*, A 1964 SC 907; see however, *Bhaktipada Majhi* v. *Sub-Divisional Officer, Kalna*, A 1971 Cal 204.

3 *Satyendra Prasad Jain* v. *State of U.P.*, A 1996 All 77.

4 *State Bank of India* v. *Union of India*, 1994 (2) ALT 186 (AP).

5 7 All 661.

6 *Lal Chand Mangal Sain* v. *Behari Lal Mehar Chand*, 84 IC 259, A 1924 Lah 425 (FB); *S.S. Khanna* v. *Brig F.G Dillon*, A 1964 SC 497; see also, *S.Rama Iyer* v. *Sundaresa Ponnapoondar*, A 1966 SC 1431; *Palghar Rolling Mills* v. *V. Iron & Steel*, A 1985 Kam 282 (attachment before judgment); *Chintapatta Arvind Babu* v. *K. Balakistamma Bhagari*, A 1992 AP 300.

7 *Kailash* v. *Agarwal Export Corporation*, 1984 ALJ 30.

8 *S.D.Jain* v. *Rakesh*, A 1986 All 30.

9 *Firm Jawahar Lal Sunder Lal* v. *Firm Jagdish Raj Brij Nath*, A 1951 All 335.

10 *Joginder Pal* v. *Raj Narain*, A 1995 P&H 305.

the impugned order has the effect of deciding the rights and obligations of the parties, it is a case-decided and revision lies.[11] The 1976 Amendment of section 115 further makes it clear that even if any one of the three main conditions laid down in section 115 C.P.C. is satisfied, the High Court shall not, under this section vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding except where—

(a) the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceeding, or,

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

An order allowing or refusing an application for amendment of pleadings has been held to be revisable, (see Chap. X, *ante*), but the power of revision should be sparingly exercised against an order allowing amendement.[12]

Independent Procedure : One other condition for the entertainment of revision is that the order should be one against which no appeal lies. The word appeal is not restricted to first appeal only. It would include a second appeal as well. Appealable orders, are given in section 104 C.P.C. and O.42. Against such orders whether passed by the trial court or the first Appellate Court, the High Court will have no jurisdiction to entertain a revision. Subject to other conditions given in the section, an order or decision which is not open to appeal or further appeal may be questioned in revision. The bar under section 115(2) is to exercise revisional power where the party is provided with right to appeal to the High Court or the Subordinate Court against the impugned order. It is not a bar to exercise of revisional power under section 115(1) against appellate order.[13] Orders passed in proceedings, before the registration of a suit, like those on an application to sue as an indigent person or in proceedings commenced after a suit has ended, like execution proceedings, or independent proceedings started under any legislative enactment, like those under Stamp Act or Court Fees Act, on the report of Inspector of Stamps or proceedings for which a different procedure has been provided, cannot

11 *Nizamuddin Mohd.* v. *Mohd Abdul Khader*, 1992 (2) Andh LT 272 (AP).

12 See *Panchdeo Narain* v. *Km. Jyoti*, 1984 (Supp) SCC 594.

13 *Mahadeo Savlaram Shelke* v. *Pune Municipal Corporation*, (1995) 3 SCC 33.

be termed as interlocutory proceedings and so the orders passed in such proceedings, may be interfered with in revision.[14]

APPLICATION UNDER CERTAIN OTHER STATUTES

Under this head only such applications will be dealt with as are of common use.

Application for a Succession Certificate

A succession certificate is necessary for realisation of the debts or securities, or the Provident Fund, or the life insurance money due on the life of the deceased (in case there is no nominee) or the money in deposit with any bank or the like. This is insisted upon to give a valid discharge to the debtor, so that he may not be harassed by other claimants. An application, therefore, has to be filed in the court of the District Judge (or any other court to which jurisdiction has been transferred) within whose jurisdiction the deceased ordinarily resided before his death, or within whose jurisdiction a part of the property of the deceased may be found. *see* section 371 of the Succession Act. The application has to be signed and verified in the same manner as a pleading under C.P.C. The application must contain all particulars given in section 372, i.e., the time and place of death of deceased, his ordinary residence, the names of all near relatives of the deceased, the right under which the applicant makes his claim, and full details of debts and securities in respect of which the certificate is claimed, etc.

The certificate is granted to only one person and if more than one person is entitled as an heir, his rights can be protected by making a provision in the succession certificate that it will enure to the benefit of so and so to such and such extent. For that purpose a security can also be demanded by the court from the applicant as a condition for grant of certificate. It can also be demanded if the application is on behalf of a minor and there is no certificated guardian. If a suit has already been filed for realisation of the dues of the deceased, the succession certificate may be filed at any time before the passing of the decree.

If an occasion arises for applying for probate or letters of administration, the appropriate provisions of law may be looked into. There

14 *Sukhdeo* v. *State of Punjab*, A 1960 Punj 407.

is also an Administrator-General for administering the property of the deceased, working under the directions of the High Court.

Application Under the Insolvency Acts

There are two Acts, one the Presidency Towns Insolvency Act which applies only to presidency towns and the other, the Provincial Insolvency Act which applies to the rest of the country. Except for minor procedural differences the provisions of the two are substantially similar. The following statement is based on the provisions of the latter. So far as presidency towns are concerned, the corresponding provisions may be looked into.

A petition for insolvency may be made by a creditor or debtor under section 7 of the Provincial Insolvency Act if he has committed any act of insolvency given in section 6 of the Act. If a debtor presents a petition under section 7, the presentation itself is deemed to be an act of insolvency. Generally speaking, transfer of the whole or substantial portion of the property to a third person, or transfer of the property with the *mala fide* intention of delaying or defeating the creditors, or any fraudulent preferential transfer of property or his going under ground to evade the creditors or his unequivocal declaration that he was unable to pay debts and has suspended payment, are some of the acts of insolvency.

A petition of insolvency may be presented to the court having jurisdiction, by the debtor only if the conditions given in section 10 are fulfilled, and by a creditor, if the conditions given in section 9 are fulfilled. If there are more than one applications against the same debtors or against joint debtors, they will all have to be consolidated under section 15. In either case the outstanding debts should not be less than Rs. 500. It is also necessary that the acts of insolvency should have been committed within three months in case the application is given by a creditor. The petition has to be framed in the light of section 13 giving the particulars mentioned therein.

As soon as a petition is admitted, an interim receiver is appointed to take possession of the property of debtor. After hearing, if the debtor is adjudged an insolvent, the court has to fix a period for his discharge in the order, which may be extended from time to time. As a consequence of adjudication, the property of the insolvent vests in the Official Receiver from the date of application, vide section 28(7) of the Act.

Application under the Transfer of Property Act

Under Sec.83 of the Transfer of Property Act, at any time after the principal money has become due and before a suit for redemption of the mortgaged property is barred, the mortgagor or any other person entitled to institute such suit for redemption may deposit in any court in which he might have instituted suit, to the account of the mortgagee, the amount remaining due on the mortgage. The court shall thereupon cause written notice of deposit to be served on the mortgagee and the mortgagee may file a verified petition stating that the amount then due on the mortgage and his willingness to accept the money so deposited in full discharge of such amount, whereupon the mortgage deed and all such other documents shall be deposited by the mortgagee and shall be delivered to the mortgagor or such other person aforesaid and the amount shall be paid to the mortgagee. Where the mortgagee is in possession of the mortgaged property, the court shall, before paying to him the amount so deposited, direct him to deliver possession of the property to the mortgagor or to retransfer the mortgaged property to the mortgagor at the cost of the mortgagor or to execute a registered acknowledgment in writing that the mortgagor's interest transferred to the mortgagee has been extinguished. Under section 83 of the Act, the Court is not competent to determine the actual amount due on the mortgage nor has it the power to compel the mortgagee to accept the money deposited, if the mortgagee refuses to accept the amount. But, under section 84, interest on the deposited money shall cease from the date of the deposit.

Application under the Guardians and Wards Act

A guardian is defined in section 4(2) of the Act as a person having the care of the person of a minor or of his property, or of both his person and property. This term includes natural guardian, a testamentary guardian, a guardian appointed or declared by a court and a person empowered to act as such by or under any enactment or personal law. The court, in appointing a guardian, is primarily guided by the consideration of the welfare of the minor. It has to see that he is a proper and fit person to look after the minor and his interest.

The provisions of the Hindu Minority and Guardianship Act and the personal law of Muslims are only supplementary to those of the Guard-

ians and Wards Act. The appointment by court of guardian of a minor, whether Hindu or not, is still governed by the provisions of Guardians and Wards Act.

Any person, desirous of being appointed a guardian of a minor, including a relative or friend or the collector of the district in which the minor ordinarily resides or in which he has property, has to apply *vide* section 9(1), to the District Judge, having jurisdiction in the place where the minor ordinarily resides. In case of guardianship of the property alone, the application may also be made to the District Judge in whose jurisdiction the property is situated *vide* section 9(2). The form of application made by any person other than the collector is given in section 10(1). The application requires to be signed and verified in the same manner as a plaint. It is also necessary that the application must be accompanied by a declaration of the willingness of the proposed guardian signed by him and attested by at least two witnesses, *vide* section 10(3). The collector may apply in the form of a letter addressed to the court, giving the particulars, *vide* section 10(2). If the application is made by a distant relation or a friend, and a nearer relative is living, the application should show why he is not fit to be appointed as guardian, and that the application is a *bona fide* one.

If there is no good cause or if it appears to the court on examination of the facts disclosed, that the application has not been made with *bona fide* intention, then it may reject it summarily, On admission of the application, procedure given in section 11 onward has to be followed for determination of the question. The court may adopt the C.P.C. for the purpose of convenience or facility, or follow any other procedure which would be conducive to the ends of justice. Evidence of affidavit may be permitted by courts.[15] The guardian after appointment has duties to perform as given in section 24 and 27 and he stands in a fiduciary relation to the ward and unless otherwise provided he cannot make any profit out of his office (*see* section 20).

Guardianship of Unclaimed Children-Adoption (Inter-Country Adoptions) : At present only Hindu law recognises adoption as such. Among Muslims there is a body of orthodox opinion opposed to the concept, and due to it a general law of adoption has not yet been enacted.

15 *Shafi* v. *Shamin Banoo*, A 1979 Bom 156.

Problems arise in regard to adoption of orphans or unclaimed children or children abandoned by their unmarried mothers. Their religion or parentage is not known. Many childless couples, both Indian and foreign, are keen to adopt such children. The provisions of the Guardians and Wards Act have come in handy for the purpose. The institution in which the child is being brought up, may be a hospital, a convent, an orphanage, verifies the antecedents and character of the couple showing interest in adopting the child and thereafter with its consent, an application for guardianship of the child is made by the intending parent and if the court approves, the applicant is appointed guardian of the child. The court may also permit such guardian to take the child out of the country. The Supreme Court after taking into account various complaints about possible abuse of this practice for purposes of trafficking in children, has issued detailed guidelines in this regard in order to fill the void felt by the absence of an adoption law which may govern such cases. Such guardian is thus indirectly permitted to adopt the child. An application in this regard should give all necessary particulars as required by the Supreme Court and the court should also take care to observe the various safeguards indicated in the said guidelines.[16]

The Supreme Court has laid down the following procedural safeguards in this regard:—

1. Since there is no statutory enactment in India providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, resort is had to the provisions of the Guardians and Wards Act (8 of 1890) for the purpose of facilitating such adoption.

2. Preference to be given to parents of Indian origin.

3. Every application from a foreigner must be sponsored by a social or child welfare agency recognised or licensed by the Government of the country in which the foreigner is resident.

4. Every application must be accompanied by a home study report showing the social and financial status of the applicant and his declaration

16 *Laxmi Kant Pandey* v. *Union of India*, A 1987 SC 232; *Laxmikant Pandey* v. *Union of India*, A 1992 SC 118; *K.S. Council For Childwelfare* v. *Society of Sisters of C.S.A., Covent*, A 1994 SC 658; *S.C. Kamdar* v. *Asha Trilokibhai Saha*, A 1995 SC 1892.

and appropriate security that he will maintain the child and provide for his education and upbringing.

5. If a child is to be given in inter-country adoption it would be desirable that it is given before it completed the age of 3 years. Children above the age of 7 years may be given in intercountry adoption but in such cases, their wishes may be ascertained.

6. The proceedings on the application for guardianship should be held by the Court in Camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship, the entire proceedings including the papers and documents should be sealed.

7. The social or child welfare agency sponsoring the application must undertake that in case of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India and report such alternative placement to the court handling the guardianship proceedings and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India.

8. If there is a social or child welfare agency owned or operated by the Government in a foreign country, it would not be necessary for a foreigner to route his application through a recognised social or child welfare agency within his country and he can approach a recognised social or child welfare agency in India through such Government agency.

Applications under the Arbitration Act

Indian Arbitration Act 1940 has been repealed by Arbitration and Conciliation Act, 1996.

Section 85 of Act 1996 provides that the provisions of the Arbitration Act, 1940, in spite of repeal shall apply to the arbitral proceedings commenced before 25-1-1996 when the new Act came into force, unless otherwise agreed by the parties.

A reference to the provisions of the repealed Arbitration Act, 1940, appear necessary. Under the old 1940 Act, an arbitration with regard to

any dispute could take place both without or with the intervention of the court. In the former case there could be occasion to make applications under section 8, 11 and 12 to invoke the powers of the court or to contest under sections 15, 16 and 30, the validity of the award when filed under section 14.

An arbitration with the intervention of the court could be resorted to when a suit in respect of it is pending in any court, and the parties thereto have agreed to get such differences settled through arbitration. In such case the parties to the suit or some of them if their interest is separable (*see* section 24) nominate the arbitrator either through an application or by a joint statement before the court. The court, after obtaining the consent of the arbitrator, makes a reference (section 22 and 23). After the award is filed, the parties could file objections for modification of the award on the grounds given in section 15, or for remitting the award on the grounds given in section 16, or for setting aside the award on the grounds contained in section 30 of the Act. It is the duty of the counsel to see that the objection really has substance, and is not frivolous.

The other manner of arbitration through the intervention of the court is to make an application to court having jurisdiction under section 20 of the Act for filing the arbitration agreement, but this can only be done if no suit has been instituted with regard to the dispute or differences agreed to be referred to arbitration. Such an application is registered as a suit. It has to be drafted in the same manner as a plaint and it must contain all the material facts with necessary particulars making all interested persons, who are necessary to be brought before the court, as parties to the application. It must be signed and verified. The opposite party has a right to contest, after a notice is served upon him. If no sufficient cause is shown, the court shall order that the agreement be filed. It shall at the same time order that a reference be made to the arbitrator or arbitrators nominated by the parties, or appointed by the court. If each party appoints his own arbitrator, the arbitrators in their first meeting, before entering upon the reference (which must be done within thirty days of the receipt of the court's order) should appoint an umpire, and thereafter proceed with the arbitration and give award within four months of entering upon the reference. The time for making award can be extended by the court. When the award

has been made, it shall be signed and the arbitrator or the arbitrators shall give notice in writing to the parties of the making and signing the award. Thereafter the award can be filed in court in the manner provided in section 20(2).

The material changes introduced by the Arbitration and Conciliation Act 1996 are as follows –

(1) No time limit for giving the award has now been fixed and as such the arbitral tribunal is competent to give the award at any time.

(2) The court has now no jurisdiction to interfere or stay the proceedings till the making of the award.

(3) The Code of Civil Procedure is not applicable and the proceedings are to be held as per agreement in the absence of the same as the arbitral tribunal considers proper.

(4) The arbitral proceedings are to be conducted in accordance with the provisions of Chapter 5, Section 18 to 27.

(5) The provisions of the Indian Evidence Act do not apply. The arbitral tribunal can compel the witness to appear before it without moving the court. It can appoint experts to report on specific issues to be determined by the arbitral tribunal.

(6) The award has to be reasoned one, unless otherwise agreed.

(7) Interest is to be awarded at the rate of 18% per annum and it is deemed to be decree of the court.

(8) Only independent persons not connected with any party shall be appointed as arbitrator. If the independency of the arbitrator is challenged the same can be adjudicated upon by the arbitral.

Election Petitions Under Representation of the People Act

An election petition is not an action at law or suit[17] in equity but it is a purely statutory proceeding unknown to common law and the court possesses no common law power independent of statue. Strict statutory compliance is necessary to enforce the right to move for setting aside the election.

17 *Charan Lal Sahu* v. *Nanda Kishore Bhatt*, A 1974 MP 140; relying upon, *Kamaraja Nadar* v. *Kunju Thevar*, 1959 SCR 583.

So far as elections to Parliament and State Legislatures are concerned, the powers of the court are circumscribed by the provisions of the Representation of the People Act, which is a self-contained special law. More or less similar statutory provisions exist in respect of disputes relating to elections to other statutory bodies. However, disputes relating to elections to various bodies of universities are decided by the Chancellor, or Visitor as may be provided in the statute governing the university.[18]

Grounds : An election petition has to be founded on any one or more grounds given in sections 100 and 101, as required by section 81. According to section 83 such a petition must contain :

(a) a concise statement of the material facts on which the petitioner relies;

(b) full particulars of any corrupt practice that the petitioner alleges, with the further details as to who committed them, when and where and in what manner;

(c) the relief claimed i.e. a declaration that the election of all or any of the returned candidate is void, and in addition a further declaration declaring the petitioner or any other candidate as duly elected may also be sought.

Signature, Verification, Annexures and Copies : The petition has to be signed and verified in the same manner as any pleading under C.P.C. Mere defect in verification of the election petition is not fatal, and the court should give time to the petitioner to cure the defect of verification.[19] The schedules and annexures attached to the petition have also to be signed and verified likewise. It is necessary to enclose and serve copies of petition along with the copies of annexures on the respondents. When this requirement has not been either fully or substantially complied with, the petition is liable to be rejected.[20] Where a document forms part of the election petition, failure to supply copy thereof along with the election petition is fatal,[1] but if the document is merely referred to

18 *Satya Narain* v. *Dhuja Ram*, A 1974 SC 1185, (1974) 4 SCC 237.

19 *F.A. Sapa* v. *Singora*, A 1991 SC 1557.

20 *Jagat Kishore Prasad Narayan Singh* v. *Rajendra Kumar Poddar*, A 1971 SC 342; *Satya Narain* v. *Dhaja Ram*, A 1973 P&H 431.

1 *U.S. Sashidharan* v. *K.Karunakaran*, A 1990 SC 924; *F.A. Sapa* v. *Singora*, A 1991 SC 1557.

in the petition or filed in the proceedings as evidence of any fact, failure to supply a copy thereof will not be fatal.[2] Where copies of annexures, which were integral part of election petition and not merely evidence in that case, were not served on the respondent the petition would be hit by section 86.[3] Service of petition without annexures amounts to non-service, and this being a defect in the presentation of the petition cannot be allowed to be cured subsequently.[4] The copy of election petition required to be filed would also include copy of affidavit. The sources of information are to be set out in the affidavit.[5] The absence of source of information is not a defect of substance but the respondent may raise an objection relating to supply of material particulars.[6] The mere non-submission of affidavit in proper form is not a fatal defect and the petitioner can be granted an opportunity to file a fresh affidavit.[7]

Parties to be Impleaded : In an election petition, Election Commission of India is not a necessary party.[8] In case the petitioner seeks only the declaration that the election is void in respect of the returned candidate or candidates, he has to implead only the returned candidate or candidates. In case further relief of declaring himself or any other candidate as the returned candidate is sought, all the contesting candidate must be made respondents. It is obligatory to join as respondent every person (including an unsuccessful candidate) against whom a corrupt practice has been alleged.[9] If allegation of corrupt practice has been made against a candidate who has withdrawn, sub-section (b) of section 82 read with section 86(1) applies and the petition is bound to be dismissed.[10] A returning officer is neither necessary nor a proper party.[11] Objection to

2 *F.A.Sapa.* v. *Singora*, A 1991 SC 1557.

3 *Randhir Singh* v. *Ravi Inder Singh*, A 1981 P&H 45; *Sohan Lal* v. *Thakur Baldeo Singh*, 1978 Kash LJ 148.

4 *Rama Shanker Parmanand* v. *Jugalkishore*, A 1969 MP 243; *Ranna* v. *Mukhtiar Singh*, A 1972 P&H 451.

5 *Virendra Kumar Saklecha* v. *Jagjiwan Ram*, (1972) 1 SCC 826.

6 *Ziauddin Burhanuddin Bukhari* v. *Brij Mohan Ram Das Mehra*, A 1975 SC 1788.

7 *Sohan Lal* v. *Thakur Baldeo Singh*, 1978 Kash LJ 148.

8 *D. Sundara Rami Reddy* v. *Election Commission of India*, A 1991 SC 772.

9 *Horo* v. *Jahanara Jaipal Singh*, A 1972 SC 1840.

10 *Mukat Behari Lal* v. *Shiv Charan Singh*, A 1978 Raj 106.

11 *Sri Lal Janva* v. *Udai Ram Dhakad*, A 1981 Raj 251.

non-joinder of necessary party can be raised at any stage and the court is bound to dismiss the petition under section 86.[12]

Security Deposit : Section 117 of the Act provides that at the time of presenting an election petition, the petitioner shall deposit in the High Court, in accordance with the rules of the High Court, a sum of Rs. 2,000 as security for the costs of the respondents. The High Court has no option but to reject the petition which is not accompanied by payment of security money.[13] In application for substitution under Sec. 112 (3), deposit of security is not necessary at the time of the presentation of the application.[14] On the death of the appellant, appeal abates, and transposition or substitution is not permissible in election petitions.[15] The election petition has to be presented by the petitioner or his authorised agent to an authorised officer of the High Court and must comply with the requirements of sections 81, 82 and 117 of the Act, failing which it is liable to be dismissed after giving an opportunity of being heard.[16]

Material Facts and Material Particulars : All the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence are material facts. If the material facts are not pleaded the petition is liable to be rejected for want of cause of action. The function of particulars, on the other hand, is to present as full a picture of the cause of action with such further information of details as may make the opposite party understand the case he will have to meet.[17]

When the charge is that the agent did something, it cannot be amplified by giving particulars of acts on the part of candidate or vice versa. Publication of false statement by agent is one cause of action and publication by the candidate, a different cause of action.[18] An election petition where corrupt practices are imputed must be regarded as proceedings of a quasi-

12 *Udhav Singh* v. *Madhav Rao Scindia*, A 1976 SC 744, (1976) 2 SCR 246, (1977) 1 SCC 51.

13 *Charan Lal Sahu* v. *Nand Kishore Bhatt*, A 1973 SC 2464; *Alemesh Ram* v. *Chandulal Chandrakar*, A 1981 SC 1199.

14 *Manohar Joshi* v. *Bhaurao Ragoji Patil*, A 1992 SC 1449.

15 *Kashinath Sajan Patil* v. *Dr. Deshkukh Hemant Bhaskar*, A 1992 SCW 3223.

16 *Satya Narain* v. *Dhaja Ram*, A 1973 P & H 431.

17 *Samant N. Balakrishna* v. *George Fernandes*, A 1969 SC 1201; *Udhav Singh* v. *Madhav Rao Scindia*, A 1976 SC 744, (1977) 1 SCC 51.

18 *Samant N. Balakrishna* v. *George Farnandes*, A 1969 SC 1201.

criminal nature, wherein strict proof is necessary.[19] It is not permissible to plead one kind of corrupt practice and prove another though they may be inter-connected.[20]

But if the charge is of bribery of voters and a few instances are given or if the charge is of use of vehicles for free carriage of voters, other instances can be subsequently added by way of amendment under section 6(5), or by way of better particulars.[1] In respect of a charge of corrupt practice under section 123(2), where the person who gave the threat and the person who was threatened were duly named it was held that material facts were already mentioned and even the approximate date of administering the threat, which was only a material particular as distinguished from a material fact, had been given the omission of the time and place of giving the threat was of no consequence as they were only material particulars and it was held that the occasion for giving such particulars would arise only when the respondent asked for them.[2] But where it is merely asserted that certain speeches were given between 5th and 12th May and no date or place was mentioned it was held that this left a wide scope to the petitioner to adduce evidence in respect of a meeting at any place on any date that he found convenient or for which he could procure witnesses. Such pleading was held vague and wanting in essential particulars, hence no evidence could be permitted on that point.[3] In another case failure to give particulars of printing of the pamphlets containing the false statement was not held a fatal defect.[4] In an allegation of corrupt practice by undue influence, it was considered essential that full particulars as to who attempted to induce electors to believe that voting for a particular person would render them object of divine displeasure or spiritual censure and in what manner such attempts were made should be specified.[5]

19 *Laxmi Narayan Nayak* v. *Ramratan Chaturvedi*, A 1991 SC 2001; *F. A. Sarkar* v. *Singora*, A 1991 SC 1557; *Ram Saran Yadav* v. *Thakur Muneshwar Nath Singh*, A 1985 SC 24; *Manphool Singh* v. *Surinder Singh*, A 1973 SC 2158.

20 *N. C. Zeliang* v. *Ajunewmai*, A 1981 SC 8.

1 *Samant N. Balkrishna* v. *George Fernandes*, A 1969 SC 1201, (1969) 3 SCC 238 (para 29).

2 *Udhav Singh* v. *Madhav Rao Scindia*, A 1976 SC 744, (1977) 1 SCC 511 (para 49).

3 *Nihal Singh* v. *Rao Birendra Singh*, (1970) 3 SCC 239 (para 8).

4 *Thakur Virendra Singh* v. *Vimal Kumar*, A 1976 SC 2169, (1977) 1 SCC 718.

5 *Lakhi Prasad Agarwal* v. *Nathmal Dokania*, A 1969 SC 583.

The pleadings in an election case has great importance particularly when the returned candidate is charged with a corrupt practice.[6] The petitioner cannot be allowed to travel beyond his pleadings and no amount of evidence can be looked into, upon a plea which was never put forward.[7] On a charge of telling the electors that by giving their vote to a particular candidate, they would commit sin of *go-hatya*, evidence cannot be given to prove the charge of telling them that they would commit a sin of *brahmahatya*.[8] No evidence on the question of misappropriation of public funds was allowed when no such allegation was made in the pleadings.[9] It has, however, been held that while a corrupt practice has got to be strictly proved it does not follow that the pleading should receive strict construction. for even a cirminal trial is not necessarily vitiated by a defective charge where no prejudice has been caused thereby to the accused.[10] In an election petition based on allegations of corrupt practice, final verdict cannot be arrived at without giving collaborators an opportunity of being heard.[11]

Section 87 of the Representation of the People Act provides that if any provisions under the Act or Rules made under the Act are inconsistent with the provisions of the C.P.C., then to that extent the provisions of the C.P.C. will have no application, that is, over-riding effect has been given to the provisions of the Act and the Rules over the provisions of the C.P.C. But where there is no such inconsistency, the C.P.C. will apply.

The High Court has power under section 86(5) (which controls the power under O.6, R.17), to allow the particulars of any corrupt practice alleged in the petition to be amended or amplified provided the amendment is necessary for the purpose of determining the real controversy between the parties, but there are several limitations on the powers of the court :

(i) that it cannot allow any amendment which will enable the petitioner to remove the defect pertaining to the presentation of the petition;

(ii) that it cannot allow a defect of non-joinder of parties to be cured after limitation; and

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6 *Jagat Kishore Prasad Narain Singh* v. *Rajendra Kumar Poddar*, A 1971 SC 342, (1971) 1 SCR 821.

7 *Bharat Bhushan* v. *Ved Prakash*, A 1978 Del 199.

8 *Manubhai Nandlal* v. *Popatlal Manilal Joshi*, A 1969 SC 734.

9 *Narasingh Charan Mohanty* v. *Surendra Mohanty*, A 1974 SC 47.

10 *Raj Narain* v. *Indira Gandhi*, A 1972 SC 1302, (1972) 3 SCC 850 (para 16).

11 *Vimal* v. *Bhaguji*, A 1995 SC 1836.

(iii) that it cannot allow any amendment which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.[12]

Thus a defective petition cannot be allowed to be amended after the period of limitation for filing it had expired,[13] but an amendment to introduce particulars of a corrupt practice already alleged in the petition may be allowed in appropriate cases.[14]

Rules contained in O.8, R.5, cannot be strictly enforced in the trial of election petition and a charge of corrupt practice may not be held proved for want of specific denial, as the court cannot overlook the fact that onus of proof is on the petitioner.[15] The petitioner cannot rely upon the rule of pleading to infer an admission in substitution of lack of evidence.[16] Besides where an allegation relates to something which is not likely to be within the knowledge of the respondent a specific denial cannot always be expected from him, hence a simple non-admission need not be treated as an implied admission, and the court may well require the petitioner to prove it.

The provisions of the Act do not expressly or impliedly exclude the application of O.11.[17] The provision of O.23, R.1, are not applicable to election petitions and the petitioner has no absolute right to withdraw the petition or even a part thereof.[18] Withdrawal is possible only with the leave of the Court under section 109(1). Principle of postponing order under O.6, R.5(2), as to particulars till discovery of documents does not apply to election petitions. The provision of O.8, R.9, has not been excluded

12 *Rama Shankar Permanand* v. *Jugalkishore*, A 1969 MP 243; *Venkateswara Rao* v. *Bekharu Narasinha Reddi*, A 1969 SC 872, (1969) 2 SCJ 505.

13 *Mashi Nath* v. *Kudesia Begam*, A 1971 SC 372; *K.D Deshmukh* v. *Amritlal Jayaswal*, A 1992 SC 164.

14 *Mohan Roy* v. *Surendra Kumar*, A 1968 Raj 287; *D.P.Mishra* v. *Kamal Narayan*, A 1970 SC 1477; *Ziyauddin Burhanuddin Bukhari* v. *Brij Mohan Ramdas Mehra*, A 1975 SC 1788; *Balwan Singh* v. *Prakash Chand*, A 1976 SC 1187, (1976) 2 SCC 440; *Sohanlal* v. *Thakur Baldeo Singh*, 1978 Kash LJ 148; *Jagannath Prasad Singh* v. *Kamlapati Tripathi*, 1981 ALJ 912.

15 *Jagjit Singh* v. *Giani Kartar Singh*, A 1966 SC 773.

16 *Ajit Narayan Singh* v. *Nandini Satyapathi*, A 1975 Ori 184.

17 *Rajendra Kumari Bajpai* v. *Ram Adhar Yadav*, (1975) 2 SCC 44.

18 *Jugal Kishore* v. *Baldeo Prakash*, A 1968 Punj 152 (FB).

19 *Balkrishna* v. *H.R.Gokhale*, A 1973 Bom 32.

by any provision of the Act and it cannot be said that the provision relating to filing of subsequent pleading with the leave of the Court has been eliminated

Writ Petitions Under Articles 32 & 226 & Petitions Under Article 227

Writ jurisdiction is exercised by the Supreme Court under Article 32 and by the High Courts under Article 226. The Supreme Court can be moved only for the enforcement of the fundamental rights guaranteed under Part III of the Constitution, while High Courts can be approached for infringement of any fundamental right as well as "for any other purpose".[1]

Both Supreme Court and the High Courts in India have been conferred powers to issue five kinds of writs specifically mentioned in Article 32 & 226, namely, those in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari, or any one or more of them, with the further power to issue such other directions and orders as may be considered appropriate in any case.

So far as the enforcement of fundamental rights goes, the Supreme Court and the High Courts have concurrent jurisdiction. It depends upon the choice of the petitioner whether to approach the High Court first and then make an attempt to go to the Supreme Court in appeal or file a writ petition directly in the Supreme Court. It has been pointed out by the Supreme Court that "this court is constituted as the protector and guarantor of fundamental rights and so it cannot, consistently with its responsibility, refuse to entertain applications seeking protection against infringement of such right".[2] For Article 32 is itself contained in Part III of the constitution enumerating various fundamental rights. Clause (1) guarantees a right to a person to move the Supreme Court by appropriate proceedings for enforcement of the right conferred by Part III. The underlying idea in conferring power on the Supreme Court under Article 32 and on the High Courts under Article 226 for the enforcement of the

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Kalyan Mal Mina v. *Ratan Lal Jambi*, A 1981 Raj 249.

1 *State of Orissa* v. *Madan Gopal*, A 1952 SCR 28; *Calcutta Gas Co.* v. *State of West Bengal*, A 1962 SC 1044.

2 *Ramesh Thapar* v. *State of Madras*, A 1950 SC 124; *Sadhu Ram* v. *The Custodian General of Evacuee Property*, A 1956 SC 43.

fundamental rights as explained by the Supreme Court is that "the Constitution having provided for the fundamental rights, it was thought necessary to provide also a quick and inexpensive remedy for the enforcement of such rights. In the State's sphere new and wide powers were conferred on the High Courts for issuing directions, orders or writs, primarily for the enforcement of fundamental rights, the power to issue such directions for any other purpose being also included".[3] The jurisdiction of the Supreme Court or High Courts under Article 32 and 226 is not excluded even in respect of so-called exercise of political powers of the government where violation of the constitution or of any other statute is involved.[4] The provisions of O.22 are not applicable to the writ proceedings under Arts. 226 and 227 of the Constitution.[5] Against a threatened act the writ petition can be maintained by a person or group of persons.[6] Grievances not made in the writ petition cannot be considered by the High Court.[7]

Direction and Orders : The Constitution enables the Supreme Court and High Courts to issue not only prerogative writs but also such other directions, order or writs as may be appropriate in each case.[8] The directions or orders that may be issued need not be *ejusdem generis* with the five prerogative writs enumerated by name.[9] Although the power given to Supreme Court under Article 32 and High Courts under Article 226 is a large one, yet it has to be exercised in accordance with the well established principles.[10]

It is not open to a party to invoke the supervisory jurisdiction of the High Court under Art. 227 as a substitute for its appellate or revisory jurisdiction under the C.P.C.[11] The supervisory jurisdiction under Art. 227

3 *Election Commissioner of India* v. *S. Venkata Rao*, A 1953 SC 210.
4 *H.H. Maharajadhiraja Mahadew Rao Jivaji Rai Scindia* v. *Union of India*, A 1971 SC 530 (579).
5 *Puran Singh* v. *State of Punjab*, A 1996 SC 1093.
6 *Samajwadi Party* v. *State of U.P.*, 1996 (27) ALR 105 (All).
7 *ADM (City) Agra* v. *Prabhakar Chaturvedi*, 1996 (2) SCC 12, A 1996 SC 2359.
8 *Rashid Ahmad* v. *Municipal Board, Kairana*, A 1950 SC 163; *Moti Lal* v. *State of U.P.*, A 1951 All 257 (FB).
9 *Jeshingbhai Ishwarlal* v. *Emperor*, A 1950 Bom 363.
10 *Janardhan Reddy* v. *State of Hyderabad*, A 1951 SC 217 (223); *Asiatic Engineering Co.* v. *Achhru Ram*, A 1951 All 746.
11 *Chandigarh Administration* v. *Manpreet Singh*, (1992) 1 SCC 380.

is "limited to seeing that an inferior court or tribunal functions within the limits of its authority and not to correct an error apparent on the face of the record much less an error of law," nor to "review or re-weigh the evidence upon which the determination of the inferior Court or tribunal purports to be based or to correct errors of law in the decision," when there was no failure on its part to exercise jurisdiction or to observe the principles of natural justice or otherwise to act in consonance with the procedure established by law.[12] A new plea for the first time in the writ petition cannot be allowed.[13]

Following guidelines for the exercise of the writ jurisdiction have been laid down by the Supreme Court :

(1) All other alternative remedies must have been exhausted.

(2) There should not have been any undue delay or laches on the part of the petitioner.

(3) There should not be disputed questions of facts.

(4) The petitioner should not be guilty of *suppressio veri or suggestio falsi* and must come with clean hands.

(5) The writ should not be infructuous or futile.

Alternative Remedy : The power of the High Courts in issuing writs is discretionary and an appropriate writ can only be issued if the petitioner succeeds in showing that grave injustice has been or will be done to him. in other words, that his legal right has been[14] or is threatened to be[15] infringed unless the court comes to his aid. For that reason he must first exhaust all other remedies open to him. In case another adequate remedy is available, the court may refuse to exercise its discretion in favour of the petitioner, but mere existence of such a remedy is no bar to the grant of relief by issuing an appropriate writ. It is only a factor to be taken into consideration.[16] There may be extraordinary situations or circumstances, which may even warrant, a different approach. The Court cannot be a

12 *Mohd. Yunus* v. *Mohd. Mustaquin*, (1983) 4 SCC 566 (paras 6 & 7), A 1984 SC 38; *Chandigarh Administration* v. *Manpeet Singh*, A 1992 SC 435 (para 12).

13 *Mohd. Saleem* v. *Jt. Director of Consolidation, Basti*, A 1996 All 78.

14 *State of Orissa* v. *Madan Gopal Rungta*, A 1952 SC 12; *Calcutta Gas Co.* v. *State of West Bengal*, A 1962 SC 1044.

15 *State of H.P.* v. *Bhailal*, A 1964 SC 1006 (para 15).

16 *Union of India* v. *T.R. Varma*, A 1957 SC 882 (884); *N.T. Veluswami Thever* v.

silent spectator in such extraordinary situations.[17] The rule requiring the exhaustion of statutory remedies before the writ will be granted, is a rule of policy, convenience and discretion rather than a rule of law.[18] Before rejecting a writ petition on the ground of alternative remedy, the Court must ascertain whether the alternative forum has jurisdiction to decide the question raised in the writ petition.[19]

The courts may not exercise their power of issuing a writ, if the petitioner has already pursued an alternative remedy and the matter is thus pending before another authority, Tribunal or Court,[20] or has allowed that remedy to become time barred,[1] or where the statute which created the right or liability which is being enforced has itself prescribed a statutory remedy.[2] Where remedy is available under the provisions of the Code of Civil Procedure, the writ jurisdiction under the Constitution should not be invoked.[3]

The existence of an alternate remedy has not been held to be a bar where infringement of a fundamental right is alleged,[4] a mandatory provision

G. Raja Nainar, A 1959 SC 422 (429); *J.K. Manufacturers Ltd* v. *The Sales Tax Officer*, A 1970 All 362 (363, 369) (FB); for a contrary view, see *Pannalal Ram Kumar and Co* v. *Income Tax Officer*, A 1970 Mad 264; *S.A. Khan* v. *State of Haryana*, A 1993 SC 1152; *Ramchandra Ganpat Shinde* v. *State of Maharashtra*, (1993) 4 SCC 216; *Shyam Kishore* v. *Municipal Corporation of Delhi*, A 1992 SC 2279; *Ghan Shyam Das Gupta* v. *Anant Kumar Gupta*, A 1991 SC 2251; *Kuntesh* v. *Management, H.K. Mahavidyalaya, Sitapur*, A 1987 SC 2186; *Ram and Shyam Co.* v. *State of Haryana*, A 1985 SC 1147.

17 *Awadh Bihari Yadav* v. *State of Bihar*, A 1996 SC 122; *State of Uttar Pradesh* v. *Indian Hume Pipe*, A 1977 SC 1132.

18 *State of U.P.* v. *Mohammad Nooh*, A 1959 SC 86.

19 *Popular Plantation* v. *State of Kerala*, A 1991 SC 1232.

20 *Ajit* v. *Sarbamangla*, A 1954 Pat 476; *Rashid* v. *I.T. Commissioner*, A 1954 SC 207; *Vijai Transport* v. *Appellate Tribunal*, A 1958 Raj 165.

1 *Vishwamittara* v. *Authority*, A 1955 All 702.

2 *Premier Automobiles* v. *K.S. Wadke*, (1976) 1 SCC 496 (para 10), relying on, *Wolver Hempton New Water Works Co.* v. *Hawkesford*, (1859) 6 CB (N.S) 336 (Wills J.); *Titaghur Paper Mills* v. *State of Orissa*, A 1983 SC 603, (1983) 2 SCC 433 (para 11), relying on, *Wolver Hampton, supra; Union of India* v. *Cottage Arts Emporium*, A 1991 SCW 492 (remedy of appeal available, writ does not lie).

3 *Ghan Shyam Das Gupta* v. *Anant Kumar Sinha*, A 1991 SC 2251.

4 *B.I.C.* v. *State of Bihar*, (1955) 2 SCR 603; *Himatlal* v. *State of M.P.*, 1954 SCR 1122; *Glaxo Laboratories* v. *Laxmichand*, (1979) 2 Lah LN 7 (All).

of the Constitution has been violated,[5] a flagrant violation of a provision of law which is not a mixed question of fact and law comes to the notice.[6] The rules of natural justice where applicable have been violated,[7] the statute, providing the alternative remedy or the rule under which the impugned order has been made, is ultra vires[8] or the alternative remedy is too costly, ineffective, onerous [9] or inadequate,[10] or because the order is bad for lack of jurisdiction.[11] If the petitioner has himself allowed limitation for the alternative remedy to expire that will be no ground for entertaining a writ petition.[12] However if a writ petition has once been entertained and if thereafter in the meantime limitation for the alternative remedy has expired and the writ petition has been heard on merits it may not be dismissed on the ground of alternative remedy being available.[13] The principle of alternative remedy is not applicable to writ of prohibition which is matter of right and not of discretion where an inferior court or tribunal has wrongly assumed jurisdiction.[14]

Limitation: No period of limitation is provided for petitions under Article 226 or 227. As however, the jurisdiction in writs is extraordinary, the courts expect the petitioners to act promptly and can refuse to interfere if there is delay which is not adequately explained.[15] Some High Courts

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5 *Chaudhury* v. *Union of India*, A 1956 Cal 662.

6 *Gopal Sen* v. *State of W.B.*, A 1981 Cal 431; relying upon, *Joy Chandon* v. *State of W.B.*, A 1975 SC 2190.

7 *State of U.P.* v. *Mohd. Nooh*, A 1958 SC 86; *D.R.M. Steel Industries Private Ltd* v. *BIFR*, A 1996 Cal 54 (Para 33).

8 *B.I.C.* v. *State of Bihar*, (1955) 2 SCR 603, A 1955 SC 661.

9 *Goberdhan* v. *Collector*, A 1956 All 271; *Raghunath Dwivedi* v. *Vice-Chancellor, University of Allahabad*, A 1996 All 52; *Himmatlal* v. *State of M.P.*, 1954 SCR 1122; *A.I.O. Mills* v. *Dutta*, A 1956 Cal 450; *Ali Shah* v. *Tax Recovery Officer*, 1979 Tax LR 811 (J&K); see however, *S.T.O.* v. *Shiv Ratan Mohatta*, A 1966 SC 142.

10 *K.A. Siddalingaiah* v. *State of Karnataka*, A 1979 Kant 190.

11 *D.R.M. Steel Industries Private Ltd* v. *Board for I & F.R.*, A 1996 Cal 54; *Kumesh* v. *Management H.K. Mahavidyalaya, Sitapur*, A 1987 SC 2186.

12 *A.V. Venkateswaran* v. *Wadhwani*, A 1961 SC 1506.

13 *Hirday Narain* v. *I.T.O.*, (1970) 2 SCC 355 (para 13).

14 *Bengal Immunity Co.* v. *State of Bihar*, A 1955 SC 661 at 726 (per Ayyar J.).

15 *Srinivas* v. *Election Tribunal*, A 1956 All 251; *Venketeswarulu* v. *State of Madras*, A 1954 Mad 87; *Jagjiwandas* v. *State of Bombay*, 1952 DLR 149 (Bom).

have imposed on themselves a rule that ordinarily they will not entertain petitions filed beyond 90 days of the accrual of cause of action,[16] but this is a mere rule of practice and not a rigid rule of limitation,[17] hence if the delay is explained satisfactorily, it may be condoned. Time for obtaining copy of impugned order is to be excluded.[18] The Court may take a liberal view if the petitioner has positively good case.[19]

Disputed Facts : The very nature of the proceedings under Article 226 shows that the parties should not be allowed to agitate disputed questions of facts in such summary proceedings. Where the rights claimed by the petitioner cannot be conveniently determined on affidavits the High Court may refuse to exercise its discretion under Article 226.[20] Disputed questions relating to title cannot be gone into or adjudicated in a writ petition.[1] The question of ownership and the possession of the premises cannot be decided in writ petition under Art. 226 of the Constitution, civil court is the proper forum for deciding such issues.[2]

Suppressio Veri : Suppression of material facts and any attempt to mislead the court is considered to be a disqualification for a relief under Article 226, for the High Court will refuse to exercise its discretion in favour of a party who by suppressing true facts, or by suggesting incorrect facts tries to abuse the process of the court and to secure unfair advantage for himself.[3] The court may refuse relief to, when the party has not come

16 *Mongey* v. *The Board of Revenue U.P.*, 1956 ALJ 334.

17 *Chandrabhushan* v. *D.D.C.*, A 1967 SC 1272, (1967) 2 SCR 286.

18 *Sarbajit Singh* v. *Deputy Director*, 1961 ALJ 726.

19 *P.B.Roy* v. *Union of India*, A 1972 SC 908, (1972) 3 SCC 432 (para 8).

20 *Raja Ram* v. *State*, A 1958 All 141; *Simbhaoli Industries Pvt Ltd.* v. *State of U.P.*, A 1959 All 369; ***Sohan Lal* v. *Union of India***, A 1957 SC 529 (531); *Union of India* v. *T.R.Varma*, A 1957 SC 882; *Kailash Nath* v. *State of U.P.*, A 1957 SC 790; *Pithana Apparao* v. *State of Andhra Pradesh*, A 1977 SC 1666; *Tosh & Sons (Pvt.) Ltd.* v. *Asstt. Collector of Customs*, A 1979 Cal 386; *Mohan Pandey* v. *Usha Rani Rajgaria*, (1992) 4 SCC 61; *G.S.Sodhi* v. *Union of India*, A 1991 SC 1617; *Northern Corporation* v. *Union of India*, A 1991 SC 764; *C.O.M.Lakhauri Inter College* v. *Deputy Director Education, Moradabad*, A 1995 All 434.

1 *State of Rajasthan* v. *Bhawani Singh*, A 1992 SC 1018.

2 *Babu Lal* v. *Collector, Varanasi*, 1996 All LR 292 (All) (DB).

3 *S.B.Mathur* v. *Matu Ullah*, 1995 Supp (2) SCC 650; *The Chancellor* v. *Dr. Bijayananda Kar*, A 1994 SC 579; *Naronah S.B.* v. *Union of India*, (1994) 1 SCC 372; *Ramjas Foundation* v. *Union of India*, A 1993 SC 852; *Asiatic*

with clean hands.[4] It is settled law that when a person approaches the Court of equity in exercise of its extraordinary jurisdiction under Art. 226 of the Constitution of India, he should approach the Court with clean objectives.[5]

Futile Writ : The last principle on which High Courts refuse to exercise writ jurisdiction is the futility of the petition.[6] If the court is satisfied that the writ applied for will not serve any useful purpose, it may reject the petition.[7]

Res Judicata : The Principle of *res judicata* applies to writ petitions. Where a writ petition has been dismissed after hearing the parties on merits, subsequent writ for the same relief is barred by the principle of *res judicata*.[8] The principle of *res judicata* would not apply where the earlier writ petition has been dismissed in limine or on the ground of availability of alternative remedy or laches.[9] A second writ petition may be barred by *res judicata* if the first was dismissed on merits but not if it was dismissed by a non-speaking order like "Dismissed".[10] The reason is that dismissal by a non-speaking order could be conceivably based on various grounds unrelated to merits. For instance the court may on the earlier occasion have taken the view that the petition was premature, or that the petitioner should first make a demand on the public authority-opposite party for redress, or that

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Engineering Co. v. *Achhru Ram*, A 1951 All 746 (769) (FB); *M. Haji Mohammed Ismail Sahib & Co.* v. *Deputy Commercial Tax Officer*, A 1970 Mad 422 (FB).

4 *Chancellor* v. *Bijayanda Kar*, A 1994 SC 579.

5 *Ramjas Foundation* v. *Union of India*, A 1993 SC 852; *G. Narainswami Reddy* v. *Govt. of Karnataka*, A 1991 SC 1726; *K.R. Srinivas* v. *R.M. Premchand*, (1994) 6 SCC 620; *Rajbir Singh* v. *Purshottam Lal*, 1996 ALJ 498 (All).

6 *Gopal Prasad Gayaprasad Tiwari* v. *The Board of Revenue*, A 1953 Nag 121; *Subodh Kumar Bose* v. *Commissioner of Krishna Nagar Municipality*, A 1956 Cal 393; *Gajanan Krishnaji* v. *Corporation of City of Nagpur*, 1980 IC 167 (Bom).

7 *State of Haryana* v. *S.M. Sharma*, A 1993 SC 2273; *Ram Pratap* v. *Revenue of the State of Rajasthan*, A 1953 Raj 111; *K.N.Guruswamy* v. *State of Mysore*, A 1954 SC 592; *Ram Niwas Gupta* v. *State of Haryana*, A 1970 P & H 462.

8 *The Direct Recruit Class II Engineering Officers Association* v. *State of Maharashtra*, A 1990 SC 1607; *Supreme Court Employees Welfare Association* v. *Union of India*, A 1990 SC 334; *Sarguja Transport Service* v. *S.T.A. Tribunal Gwalior*, A 1987 SC 88.

9 *Pujari Bai* v. *Madan Gopal*, A 1989 SC 1764.

10 *R.S. Sial* v. *State of U.P.*, A 1971 All 375 (FB).

it should avail the alternative remedy of a statutory or departmental appeal. and so on and so forth.

Contents of Petition : Like a plaint, a petition under Art. 226 has three parts. The first part consists of the title which will include the name of the High Court, the names of parties, the number and year of the case and a reference to Articles under which the petition is filed. Petitions are usually addressed to the Hon'ble Chief Justice and his Companion Judges of the High Court. In some High Courts there is a practice of giving a gist of the relief sought before and immediately above the body of the petition.

The second part consists of the main body of the petition containing the facts of the case stated in paragraphs consecutively numbered. If there is any delay in the filing of the petition or any earlier acquiescence or inaction, it has to be explained satisfactorily. After stating the facts, it is usual to state that the petitioner has no other alternative, effective or speedy remedy and that it is necessary for him to invoke the writ jurisdiction of the court. If he has already exhausted other remedies their result should be indicated and copies of the orders passed by the authorities or tribunals approached be annexed. In case of a writ of mandamus the fact that a demand was made on the public authority concerned should be stated and its particulars given. Then follow the ground on which the particular writ, order or direction is claimed. The grounds are also divided in paragraphs serially numbered. The gounds of a writ petition may, like Grounds of Appeal contain legal contentions as well, but should not be argumentative.[1] The requirement of pleadings in a civil suit, that they should contain only facts and not law, is not rigidly insisted on in respect of writ pleadings, the more so as in most cases it is not the basic general law but the fast-changing special enactments and statutory instruments and executive instructions issued there under or with reference thereto that are the subject matter of writ litigation and it is considered convenient to bring. to the notice of the court the relevant provisions of such enactments, instruments and instructions.

The last part of the petition consists of the prayer or relief in which is mentioned the particular writ, order or direction, which is being applied for. If any specific order is being challenged, its date and annexure serial

[1] See Chap. XVII, *ante*.

number must be mentioned in the relief. For drafting different kinds of writ petitions, see the precedents and the notes thereunder.

Annexures and Affidavit : All important documents, referred to in the writ petition, which are required to be before the court, in order to enable it to decide the petition, should be made annexures to the petition, if available in original. If for any reason they cannot be filed in original, their attested or certified copies must be made annexures. Care should be taken to see that orders which are impugned, if they are in writing are made annexures, either in the original or in the shape of the attested or certified copies. An affidavit in support of the facts stated in the petition has to be filed, which must be properly verified.

Interim Relief : Practice differs in various High Courts about the prayer for interim relief. In some High Courts prayer for interim relief is permitted to be added to the relief claimed in the petition. In others, a separate application for interim relief has to be made, which is also to be supported by an affidavit. If such a separate application has to be made, the facts necessary to support the prayer for interim relief must be stated along with the relief prayed for. It is however, not necessary to repeat the facts which are already mentioned in the writ petition or in the affidavit supporting it. It is indeed permissible and customary to refer to the facts stated in the writ petition itself as a justification for interim relief instead of filing a separate affidavit with the application for such relief.

Counter and Rejoinder Affidavits : As writ petition is not a plaint, no "written statement" is filed in reply to it. After notice has been served on the opposite parties, they file counter-affidavits. In these counter-affidavits, with reference to each paragraph of the petition the facts alleged are either admitted or denied and although C.P.C. does not as such apply to writ proceedings (*vide* section 141), yet the principle of O.8, R.5 (*See* Chap. XV, *ante*) may be applied to evasive denials. Where a certain allegation made in the writ petition is not controverted by the respondent, it shall be deemed to have been admitted.[12] If there are any additional facts, they must be stated. The stand which the opposite party intends to take, or on which he wants to rely in order to defeat the petition should be clearly stated. If any facts or grounds are to be relied on, by way of preliminary objections to the maintainability of the writ petition they should

12 *Naseem Bano* v. *State of U.P.*, A 1993 SC 2592.

be stated in preliminary paragraphs of the counter affidavit before starting para-wise reply to the writ petition. Like the petition the counter affidavit is also divided into paragraphs. Though mainly confined to facts, the counter affidavit like a writ petition may also refer to the relevant statutory enactment, statutory instruments and executive instructions in support of the legal pleas raised in defence but it must not be argumentative. If any additional facts are given in the counter affidavit, which it is necessary for the petitioner to explain or controvert, he files a rejoinder-affidavit. Without the permission of the court, new or additional facts cannot be put in the rejoinder affidavit. If they are so put, it will be open to the court to ignore the same, as a rejoinder affidavit or supplementary affidavit cannot be a substitute for a proper application for amendment of the writ petition. If new facts are to be pleaded in support of the writ it is always advisable to apply for leave to amend the writ petition instead of being content with mentioning those facts in a rejoinder or supplementary affidavit. The general principles (discussed in Chap. X *ante*) underlying the provisions of the C.P.C., though not the C.P.C. as such, would govern the discretion of the court in regard to such amendment applications. Supplementary counter and rejoinder affidavits can also be filed with the leave of the court to meet any new factual allegations made by the opponent.

Principles of Pleadings Applicable to Writs : Subject to the above, the general principles of pleadings referred to in detail in the preceding chapter are applicable to writ petitions also. Only material facts are to be stated in the petition and the counter and rejoinder affidavits and care is to be taken to avoid putting in evidence, arguments or law. The principles underlying Rules 1 and 3 of Order 1 of the C.P.C. are also applicable.

Parties : Regarding impleadment of parties one point of difference is that while in a suit it is the State concerned or the Union of India that has to be sued (*vide* Article 300 of the Constitution), even if damages or other relief is claimed on account of any act of a subordinate official, a writ petition may instead be filed against the authority whose order or whose act or omission is being assailed even without impleading the government concerned. Such authority, unless it is a corporation sole or corporation aggregate,[13] not being a juristic person, will not be capable of being sued by name of office or designation and it is only when the individual holder

13 See Chapter XII, *ante*.

of an office is sought to be sued for damages, etc., on account of any act, which though purporting to be performed in his official capacity, was malafide or otherwise ultra vires, that he may be sued by name. In a writ petition, however, the officer or authority can be impleaded by designation as an opposite party. It is, however, necessary to implead the government concerned (Union or State) also as an opposite party where the results of allowing the writ petition will be to deprive the government of any property or to saddle it with any liability, e.g., in a writ petition by a public servant claiming declaration regarding his service. Where an officer is alleged to have acted out of malice in fact (as distinguished from malice in law) he should also be impleaded by name as an opposite party so that he may have an opportunity of meeting the factual allegations made against him. In respect of seniority and like disputes the other fellow employees who would be affected by the decision should also be impleaded. In the undernoted case it was held that such impleadment, though proper, was not necessary where the validity of a statutory provision or other like order of general application was being challenged,[14] but a different view has been taken in a later decision.[15] It is, therefore, expedient to implead them as opposite-parties even in such cases. Of course, if the number of such persons is large, e.g., where the controversy is between one *class* of servants and another, resort may be had to the device of representative petition vis-a-vis the petitioners or the opposite-parties or both, as the case may be.[16] In a writ petition challenging a selection, all the selected candidates are necessary party and without them writ petition is not maintainable.[17]

HABEAS CORPUS

It is a prerogative process, remedial and mandatory, for securing the liberty of the subject from unlawful detention whether in the custody of the State or of a private person. By this writ, release of a person in confinement is sought on the ground that his confinement or detention is without any lawful justification. The person who has kept the prisoner in confinement is asked by the court to produce him before it and to show

14 *General Manager, S.C. Rly.* v. *Sidhanti*, (1974) 4 SCC 535 (para 15).

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

16 *Gulam Abbas* v. State of *U.P.*, (1982) 1 SCC 71 (para 1); *Prabodh Verma*, supra.

17 *Ishar Singh* v. *Kuldip Singh*, 1995 (I) Supp. SCC 179.

on what authority he has been detained. If the court is satisfied that there is no legal justification for his detention, the person is ordered to be released. Such an application may be made by the person detained or by any other person on his behalf. It provides only a safeguard against wrongful detention in order to secure an early release.

The question which the court has to consider is whether there is any unlawful restraint on the movements of the person detained. The court will not ordinarily interfere unless it finds that the person has been deprived of his liberty against the procedure "established by law" as provided in Article 21, or where there has been breach of any of the conditions given in Article 22,[18] or in the statute concerned. There may yet be another ground, viz., that the law under which he has been detained was not within the competency of the Legislature which enacted it, or that the particular provision under which he has been detained is otherwise *ultra vires*. The legality of the order has to be seen on the date of hearing.[19] It has been held in a subsequent case that legality of detention can be considered with reference to the date of filing of the petition for such writ.[20] The law on the subject has been discussed further at some length in the notes below the precedents in part III, *post*.

MANDAMUS

Mandamus literally means a command. The main purpose of issuing such a writ is to compel an authority, may it be the government, or any other public authority, to act according to the provision of law, or forbear from acting in a particular manner which goes against such a provision. The main object is that such bodies should function within the four corners of law. The person applying for such a writ has to show that he has a legal right to compel the authority for the performance of the alleged duty, which may be of public nature, *i.e.*, affecting the public at large and specially affecting the right of the petitioner.[1]

18 *Saptawana* v. *State of Assam*, A 1971 SC 813; *Warrange Chambers of Commerce* v. *Director of Marketing, Government of Andhra Pradesh*, 1974 (2) An WR 382.

19 *Talib Hussain* v. *State of J. & K.*, A 1971 SC 62.

20 *Kanu Sanyal* v. *District Magistrate, Darjeeling*, A 1974 SC 510, (1974) 4 SCC 141.

1 *Shobti Construction Co.* v. *City for Industrial Development Corporation*, (1995) 4 SCC 301.

When Mandamus will lie : Mandamus is not a writ of right, but will be granted if the duty is in the nature of a public duty and specially affects the rights of an individual provided there is no more appropriate remedy.[2] Mandamus cannot be demanded *ex-debito justitiae* but is issued only in the discretion of the court.[3] As has been put by the Supreme Court "There must be in the applicant a right to compel the performance of some duty cast on the opponent".[4] The duty must be of a public nature, *i.e.* created by statute or some rule of common law.[5] If the rights are purely of a private character, no mandamus can be issued.[6] Apart from statutory authorities and instrumentalities of the State, writ of mandamus can be issued to any other person or authority performing public duty. It is not necessary that the duty should be imposed by the statute.[7] Merely ministerial acts which an officer has to perform in obedience to the orders of his superior cannot be considered public duties. The duty to be performed must be imperative and not discretionary.

Secondly, before the petition is filed the petitioner should have demanded the performance of duty. The absence of an allegation of demand and refusal in an application for mandamus is fatal to the maintainability of the petition.[8] A person seeking writ of mandamus must prove that he has a legally and judicially enforceable right.[9] There should be no other equally efficacious, convenient and beneficial remedy.[10] A writ of mandamus cannot be issued to the Legislature to enact a particular

2 *State of Madhya Pradesh* v. *G.C. Mandawar*, A 1954 SC 493; *Sohan Lal* v. *Union of India*, A 1957 SC 529; In re, *Jatinder Mohan Sen Gupta*, A 1925 Cal 48; *Air Corporation Employees Union* v. *G.B. Birade*, A 1971 Bom 288.

3 *Moti Lal* v. *Uttar Pradesh*, A 1951 All 257 (FB).

4 *State of Madhya Pradesh* v. *G.C. Mandawar*, A 1954 SC 493.

5 *Chief Commissioner of Police* v. *Gordhandas*, 1952 SCR 135 (148); *S.C. Advocates on Record Association* v. *Union of India*, A 1993 SC 268; *Ghanashyam Misra* v. *Orissa Association of Sanskrit Learning*, A 1971 Ori 212.

6 *Shri Anadi Mukta Sadguru S.M.V.S.J.M.S Trust* v. *R. Rudani*, A 1989 SC 1607.

7 *Shri Anandi Mukta Sadguru*, supra.

8 *Staynor* v. *Commercial Tax Officer*, 55 CWN 583; *Annapoorna Farming & Fishery Ltd.* v. *State*, A 1953 Cal 756.

9 *Shabi Construction Co.* v. *City and Industrial Development Corporation*, (1995) 4 SCC 301.

10 *Dost Mohd.* v. *Hyderabad Government*, A 1953 Hyd 222; *Dhanyalakshmi Rice Mills* v. *Commissioner of Civil Supplies*, A 1976 SC 2243.

legislation.[11] For further discussion see notes under the precedents in part III, *post*.

PROHIBITION

The writ of Prohibition is a process issued by a superior court to the inferior court or tribunal directing it not to usurp a jurisdiction not vested in it or not to exceed its jurisdiction. This writ is similar to Certiorari in that both are directed to judicial or quasi-judicial proceedings, but they are issued at different stages of the proceedings of the inferior court or other authority. Prohibition is issued while the proceedings are pending in order to prohibit further hearing or continuance of the same, while Certiorari is issued to quash the order or the decision already passed or made. In that way they are complimentary to each other. Both kinds of writs can be issued to courts performing judicial functions as well as to authorities performing quasi-judicial functions.[12] There may be occasions when a prayer for the issue of both kinds of writs of Prohibition and Certiorari has to be made in the same petition.

The High Court has power to issue a writ of prohibition to prevent a Court or a tribunal from proceeding further when the inferior Court or tribunal (a) proceeds to act without or in excess of jurisdiction, (b) proceeds to act in violation of the rules of natural justice, (c) proceeds to act under law which is itself *ultravires* or unconstitutional, or (d) proceeds to act in contravention of the fundamental rights.[13]

Writ of Prohibition, unlike a writ of Mandamus, does not lie against an authority, performing purely executive or administrative functions. Its scope is limited to judicial or quasi judicial functions. It also cannot be issued against any private organisation or any other body which is not authorised to perform judicial or quasi-judicial functions.[14] The object of such a writ being to stop the mischief resulting from wrong exercise of jurisdiction, the court has to act with judicial circumspection having regard

11 *State of J&K* v. *A. R. Zakki*, A 1992 SC 1546.

12 *Hari Vishnu Kamath* v. *Ahmad Ishaque*, A 1955 SC 233 (241).

13 *U.P. Sales Tax Service Association* v. *Tax Bar Association*, (1995) 5 SCC 716 (para 23).

14 *Divakaran* v. *Deputy Director of Fisheries*, A 1975 Ker 9; *Brij Khandelwal* v. *Union of India*, A 1975 Del 184 (DB).

to the facts in each case. *See also* notes under relevant precedents in part III, *post*.

QUO WARRANTNTO

This writ is issued with the object of preventing a person holding an office, from continuing in that office on the ground that he has usurped the said office, and he must show under what authority he is holding the office, and why should he not be ousted. The office must be a public office in which the community at large is interested. It should not be an office in any private organisation. Quo Warranto is a remedy which cannot be claimed as of right or as a matter of course. It lies in the discretion of the court, depending upon the facts and circumstances of each case, to grant or refuse the issue of such a writ. The court has to inquire if the holder of the office has any legal authority to hold and to continue to hold the office. If no illegality is found the petition will fail. In case of illegality an order of ouster of the incumbent must be passed. It is a writ in which the petitioner does not necessarily seek enforcement of his right but questions the right of the respondent to hold the public office.[15] Habeas Corpus and Quo Warranto are the only two writs in which enforcement of individual right of the petitioner is not necessarily required.[16]

Such a writ will not ordinarily be issued if there is some statutory provision providing an effective remedy, as in regard to disputes relating to elections, or where there is a mere irregularity which can be cured; or where the writ will be futile or infructuous. For further discussion *see* notes under relevant precedents in part III, *post*.

CERTIORARI

Writ of Certiorari is a judicial writ like the writ of Prohibition. It is issued in the form of a command. Both the writs are complimentary to each other as pointed out earlier, and are issued at different stages of the proceedings before courts or tribunals or other authorities performing judicial or quasi-judicial functions. The grounds on which writ can be issued are :

1. Want of jurisdiction or exceeding the jurisdiction.[17]

15 *G.D. Karkare* v. *T.L. Shubedar*, A 1952 Nag 330 (334).

16 *Calcutta Gas Co.* v. *State of West Bengal*, A 1962 SC 1044.

17 *The Maharashtra State Road Transport Corp.* v. *Babu Goverdhan Regular*

2. Any violation of the procedure prescribed, or violation of the principles of natural justice in the performance of its functions.[18]

3. Any mistake or error of law apparent on the face of the record.[19]

It can thus only correct the errors in the exercise of jurisdiction or any error of law apparent on the face of the record or any illegality in following the prescribed judicial procedure, by quashing the order. It cannot normally substitute its own order in place of the order passed by the inferior court as can be done in exercising appellate jurisdiction.[1] The scope is further limited because there can be no quashing of any purely executive or administrative orders but only orders passed in judicial or quasi-judicial proceedings.[2] Inquiry under Commissions of Inquiry Act 1952 was held to be purely administrative, as the recommendations of the commission do not take effect of their own force and may or may not be accepted and implemented by government.[3] But many executive acts which affect someone's rights and imply a duty to act fairly even though not judicially are now held to be subject to this writ.[4]

Every quasi-judicial order must be a speaking order.[5] Denial of an opportunity of being heard in consonance with the principles of natural justice, may also render the order a nullity and lead to the order being

Motor Service, A 1970 SC 1926; *Sheo Dulari Devi* v. *Nageshra Kuer*, A 1977 Pat 86; *Rajendra Prasad* v. *State of U.P.*, 1978 ALJ 724 (DB).

18 *The Purtabpur Co. Ltd.* v. *Cane Commissioner of Bihar*, A 1970 SC 1896; *Raj Kumar Gupta* v. *Ram Lal Bhargotra*, A 1971 J & K 37; *Ghanashyam Misra* v. *Orissa Association of Sanskrit Language & Culture*, A 1971 Ori 212; *Deva Singh* v. *Kurukshetra University*, A 1971 P & H 340; *K. Chelliah* v. *Chairman, Industrial Finance Corp. of India*, A 1973 Mad 122.

19 *Chetkar Jha* v. *Viswanath Prasad Verma*, A 1970 SC 1832; *Parry & Co.* v. *P.C. Pal*, A 1970 SC 1334; *Bachan Singh* v. *Gauri Shankar Agarwal*, A 1971 SC 1531; *Mysore State Road Transport Corp.* v. *S.K. Athani*, A 1973 SC 2448; *Sundari Devi* v. *Ganga Ram*, 1979 ALJ 38.

1 *Hari Vishnu Kamath* v. *Ahmad Ishaque*, A 1955 SC 233; *Chandroji Rao* v. *State of M.P.*, A 1976 MP 119; *Rajni Kanta Mehta* v. *State of Orissa*, (1976) 42 CLT 292.

2 *Dr. Herekrushna Mahtab* v. *Chief Minister of Orissa*, A 1971 Ori 175; *Rajendra Prasad* v. *State of U.P.*, 1978 ALJ 724.

3 *Brajnandan* v. *Jyoti Narain*, A 1956 SC 66.

4 *I.K. Kraipak*, v. *Union of India*, A 1970 SC 150, (1969) 2 SCC 262.

5 *Mahabir Prasad Santosh Kumar* v. *State of U.P.*, A 1970 SC 1302; *Travancore Rayons Ltd.* v. *Union of India*, A 1971 SC 862.

quashed.[6] On what constitutes an error apparent on the face of the record see the undernoted decisions.[7] Further see notes under relevant precedents in part III, *post* and also earlier discussion in this Chapter with reference to Article 227, the power under which is in many respect similar to the power of issuing writs of Certiorari and Prohibition.

PUBLIC INTEREST LITIGATION

The concept of Public Interest Litigation in this country is of recent origin, thanks to the Judicial activism displayed by the Apex Court and followed by all the High Courts. The law on the subject is evergrowing and has had a remarkable impact on the functioning of the Governments in the Centre and the States. The purpose of public interest litigation is to promote public interest which mandates the infringement of legal or constitutional rights of a large number of persons, poor, downtrodden, ignorant, socially or economically disadvantaged, the oppressed and the suppressed should not go unredressed. Public interest litigation is *pro bono publico*.

Public interest litigation has relaxed the strict rule of *locus standi* applicable to private litigation and has evolved a principle which gives the right of *locus standi* to any member of public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury but who is not a mere busy body or meddlesome interloper.[8]

The violations of fundamental rights guaranteed by the Constitution by acts of commission or omission on the part of the State have been the subject of a large number of public interest litigations. The broadening the rule of *locus standi* has been largely responsible for the development of public law because it is the only violability of judicial remedy for enforcement which invests law with meaning and purpose or else the law would remain merely a paper parchment, a tearing illusion and a promise of unreality.[9]

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6 *Cura* v. *State of Orissa*, A 1981 Ori 84.

7 *Parry & Co.* v. *P.C. Pal*, A 1970 SC 1334; *Chetkar Jha* v. *Vishwanath Prasad Verma*, A 1970 SC 1832; *Hindustan Steel* v. *K.K. Roy*, A 1970 SC 1401; *Zora Singh* v. *J.M. Tandon*, A 1971 SC 1537.

8 *People's Union for Democratic Rights* v. *Union of India*, A 1982 SC 1473.

9 *S.P. Gupta* v. *Union of India*, 1981 Supp. SCC 87.

The scope of public interest litigation is not confined to infringement of fundamental rights guaranteed by the Constitution. It has been extended to several fields such as bonded labour, rights of labourers, legal relief to the poor and the needy, environmental hazards, women and children, child prostitution, financial relief to the poor and the needy, economic and social Justice etc.

PETITIONS UNDER THE RAILWAY CLAIMS TRIBUNAL ACT, 1987

The substantive liability of the Railway Administration for loss, damage, non-delivery or deterioration of goods entrusted to them for carriage and for death or injury or loss etc., to any passenger in a railway accident is laid down in the Indian Railways Act. As litigation in the courts of law and before the Claims Commissioner is very protracted, it has been decided by the Parliament to set up a Specialised Tribunal for speedy adjudication of such claims. It is to give effect to this object this Act has been passed. Under section 3 the Central Government is authorised to establish a Claims Tribunal known as the Railway Claims Tribunal to exercise the jurisdiction, powers and authority conferred on it by or under this Act. Its jurisdiction, powers and authority are set out in section 13 of the Act. Section 15 of the Act lays down that on and from the appointed day no court or other Authority shall have or be entitled to exercise any jurisdiction, powers or authority in relation to matters referred to sub-section (1) and (1)A of section 13. An appeal from the decision of the Claims Tribunal shall lie from every order, not being an interlocutory order to the High Court having jurisdiction over the place where the Bench of the Tribunal is located.

PETITIONS UNDER THE ADMINISTRATIVE TRIBUNALS ACT, 1985

The Administrative Tribunals Act, 1985 provides for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of Persons appointed to public services and posts in connection with the affairs of the Union of India or of any State or any local authority within the territory of India or under the control of the Government of India or of any Corporation or society owned and controlled by the Government. Section 4 empowers the Central

Government to establish an Administrative Tribunal known as the Central Administrative Tribunal to exercise jurisdiction powers and authority conferred on the Central Administrative Tribunal by or under this Act. The Central Government is also authorised on receipt of a request in this behalf from any State Government to establish an Administrative Tribunal to be known as (name of the State) Administrative Tribunal to exercise the jurisdiction, powers and authority conferred on the Administrative Tribunals for the State by or under this Act. Sections 14 and 15 of the Act deal with the jurisdiction, powers and authority of the Central Administrative Tribunal and the State Administrative Tribunals respectively. Section 28 lays down that on and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matter concerning recruitment to any service or post or service matters concerning members of any service or persons appointed to any service or post, no court except (a) the Supreme Court or (b) any Industrial Tribunal, Labour Court or other Authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force, shall have or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or such service matter concerning such recruitment or such service matters. Under this section direct appeals have been provided for from the decision of Tribunals to the Supreme Court, and the jurisdiction of all other courts is excluded. The matter was, therefore, referred to a larger Bench of Seven Judges of the Supreme Court.[10] The Tribunals constituted under Art. 323-A and 323-B of the Constitution are competent to hear matters where the *vires* of the statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts, and the Supreme Court which have under our constitutional set up been specifically entrusted with such obligation. Their function in this respect only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently have the power to test the *vires* of subordinate Legislation and Rules. But, the Tribunals shall not determine any question regarding the *vires* of their parent statutes following the settled principle that a Tribunal, which is a creature of an Act cannot declare that very Act to be

10 *Chandrakumar* v. *Union of India*, A 1997 SC 1125.

unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of the Tribunals rendered in cases that they are specifically empowers to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. The Tribunals will, however, continue to act as the only Courts of the first instance in respect of the areas of law for which they have been constituted. By this, it meant that it will not be open for litigants to directly approach the High Courts even in cases where they question the *vires* of statutory legislations (except as mentioned, where the legislation which creates a particular Tribunal is challenged) by overlooking jurisdiction of the concerned Tribunal.

PETITIONS UNDER RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993.

This Act provides for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. As per the statements of objects and reasons, banks and financial institutions at present are experiencing considerable difficulties in recovering loans and enforcement of securities. The existing procedure of the Ordinary Civil Court for recovery of debts due to banks and financial institutions has blocked a significant portion of their funds in unproductive assets. The Committee on the Financial System has considered the setting up of Special Tribunals with special powers for adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector reforms. Section 3 of the Act empowers the Central Government by notification to establish one or more Tribunals to be known as Debts Recovery Tribunal to exercise the jurisdiction, powers and authority conferred on such Tribunal by or under this Act. Section 8 empowers the Central Government to establish one or more Appellate Tribunals to be known as the Debt Recovery Appellate Tribunal to exercise the jurisdiction, powers and authority conferred on such Tribunal by or under this Act. Section 17 deals with the jurisdiction, powers and authority of the Tribunals. Section 18 bars the jurisdiction of the regular courts from the day on which the tribunal is established and not the day on which the Act came into force. Under this section, no court has jurisdiction over matters

covered by section 17 other than the writ jurisdiction of the High Court and the Supreme Court.[11] Section 19 of the Act lays down the procedure for filing an application before the Tribunal by a bank or financial institution to recover any debt due from any person and section 20 provides for appeal to the Appellate Tribunal.

PETITIONS UNDER THE FAMILY COURTS ACT, 1984

This Act has been enacted with a view to promoting conciliation in, and securing speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith. The State Government is empowered to establish, in consultation with the High Court, Family Courts for such areas in the State as it may deem necessary. Section 7 of the Act empowers the Family Court to exercise all the jurisdiction exercisable by any District Court or by any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation to said section. Under section 9 of the said Act, in every suit or proceeding, endeavour shall be made by the Family Court in the first instance to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding. Section 10 lays down the procedure to be adopted by the Family Courts. Section 13 of the Act bars legal practitioners from appearing before the Family Courts, provided that if the Family Court considered it necessary in the interests of justice, it may seek the assistance of a legal expert as the *amicus curiae*. An appeal against the judgment or order of the Family Court shall lie to the High Court.

PETITIONS UNDER THE CONSUMER PROTECTION ACT, 1986

Consumerism is a concept which has taken deep roots in western countries for nearly two centuries. In India the movement started only in the second half of the last century and the Consumer Protection Act, 1986 has been passed not a day too soon. The Act is intended to protect the interests of the consumers who have all along been at the receiving end. Section 3 of the Act lays down that its provisions shall be in addition to and not in derogation of the provisions of any other law for the time

11 *Industrial Credit and Investment Corporation of India* v. *Srinivas Agencies*, (1996) BC 523 SC; *Bhanu Construction Co. Pvt. Ltd.* v. *Andhra Bank*, A 2001 SC 477.

being in force The Act does not, therefore, create new rights but only new remedies. The expensive, teasing and dilatory forensic process of the regular courts has left many a consumer in the lurch and this Act provides an inexpensive and expeditious remedy. The complainant need not pay any court-fee, not even process fees. A hierarchy of Tribunals has been created *viz* a Consumer Disputes Redressal Forum in every district known as the "District Forum", a Consumer Disputes Redressal Commission in every State known as the "State Commission" and the National Consumer Disputes Redressal Commission known as "National Commission". The composition and jurisdiction of these forums have been set out in the Act. The Act deals with two kinds of consumers: consumer of goods and consumer of services. Consumer is defined under section 2(d). "Goods" means goods as defined in the Sale of Goods Act, while "service" is defined under section 2(o). Any consumer to whom goods are sold or service is rendered or any recognised consumer association or one or more consumers having the same interest can file a complaint before the respective forum according to its Jurisdictional value if there are defects in the goods or deficiency in the service rendered, or where there is any unfair trade practice on the part of the traders or manufacturers and the forum is entitled to give any one or more of the reliefs mentioned in section 14 of the Act.