Chapter XIX

AFFIDAVITS

As an affidavit is an important document and the consequences of a false affidavit are serious,[1] and therefore, great care is required in drafting it.

As far as possible the affidavit should be filed by a party to the suit or application or by his authorised agent or in their absence by any other person having knowledge of the facts in question. In cases by or against the State or any other public body, an officer dealing with the matter or having access to the relevant records may do so.

A court may at any time for sufficient reason, order that any particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such conditions as the court thinks reasonable.[2] Final adjudication of rights of parties in a civil suit cannot be generally based on affidavits, but interlocutory matters, such as applications for temporary injunction, arrest or attachment before judgment, for appointment of a Receiver, or for adjournment, or for leave to amend pleadings, or for setting aside an order to proceed *ex parte*, or for seeking discovery or interrogatories, are normally decided on affidavits. So are writ petitions. Adjudication under Special Acts such as U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, is also generally based on affidavits. It is not open to the Court to order evidence on affidavits, if the parties bonafide want to lead oral evidence and the witnesses are available.[3]

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which, statements of his belief may be admitted, provided that the grounds thereof are stated.[4]

Affidavits sworn "to the best of my knowledge"[5] or only "on belief"[6] are useless. All affidavits must strictly conform to the provisions of O.19, R.3.

---

1 Punishable under sections 199, 200, I.P.C.

2 O.19, R.1; *Kandesh Spinning Company* v. *Rashtriya Girni*, A 1980 SC 581

3 *Abbott Laboratories (India) Ltd.* v. *J.D. Jandar*, 1995 All. H.C. 3797 (Bom).

4 O. 19, R.3.

5 *Akshay Kumari* v. *Naini Ranjan*, A 1956 Cal 495.

6 *Nem Chandra* v. *State*, A 1953 All 99.

and in the verification it must be specified as to which portions are being sworn on the basis of personal knowledge and which on the basis of information received and believed to be true. In the latter case the source of information must also be disclosed.[7] Where the nature and source of information are not divulged, the affidavit is not in accordance with law.[8] The affidavit is inadmissible in evidence.[9] However, the deponent can be directed to file fresh affidavit disclosing source of information, as amendment in affidavit is not permissible.[10]

Affidavits not properly verified cannot be treated as evidence.[11] A defect in verification such as omission to specify the date and place of execution of affidavit is a mere irregularity and not fatal.[12] An affidavit prepared in English, signed in Hindi by the deponent, contents of which have not been explained to the deponent has no evidentiary value.[13] Where, however, a writ petition is based on an affidavit which has not been properly verified, it is not necessary to dismiss the petition on that ground without first giving the petitioner an opportunity to file a duly verified affidavit.[14]

The cost of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matters, or copies or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same.[15] Where the affidavit contains contradictory versions, the court may permit cross-examination of the deponent.[16]

---

7 *State of Bombay* v. *Purushotam Jog*, A 1952 SC 317; *Barium Chemicals* v. *Company Law Board*, A 1967 SC 295; *Gouri Shanker Mukherjee* v. *State of West Bengal*, A 1977 Cal 125.

8 *Sukhwinder Pal Bipin Kumar* v. *State of Punjab*, A 1982 SC 65; *R. Murlidhar Reddy & Co.* v. *National Projects Construction Corpn. Ltd.*, A 1993 Delhi 68.

9 *Har Krishan Khosla* v. *Alembic Chemicals Works Co. Ltd.*, A 1986 All 87 (DB).

10 *Pannalal Ganguly* v. *State of Tripura*, A 1982 Gau 55 (*Dwaraka Nath* v. *I.T.O.*, A 1966 SC 81 relied on); *D.N. Gupta* v. *Jaswant Singh*, A 1982 Delhi 250.

11 *Ramubai* v. *Kia Ram*, A 1964 Bom 96; *Sham Sunder* v. *Bharat Oil Mills*, A 1964 Bom 38; *Bhupender Singh* v. *State of Haryana*, A 1968 Punj 406.

12 *Mehar Singh* v. *Mahendra Singh*, A 1987 Delhi 200.

13 *Abdul Rashid* v. *Calcutta Municipal Corporation*, A 1990 Cal 37.

14 *Dwarka Nath* v. *I.T.O.*, A 1966 SC 81, (1965) 3 SCR 536.

15 O. 19, R.3.

16 *Gulabchand Jain* v. *Khushal Chand*, A 1992 MP 264; *Chotu Khan* v. *Abdul Karim*, A 1991 Raj 119.

The name of the court should be written at the top of all affidavits. If the affidavit is in support of, or in opposition to, an application respecting any case pending or being instituted in the court, the cause title of such case should be written under the name of the court with the number of the case, if a number has been assigned. If there is no case, the affidavit shall be titled "*In the matter of the petition of*—". After that, the full name and address of the person making the affidavit should be given thus : "Affidavit of AB, son of etc." Then should follow the affidavit proper. Rules have been made by various High Courts which should be carefully studied and affidavits should be drafted so as to meet all the requirements of those rules. Subject to any statutory rules, the following rules of guidance should govern the drawing up of an affidavit :

(1) Not a single allegation more than is absolutely necessary should be inserted in an affidavit.

(2) The person making the affidavit should be fully described in the affidavit, and the fact that he is conversant with the facts of the case be recited. Also that the contents of the affidavit have been explained to him and he has understood the same.

(3) An affidavit should be divided into paragraphs, numbered consecutively, and, as far as possible, each paragraph should be confined to a distinct fact.

(4) Every person or place referred to in the affidavit should be correctly and fully described, so that he or it can be easily identified.

(5) The declarant should use the words "I solemnly affirm" or "I make oath and say", or that "The deponent solemnly affirm (or makes oath) and states as under."

(6) Affidavits should generally be confined to matters within the personal knowledge of the declarant. If he verifies a fact on information received, he should use the words "I am informed by so and so" before every such allegation or in the paragraph containing the verification. If the declarant believes the information to be true, he must add "and I verily believe it to be true".

(7) When the application or opposition thereto rests on facts disclosed in documents or copies, the declarant should state what is the

source from which they were produced, and his information and belief as to the truth of facts disclosed in such documents.

(8) The affidavit should have the following oath or affirmation written out at the end :

"I swear (*or*, solemnly affirm) that this my declaration is true (*or*, that the contents of this affidavit are true), that it conceals nothing, and that no part of it is false".

(9) If there are any alterations or interlineations in the affidavit, they must not only be initialled by the deponent but be authenticated by the officer before whom it is sworn. Rules have been made by High Courts for interpretations of affidavits to deponents, identification of deponents and swearing of affidavits.

(10) Amendment in an affidavit is not permitted, but a supplementary affidavit should be filed with the leave of the court when any mistake or error is intended to be corrected or any addition is intended to be made. The new affidavit need not be in entire supersession of the old one, and need not therefore repeat all the facts. It may be confined to the matter which is sought to be added or amended thus :

"I take oath and say that my statement in para 3 of the affidavit sworn by me, and filed on November, 5, 1995, to the effect that Lachman died on August 1, 1995, was based on wrong information and is not correct, and that the said Lachman really died on August 8, 1995."

PART II

PRECEDENTS

PLAINTS

The requirements of a plaint have already been laid down in Chapter XIII of Part I. It has also been shown in that chapter how the "heading and title" of a plaint should be drafted, what particulars the formal portion of the body of plaint should contain and in what form such particulars should be drawn up. These are the general requirements of all plaints and are more or less similar in all cases. But the other portions of the plaint, viz., the substantial portion of its body, and the relief claimed, are always different, both is substance as well as in form, in different kinds of suits. Therefore, in the precedents given below, models of only this portion of the plaint have been given, the formal portion and the heading and title having been omitted. In order, however, to show what a complete plaint should be, Precedent No.1 has been drafted as a full plaint, containing all the requirements of law. **The heading, title and the necessary formal portion of the body of the plaint should, therefore, be added to each precedent in order to make it a complete plaint.** As to the formal portion, it must be remembered that the date on which the cause of action arose, the facts showing that the court has jurisdiction, and the valuation of the suit for the purposes of court-fee and jurisdiction, are the essentials of every plaint. Other facts, e.g., those showing that the plaintiff sues in a representative character, or that the claim falls within any exception to the general law of limitation, are to be alleged only in cases in which they are necessary.

The precedents of plaints given in this book are classified into the following three groups according to the nature of the suits :

1. Suits arising out of Contract.
2. Suits based on Tort.
3. Other suits, e.g., those based on personal law, or on any provision of an Act of the Legislature.

I. PLAINTS IN SUITS ARISING OUT OF CONTRACT

ACCOUNT *(a)*

No. 1—Suit Against an Agent for Account

In the Court of the Civil Judge (Junior Division) at Agra

Original Suit No. of 1995.

Alfred Addison, son of the late George Addison, resident of Etmadpur, district Agra ... ...Plaintiff

versus

Muhammad Hussain, son of Ahmed Baksh Sheikh, aged 45, occupation service, Muhalla Nai ki Mandi, Agra ... ...Defendant

The above-named plaintiff states as follows :

1. By a registered general power-of-attorney, dated June 20, 1990, the late George Addison appointed the defendant as his agent to collect the rents from tenants of his houses and shops in the city of Ferozabad.

2. The defendant began collection from July 1990 and has been collecting rents from the said tenants ever since.

(a) The word 'account' has no definite legal meaning. The primary idea of 'account computation' is some matter of debit and credit and it implies that one is responsible to another on the score either of contract or some fiduciary relation of a public or private nature created by law or otherwise.

The following facts must exist to impose an obligation to account: (1) The person upon whom such obligation is sought to be imposed (the obligor) must have received some property not his own. (2) The person seeking to impose the obligation (the obligee) must be the owner of the property in respect of which the obligation is sought to be imposed. (3) The obligor must not have received the property as mere bailee. (4) The obligor must have received it into his possession and control. (5) There must be a fiduciary relation between the obligee and the obligor or there must be privity between them by contract or otherwise (*Ashutosh Roy* v. *Arun Shankar Das*, A 1953 Cal 244; *State of Bihar* v. *R.B. Das Jalan*, A 1960 Pat 400).

3. The said George Addison died intestate, and the plaintiff is his son and has obtained letters of administration to his estate.

4. The particulars and details of the collections made by the defendant are not known to the plaintiff, and the defendant has not rendered any account of the money received by him for the said George Addison, either to the said George Addison or to the plaintiff, though the plaintiff requested him to do so.

5. The cause of action for the suit arose on June 28, 1992, when the plaintiff's demand for an account was made and refused.

6. The defendant is a resident of Agra within the jurisdiction of this court.

7. The value of the subject-matter of the suit for the purposes of court-fee and jurisdiction is fixed tentatively at Rs.11,000.

8. The time for filing the suit expired on June 28, 1995, but the court was closed on that date and remained closed for the annual vacation until July 6, 1995.

A suit for account is an extraordinary remedy and becomes necessary when the plaintiff does not know the particulars sufficiently enough to enable him to sue for recovery of the specific sum due to him from the defendant. If, however, he knows such particulars of the amount which is due to him, he should bring a suit for recovery of that amount (*Khem Chand* v. *Tarachand*, 161 IC 505; A 1936 Sind 9). The test is whether having regard to the terms of the agreement between the parties and the nature of the work done, it was possible for the plaintiff to bring a suit for a definite amount or for an amount which was ascertainable, or on the other hand, a total sum could only be determined after the accounts in the possession of the defendant had been examined (*Anant Ram Munshi Ram* v. *Speddinga Singh & Co.*, A 1960 Punj 415; *State of Bihar* v. *Ram Ballabh Das Jalan*, A 1960 Pat 400). If the plaintiff knows the particulars of some transactions, but not of others, he can claim a definite sum on account of the former (giving the particulars which he knows), and can call for an account of the latter. But it is not from everybody that an account can be called for. It can be called for from an agent, or a mortgagee in possession, or a trustee managing the trust property, or a guardian or a managing partner, or a co-sharer in possession of joint property, or a receiver, or from anyone else in a similar position who has received money on plaintiff's behalf. It cannot be demanded from a sub-agent (*Banwari* v. *Pramatha*, ILR (1937) 2 Cal 124).

When defendant co-sharer, in possession of property, was managing it and deriving all profits, suits for accounts against him by other co-sharer was held maintainable (*Shekar Hussain* v. *Shariful Hussain*, 1979 ALJ 1180). A coparcener in

The plaintiff claims:

(1) A full and true account of the money realised by the defendant as agent of the late George Addison; and

(2) Payment of Rs.11,000 or such sum as may be found due from him on the taking of such account.

(3) Interest

(Sd.) ALFRED ADDISON

I, Alfred Addison, declare that the contents of paragraphs 1 and 3 of the above plaint are true within my personal knowledge, and that the

---

Mitakshara family cannot sue the manager of a joint Hindu family for account, unless he establishes fraud, misappropriation or improper conversion or mistake serious enough for reopening the accounts (*Hiralal* v. *Pyarelal*, 184 IC 833 A 1939 All 681; *Jyote Bhushan Gupta* v. *Gokul Chandra*, 1959 ALJ 110; *K. Akhalrai Sinha* v. *K. Mahadevalla*, A 1967 AP 247), but in Dayabhaga family a *Karta* can be sued for account (*Benoy Krishna* v. *Amarendra*, A 1940 Cal 51, 186 IC 546). As there is no statutory liability on a principal to keep accounts for the agent, the latter cannot ordinarily sue the former for account (*Narmada Charan* v. *Maharaj Bahadur Singh*, 169 IC 930, A 1937 Cal 359; *Mirza Najm Affendi* v. *Kashmir Footwears*, A 1946 All 489), but if, under an express contract or trade usage, it becomes the duty of the principal to keep accounts, the agents can sue him (*Gopi Kishan* v. *Padam Raj*, 37 IC 510; *Lakshimi Sugar Mills* v. *Banwari Lal*, A 1959 All 546), e.g., when the plaintiff is an insurance company agent who is paid commission on the premia paid on all policies effected through him (*Ramlal* v. *Asian Commercial Assurance Co.*, 144 IC 505, A 1933 Lah 483; *Gulab Rai* v. *Indian Equitable Insurance Co.*, 167 IC 929, A 1939 Sind 51). The agent may have an equitable right to sue the principal for account in special circumstances, e.g., where accounts are in possession of the principal or where agent's commission cannot be determined without seeing principal's account (*Narain Das* v. *SPAM Pehanund*, A 1967 SC 333; Also see, *Ramkrishna Agencies* v. *L.I.C.*, A 1967 AP 109; *Hindustan Handloom Factory* v. *Firm Rameshwar Dayal Sadhu Ram*, 1974 Cur LJ 577). But if it is found that the agent had accounts which he withholds or that the agent has no account because of his own failure to keep them due to his own fault, court may refuse to grant him the relief (*Gulabrai* v. *Indian Equitable Insurance Co.*, A 1939 Sind 51).

A creditor cannot sue his debtor for an account of payments made by the latter and of the balance due to the former, as a debtor is not liable to render such account which the creditor ought to know himself. A trustee cannot call upon his co-trustee to render account, though he can have inspection of all the papers and books of account (*Jamna Das* v. *Damodar Das*, 103 IC 225, A 1927 Bom 424, 29 BLR 418); such suit is, however, maintainable where the co-trustee was guilty of breach of trust (*Maharaj Bahadur* v. *Tej Bahadur*, A 1940 Cal 416, 190 IC 144). A person in

contents of para 2 and of so much of para. 4 as refer to the defendant not having rendered account to George Addison are believed by me, on information received, to be correct, and that the contents of so much of paragraphs 5, 6 and 8 as refer to accrual of cause of action, jurisdiction of this court and limitation respectively are based on legal advice received by me and believed to be correct while the rest of the contents of those paragraphs are true within my personal knowledge. The contents of the rest of para 4 are true within my personal knowledge. Verified at Agra, this, the 6th day of July, 1995.

(Sd.) ALFRED ADDISON

(Sd.) JWALA PRASAD, ADVOCATE

No. 2—Suit for Account Against a Commission Agent.

1. On June 1, 1993, the plaintiff, by a verbal agreement, appointed the defendant as his commission agent for the sale of grain. The defendant agreed that he would sell the grain sent by the plaintiff to the defendant's shop and would, on request, render to the plaintiff a true and full account

---

management of the private trust is bound to render proper account (*T.G. Vishwanathan Chettiar* v. *T.A. Shanmugha Chettiar*, A 1992 Mad 148 DB). A client can sue his counsel (*Ramlal* v. *Langhran*, 140 IC 564, A 1933 Lah 60). An assignee of a definite sum of money cannot sue for accounts, he can only bring a suit for the recovery of the specified sum thus assigned (*Jaini Bros & Co.* v. *Shankar Lal*, A 1938 Lah 270, 178 IC 176).

In a suit for account, the whole account between the parties should be claimed, and the plaintiff is not at liberty to select capriciously a single transaction (*Godhan Ram* v. *Iaharmall*, 40 C 335, 17 CWN 67, 17 CLJ 636, 16 IC 583; *Lachmi Chand* v. *Jagoo Lal*, 166 IC 953, A 1937 Pat 55). An agent cannot be sued for one item as a debt without settlement of accounts (*Narayan Chettai* v. *Aruna Chela Pillai*, (1965) 2 MLJ 207).

It is essential to allege in the plaint full facts showing how the defendant is liable to render account to the plaintiff, e.g., in a suit against an agent, that he received money for the plaintiff or any part of it. The terms on which one party was employed by the other and any other facts showing that the defendant is an "accounting party" must be alleged (*Shiva Prasad* v. *Hanuman*, A 1938 Pat 392, 177 IC 133; *Kanhaiyalal* v. *Hiralal*, A 1947 Bom 255, 48 BLR 795). Unless a time is fixed by contract for the rendition of account, the accounting party is liable to render account only when called upon to do so. **Hence it is necessary to allege that account was demanded and refused; or that the account given was not true and full, and also that the plaintiff was kept in ignorance as to the exact amount due to him.**

of all sales so effected, and would pay over to the plaintiff all moneys received by him for such grain.

2. The defendant has, as such agent, effected sales of the grain sent to him by the plaintiff from time to time, and has paid to the plaintiff Rs.2,000 on August 3, 1993, and Rs.3,000 on September 20, 1993.

3. The defendant has not, though requested by the plaintiff to do so, rendered any account to the plaintiff or paid over to the plaintiff all the money received by him for the grain. The said request was made by a registered notice served on the defendant on May 20, 1994.

4. The plaintiff has, in consequence, been unable to discover the names of the purchasers and has been left in ignorance as to how much money has been received by the defendant from the purchasers and how much is still outstanding.

The plaintiff claims :

To a suit for account should be added a prayer for the payment of the money due to the plaintiff, unless the plaintiff is not immediately entitled to the amount but is only entitled to examine the accounts, as a beneficiary under section 19 (b) Indian Trust Act. To a suit for account against an agent for collection of rents may be added a prayer for recovery of rents remaining unrealised owing to agent's negligence (*Hari* v. *Ramjatan*, 180 IC 64, A 1939 Pat 17). When payment of money is claimed, O.7, R.7, requires the amount sued for to be approximately mentioned in the plaint. If an Agent is bound to render accounts to several persons jointly all such persons must join as plaintiffs as he cannot be called upon to render account separately to each (*Kadir Buksha* v. *Rajchernessa*, 62 IC 766 Cal.).

Account can be demanded from an agent, but not from his heirs (*Brij Mohan* v. *Abani*, 42 CWN 1157, A 1938 Cal 610, 177 IC 935; *Badri Nath* v. *Kesho Kumar*, A 1940 Pat 114). If the agent has died without rendering an account, the plaintiff can sue his heirs only for recovery of the specific amount which he can prove was due from him, or for loss suffered by the negligence or misconduct of the agent (*Kumeda* v. *Ashutosh*, 17 CWN 5, 16 IC 742; *Prem Das* v. *Charan Das*, 117 IC 233, A 1929 Lah 362, 11 Lah LJ 66 DB). If an agent dies during the pendency of a suit, the suit can be continued against his heirs but plaintiff can get only the specific amounts which he proves to be due from the deceased (*Sasi Sakhareswar Roy* v. *Hajiramesa*, 47 IC 371). The heir will, however, be liable only to the extent of the property which has come into his hands from the agent. But the heirs of a guardian can be called upon to render account just as the guardian could be (*see* Sec. 36 Guardian and Wards Act). The heirs of a trustee cannot be called upon to render account but a suit against them will be for recovery of trust fund and therefore, if in such a suit a

(1) To have a full and true account of such sales.

(2) Payment of the moneys received, minus the sum of Rs.5000 already paid.

(3) Interest on such moneys, by way of damages, at 12 per cent per annum or at such rate as the court considers equitable up to the date of suit.

(4) Interest from the date of suit to the date of payment at such rate as the court deems reasonable.

No. 3—Suit by an Insurance Agent Against a Company

1. By an agreement in writing dated 31st March, 1988, made at Bombay, the defendant company appointed the plaintiff as their insurance agent for Uttar Pradesh, and agreed to pay the plaintiff a commission of

---

sum is on taking accounts found due to the heirs, decree cannot be passed in that suit in favour of the heirs (*Srish Chand* v. *Supravat*, A 1940 Cal 337, 190 IC 295). In the case of a joint family dealing with a third person, the manager alone can sue, and a minor co-parcener cannot, even though he impleads the manager as a defendant, as the manager alone can give a valid discharge (*Khemchand* v. *Mathradas*, A 1939 Sind 289). In the case of a partnership at will, a partner cannot sue for account except for general accounts and dissolution of the partnership (*Kessamal* v. *Gopi*, 9 A 120; *K.V. Shanthana Krishna* v. *K.S. Chellappa*, 101 IC 390, 25 LW 506), but the court can, in a proper case, decree a partial settlement of account (*Firm of Harijimal Mela Ram* v. *Kriparam*, 2 Lah 351), e.g., where the matter in dispute does not involve the taking of general accounts. The position of a *pucca arhatiya* so far as rendition of account is concerned, is that of an agent and he is also liable to render accounts of the transactions entered into by him on behalf of his constituents as an agent (*Ram Bhajan* v. *Gaya Prasad*, 1962 ALJ 20; *Ram Deo Jai Deo* v. *Seth Kaku*, A 1950 EP 92).

If account has once been rendered or settled, no fresh suit for account is maintainable, but the suit must be one for recovery of the balance due. The mere production of account or delivery of a set of written accounts without explaining them and without producing vouchers to support them is not rendering an account (*Annoda* v. *Dwarka*, 6 C 754; *Madhusudan* v. *Rakhal*, 43 C 248; *State of Rajasthan* v. *Rao Manohar Singh*, A 1961 Raj 143; *Bharat* v. *Kiran*, 52 C 766, A 1925 Cal 1069 DB; see however, *N.S.K.L. Kulandayan Chettiar* v. *A.R.R.M. Omayal Achi*, (1961) 2 MLJ 282; *Shiva Prasad* v. *Hanuman*, A 1938 Pat 392, 177 IC 133). Even the principal's writing "Seen" on the account book does not mean that the account has been rendered (*Shanker Lal* v. *Toshanpal*, 150 IC 151, 1934 ALJ 453, A 1934 All 553). But if all the papers are submitted, the plaintiff should call upon the agent to explain the accounts, and it will be only on the latter's refusal or neglect to do so

10 per cent on all the premia to be paid on the policies to be effected through, or on introduction by, the plaintiff.

2. The plaintiff acted in pursuance of the said agreement and between the 1st April, 1988 and the 31st December 1988, effected and also introduced the following policies of the defendant company:—

(1)

(2)

(3) etc., etc.

3. The defendant company have paid to the plaintiff during this period only a sum of Rs.2,000 on account of commission and not rendered an account of the premia on the policies referred to in para 2, although the plaintiff, demanded the account by his registered letter dated the 20th April 1989.

---

that he can bring a suit. **He must, therefore, allege in the plaint such demand and refusal** (*Bharat* v. *Kiran*, A 1925 Cal 1069 DB). If an account has been rendered and not disputed, the plaintiff must either accept the account or allege some fact which justifies the court in treating the account as imperfect so that a correct account has not been rendered and the defendant is not absolved from his liability (*Radhika Prasad* v. *Nand Kumar*, A 1944 Nag 7). It is not open to a principal who has got all the accounts of his agent in his possession to employ the machinery of the court for examining the accounts on the off chance of making the agent liable for any sum which, on examination may be found due (*Nalini Kumar* v. *Gadadhar*, A 1929 Cal 418, 49 CLJ 245 DB). Even a settled account can, however, be reopened if fraud or substantial error is shown, particulars of which should, of course, be given (*Bhagwan* v. *Damodarji*, 42 A 230, 18 ALJ 100, 59 IC 20; *Bharat* v. *Kiran*, A 1925 Cal 1069 DB; *Krishna Bhatta* v. *Ishwara Bhatta*, 169 IC 860, A 1937 Mad 579), but a mere allegation of undue influence and coercion by the plaintiff is not sufficient to repudiate the settlement and reopen the accounts (*Pethaperumal Chettiar* v. *Rama Swami Chettiar*, 1938 MWN 895, (1938) 2 MLJ 505, A 1938 Mad 919). Even a single fraudulent entry is sufficient to have the account reopened (*Puran Mal* v. *Ford*, 17 ALJ 805). If, however, the account-books and papers are with the plaintiff himself, he is not entitled to sue for accounts without producing the books and papers (*Debendra* v. *Narendra*, 30 CLJ 417, 54 IC 636, 24 CWN 110; *Mohanlal* v. *N.W. Rly.*, 5 Lah LJ 19). In such cases the plaintiff should point out the entries in the accounts which he alleges to be erroneous; or state what monies have been received and not credited. Specific, direct and distinct averments of this are necessary in the plaint (*Anantha* v. *Subha Rao*, 13 Mys LJ 200). When plaintiff claims a specific amount on the basis of settled accounts, and the court finds that there was no settlement of accounts, the court cannot pass a decree for the sum the court considered due after going into accounts. In such a situation the court should either dismiss the suit or

4. The plaintiff does not know which of the policies have lapsed, matured or been forfeited and therefore is ignorant as to how much money is due to him as commission under the aforesaid agreement.

The plaintiff claims :

(1) To have a full and true account of the moneys realised by the defendant company on account of premia on the above-mentioned policies and of the commission due to the plaintiff.

(2) Payment of the sum found to be due to the plaintiff on taking of account after deduction of Rs.2,000 already received.

---

should pass a preliminary decree for accounts directing that books of accounts be examined item by item and an opportunity afforded to the plaintiff to impeach and falsify either wholly or partly the accounts on the ground of fraud, mistakes, inaccuracies or omission (*Loonkaran Sethia* v. *Ivan E. John*, A 1977 SC 336).

Valuation : Subject to local rules framed by the High Court under Sec. 9 of the Suits Valuation Act, 1887, or the local amendments, if any, to that Act, a plaintiff is entitled to put his own valuation on a plaint and to pay court-fee on that valuation. But the valuation should not be arbitrary and the plaintiff should do his best to give a fair estimate of the relief which he hopes to obtain (*Mani Devi* v. *Anpurna*, A 1943 Pat 218, 206 IC 126; *Sumitra Devi* v. *Jahnvi Prasad Sah*, A 1995 Pat 202 (DB); *Meenakshi Sundaram* v. *Venkatachalam*, (1980) 1 SCC 616; *Sujir Keshav Nayak* v. *Sujir Ganesh Nayak*, A 1992 SC 1526). If more money is found due, a decree will be passed for it on additional court-fee being paid on demand (*Gulab Khan* v. *Abdul Wahab*, 31 C 365; *Balwantrao* v. *Bhima*, 13 B 517), even if the amount exceeds the court's pecuniary jurisdiction (*Chidambaran Chettiar* v. *Muthia Chettiar*, A 1937 Rang 320, 170 IC 39; *Benudhar Jena* v. *Prabir Chandra*, A 1985 Ori 117). The *forum* of appeal from a decree in suit for account is governed, according to Allahabad, Patna and Madras High Courts, by the valuation originally put by the plaintiff (*Putta* v. *Rudrabhatea*, 39 IC 439; *Muhammad Abdul Majid* v. *Ala Bux*, 47 A 534, 23 ALJ 216, A 1925 All 376 DB, 86 IC 1055; *Sumitra Devi* v. *Jahnvi Prasad Sah*, A 1995 Pat 202 DB), but according to Punjab, Bombay and Calcutta High Courts, by the amount decreed by the lower court (*Budha* v. *Rallia*, 9 L 23, A 1928 Lah 157 DB, 110 IC 631; *Ibrahimji* v. *Bejanji*, 20 B 265; *Ijjatulla* v. *Chandra*, 34 C 954, 11 CWN 1133 FB).

Jurisdiction : Suit can be filed where account is agreed to be rendered, or where contract of agency is made or performed or where refusal to give account takes place (*Gobardhandas* v. *Dawlat Ram*, 94 IC 287 Sind). A suit against an agent should generally be filed where the agent works as such and not where the principal resides or works (*Audinarayana* v. *Lakshmi Naraina*, A 1940 Mad 588; *Tika* v. *Dowlat*, 22 ALJ 591).

Procedure : In such suits, a preliminary decree directing accounts to be taken on such terms as the court thinks proper shall be passed (O.20, R.16), though

No. 4—Suit for Account Against a Co-Sharer

1. One Basdeo, an uncle of the parties, was owner of the six shops described at the foot of the plaint.

2. The said Basdeo executed a deed of gift in respect of the said shops on September 20, 1986, in favour of the plaintiff and the defendant,

omission to pass a preliminary decree does not make the final decree illegal if the parties have not been prejudiced (*Pandurang* v. *Gunwantrao*, 109 IC 385, A 1928 Nag 299). After the defendant has filed the account as directed, the plaintiff is entitled to take objections and a final decree is passed after adjudication of those objections. If the facts are so simple that a final decision can readily be given and the passing of a preliminary decree means an unnecessary lengthening of proceedings, a final decree may be passed at once (*Nallaperumal* v. *Vallayappa*, 53 M 475). Where, however, an account of a mortgagee's receipts and profits has to be taken before determining the amount payable by a mortgagor on redemption, the only preliminary decree will be that under O.34, R.7, and no separate preliminary decree under O.20, R.16 should be passed (*Naunihal* v. *Alice Georgina Skinner*, A 1925 All 707 DB). The fact that defendant has suppressed the accounts is no ground for passing a final decree straightway (*Palaniappa* v. *Ramanathan*, 1939 MWN 360, 49 LW 608). It is unnecessary to pray in the plaint for the appointment of a commissioner to take accounts. The court can be moved for this, if necessary, at the proper stage. If the defendant does not render account as directed by the preliminary decree, the plaintiff may prove in any way what amount is due to him (*Ramjilal* v. *Bujan*, 28 PLR 98, 9 Lah LJ 94, 109 IC 820, A 1927 Lah 782 DB). But when a commissioner has been appointed and the defendant failed to produce account before him, he was not permitted by court to adduce evidence thereafter (*Ram Singh* v. *Somendra Kumar*, A 1973 Raj 37). If on taking accounts a sum is found due to the defendant, a decree for that amount can be passed in favour of the defendant on his paying the necessary court-fee (*Parmanand* v. *Jagat Narain*, 32 A 525, 6 IC 162; contra, *Najan* v. *Salemahomed*, 24 BLR 998, 77 IC 943; *Panuganti* v. *Zaminder of Tarwur*, 42 M 873, 53 IC 234; *Bhawani* v. *Chhajju*, 168 IC 983, A 1937 All 276, 1937 AWR 16; *Firm Kalu Singh* v. *Baldeo Singh*, A 1942 Lah 81).

A suit against an ex-guardian can be filed after the ward attained majority as well as during his minority. In the latter case, the permission of the District Judge should first be obtained under section 36 Guardians and Wards Act, by any person who wishes to bring the suit as the minor's next friend. But the permission, being only a condition precedent, need not be pleaded in the plaint. The mere filing of an account under section 34(c) by the guardian does not relieve him nor can the scrutiny of the account by the Judge (*Sita Ram* v. *Gobindi*, 22 ALJ 585, 80 IC 592, 46 A 458), but an order of discharge under section 41(4) bars a suit for account. If, however, an account has been filed by the guardian and it is alleged to be wrong in certain particulars, the suit will properly be not one for account but for recovery of the money due according to what plaintiff thinks should be the correct account.

giving to each a half share in all and every one of the said six shops.

3. The said shops are all in possession of tenants, and the defendant has been collecting the rents with the consent of the plaintiff.

4. The plaintiff requested the defendant to render to him an account of all the moneys realised by him as rent from September 20, 1986, but the defendant has not rendered any account of collection of rent, or paid to the plaintiff his half share, or any portion, of the money so realised.

5. The plaintiff is not aware of the exact amount realised by the defendant from the tenants.

Limitation : For such suit against an agent is 3 years from the date the account was demanded and refused, or where no such demand was made during the agency, when the agency terminated (Article 88 and 89 of Limitation Act, 1908; now Article 3 of the Act of 1963). A demand after termination of agency does not give a fresh start for Limitation (*Hingulal* v. *Sarju Prasad*, 169 IC 135, A 1937 All 363). Article 89 of Limitation Act, 1908 was applied even to a suit by a principal's son after principal's death (*Bir Bikram* v. *Jadav Chandra*, 40 CWN 245). An agency is deemed to terminate when a business of agency is completed though liability to render account may continue (*Gordhandas* v. *Gokul Khataoo*, 96 IC 79, A 1926 Sindh 264; see however, *Babu Ram* v. *Ram Dayal*, 12 A 541; *Fink* v. *Baldeo Das*, 26 C 715); neglect to comply with a demand may amount to refusal (*Pran Ram* v. *Jagdish*, 49 C 250), but there must be a definite repudiation on the part of the defendant of a liability to account or any circumstances from which the failure or omission to render account might be construed as a refusal (*Abdul Latif* v. *Gopeswar*, 56 CLJ 172). When the agent promises to submit the account, his conduct cannot amount to refusal. If a particular date is fixed for settlement of accounts, the agency should be deemed to continue upto that date and limitation will begin to run from that date (*Lakhmi Chand* v. *Firm Chajjumal*, 91 IC 487, A 1926 Lah 200). When the agency is revoked by a letter, the cause of action cannot arise until the letter reaches the agent (*Ramchander* v. *Rure Kunwar*, A 1939 All 739, 1939 ALJ 961, 1939 AWR (HC) 735). There is no limitation for a suit against a trustee (section 10, Limitation Act, 1963), but if there is no express trust section 10 will not apply and Article 120 of Limitation Act, 1908 (corresponding to Article 113 Limitation Act, 1963) was applied in such a case (*Annamalai* v. *Matdukaruppan*, A 1931 PC 9, 130 IC 609, 60 MLJ 1, 35 CWN 145; *Pappa* v. *Shanmughathammal*, A 1991 Mad 90 DB). A suit between one co-owner and another was held to be governed by Article 120 and not by Article 62 of Limitation Act, 1908 (*Abu Shahib* v. *Abdul Haque*, A 1940 Cal 363, 189 IC 642). Suit by ex-minor against guardian was held to be governed by Article 120 and not by Article 62 of Limitation Act 1908 (*Mani Devi* v. *Anpurna*, A 1943 Pat 218, 206 IC 226). Now Articles 24 and 113 of the Act 1963 have replaced Articles 62 and 120 of the old Act respectively.

The plaintiff claims :

(1) To have a full and true account of all the moneys realised by the defendant from tenants of the aforesaid six shops.

(2) Payment of a half share out of the moneys realised by the defendant.

(3) Interest at 12 per cent per annum or at any other equitable rate, from the date of demand to the date of suit..

(4) Interest on the money found due to the plaintiff by way of damages from the date of suit to date of payment at such rate as the court deems reasonable.

No. 5—Suit for Account Against an ex-Guardian

1. The plaintiff was, uptill August 4, 1994, minor, and the defendant, by an order of the District Judge of Meerut, dated June 20, 1989, was appointed guardian of the property of the plaintiff.

2. The defendant was, on the application of the plaintiff's mother, removed from guardianship by the said District Judge, by an order dated September 21, 1993.

3. During the period of his guardianship, the defendant remained in possession of the plaintiff's property and realised the income thereof, but did not render any account of his income though requested by the plaintiff to do so, nor has he paid to the plaintiff any sum out of that due to him on

---

Defence : The defendant may plead that he kept no accounts but the plaintiff himself used to do so and the defendant always gave every sum that he received for the plaintiff immediately to the plaintiff. He may plead that all the account books, papers and vouchers are with the plaintiff, hence he cannot render any account. He may plead that account was never demanded by the plaintiff, or that it had been settled. Settlement of account need not be in writing, the account need not be compared and expressly admitted as correct, but it can be inferred from conduct, e.g., keeping the account for a long time without objection (*Maneklal* v. *Jawaladutt*, A 1947 Bom 135, 28 BLR 727, 220 IC 461). He may plead that the transaction of which account is demanded forms part of numerous transactions or that the period selected by the plaintiff is not the whole period for which account should have been asked for. If he is an ex-guardian, he may plead discharge by the court under section 41 (4), Guardians and Wards Act. An agent cannot plead that another person had been appointed by the principal to supervise his work if it can be *prima facie* shown that he has made realisation (*Deb Prasanna* v. *Lakhi Narain*, 196 IC 641 Pat).

account of net profit for the said period. This request was made by the plaintiff verbally on March 20, 1995.

4. The plaintiff is not aware of the income which the defendant realised or of the expenditure he made on the plaintiff's behalf.

The plaintiff claims:

(1) To have a full and correct account of the income and expenditure realised and incurred by the defendant in respect of the plaintiff's property during the period of the defendant's guardianship.

(2) Payment of the balance due to the plaintiff.

(3) Interest from date of suit to that of payment at such rate as the court deems reasonable.

ACCOUNT, SUIT ON *(b)*

No. 6—Suit on Mutual, Open and Current Account

1. The plaintiff firm carries on business as sugar merchants at Delhi and the defendant firm carries on business as *grain dealers* at Rohtak.

2. In the month of *Baisakh*, 2039 *Vikram Sambat* (corresponding to April, 1982), it was verbally agreed between Ram Lal, Manager of the plaintiff firm and Sada Sukh, Manager of the defendant firm, at the plaintiff's

(b) An account between two parties may be either one sided or mutual. It is one sided when the obligations are all on one side and the payments are only in discharge of these obligations and do not create independent obligations, e.g., an account between a creditor and debtor or between a supplier of articles on credit and his customer, or between a banker and his customer (*Puttulal* v. *Jagannath*, 1935 ALJ 33, A 1935 All 53; *Bejoy Kumar* v. *Satischander*, A 1936 Cal 382; *Roshan Lal Kuthiala* v. *Raja Rana Yogendra Chandra*, A 1996 HP 14 DB). It is mutual when there are mutual or reciprocal dealings between two parties, and each party is under liability to the other, i.e. the transactions on each side create independent obligations on the other and the balance usually shifts from one party to the other (*Chittar Mal* v. *Behari Lal*, 6 ALJ 921; *Premji Virji* v. *Sasoon*, 102 IC 225, 29 Bom 375, A 1927 Bom 225; *Ramaswamy* v. *M.S.M. Chettyar*, A 1936 Rang 495; *Firm Mansa Ram* v. *Hari Lal*, A 1940 All 209). But it is not necessary that the balance should always shift from one side to the other and shifting of balance is not a necessary criterion of a mutual account. But the balance should be *capable of* such shifting (*Karsondas* v. *Surijbhan*, 145 IC 630, 35 BLR 929, A 1933 Bom 450). The fact that once or twice there were over-payments which were afterwards adjusted does not make the account mutual (*Gokuldas* v. *Radha Kishan*, A 1933 Nag 50, 142 IC

shop at Delhi that the plaintiff firm should supply to the defendant firm as much sugar as the latter would order in writing and the defendant firm should supply as much grain to the plaintiff firm as the plaintiff firm would order in writing, and that from time to time account would be made of the price and cost of grain and sugar supplied to the plaintiff firm and the defendant firm respectively, and the balance due from one party to the other would be paid in cash at Delhi.

It was also a term of the aforesaid agreement that interest would be calculated on each item at ten per cent per annum.

3. The dealings between the parties on the aforesaid agreement commenced from *Jeth Badi* 2039 and continued up to *Aghan Sudi* 15, 2044 and during this period Rs. 68,960 became due to the plaintiff firm from the defendant firm and Rs. 62,960 became due to the defendant firm from the plaintiff firm, thus leaving a balance of Rs. 6,230 against the defendant firm. Full particulars of the items on each side of the account are given in the list appended to the plaint, which the plaintiff prays may be treated as part hereof.

4. The aforesaid mutual account of the parties has been kept according to *Sambat* year, and the last item in the said account is of *Aghan Sudi* 15, 2044 *Sambat*.

123; *Basant Kumar* v. *Chota Nagpur Banking Association*, A 1948 Pat 18). There should be independent transactions between the parties and accounts should consist of reciprocity of dealings and not of items on one side only though made up of debits and credits. In one set one of the parties should hold the position of creditor and the other of debtor, and in the other, the position should be reversed (*Dau Dayal* v. *Pearelal*, 50 A 615, 108 IC 694, 26 ALJ 353).

If the mutual account is open and current, i.e., has not been settled and is running, a suit for balance due on it can be brought within three years from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account (Article 85 of Limitation Act, 1908, and Article 1 of Act of 1963). There is a great advantage which such an account has over an account which is not mutual, open and current, as, in the latter case, the statute runs against each items from its date and a suit cannot be brought in respect of any item after the lapse of three years, while in the case of mutual account, even if all the items are more than three years old, the suit would be within time if filed within the time allowed by Article 1. The last item should, however, be real and not bogus, and if a defendant challenges that the last item set up as saving limitation is not real or is not made with his consent or knowledge, the plaintiff will have to

The plaintiff claims:

(1) Rs.6,230 principal and Rs.___ interest and

(2) Interest from date of suit at___ per cent per annum.

No. 7—Suit on Account which is not Mutual, and Alternatively on Balance Struck

1. The plaintiff carries on a shop for the sale of grain, cloth and other commodities of household use in village Ramnagar.

2. On June 1, 1982, it was verbally agreed between the parties that the plaintiff would supply on credit grain, cloth and such other articles, from time to time, to the defendant as the latter would require and that the defendant would pay the price of articles purchased, when demanded with interest at 2 per cent per mensem.

3. Between June 1, 1982 and April 20, 1984, the defendant made various purchases from the plaintiff and made several payments on account. Particulars of such purchases and payments are given at the foot of the plaint.

4. On April 20, 1984, an account was made and a balance of Rs.1,024 was found due from the defendant. The defendant admitted the correctness of the balance which was recorded on page 6 of the plaintiff's *khata bahi* and signed by the defendant. The defendant at that time agreed

prove it (*Firm of Fillip and Co.* v. *Mahommed Ali*, 55 IC 822 Sind). Account granting cash credit facility in the bank is a mutual, open and current account, Article 1 of the Limitation Act applies (*Om Prakash Agarwala* v. *State Bank of India*, A 1991 Ori 98; *State Bank of India* v. *Kashmir Art Printing Press*. A 1981 P&H 188). If the mutual account is closed and is not open, Article 1, will not apply. But an account is not necessarily closed whenever a balance is struck (*Jwaladas* v. *Hukum Chand*, 66 IC 387 Lah), unless the account is finally closed. If, inspite of the balance mutual transactions take place after that and are entered under the balance, the account is open (*Abdul Haq* v. *The Firm*, etc., 71 IC 259 Lah). Ordinarily balance is struck at the close of a year and the balance is carried forward to the account of the next year. The first year's account cannot in such cases be said to be closed. But where the balance was not so carried, and new items were entered in a subsequent account and the balance of the previous account was afterwards added to the balance of the new account, it was held that the whole did not become one account (*Firm Bhagwandas Kanhayalal* v. *Firm Nand Singh*, 100 IC 815, 28 PLR 146). An account was opened in a bank. For some time it was alternately in credit or overdrawn; from December 1928 it was always overdrawn up to June 1929. The Bank took a pronote

to repay the balance with interest at one per cent per mensem within two months. This agreement was made by the defendant in writing endorsed under the balance on the same page 6 of the plaintiff's said *khata bahi*.

5. The defendant has not made any payment since April 20, 1984.

6. The defendant has not paid the amount, or any part thereof, and the plaintiff claims it as balance due on the original account, or, in the alternative, on the basis of the new agreement of April 20, 1984.

The plaintiff claims:

(1) Judgement for Rs.1,024, on account of principal and Rs.125 on account of interest from April 20, 1984 to the date of suit; and

(2) Interest from the date of suit to that of payment at such rate as the court deems reasonable.

---

as security for overdrawals and then the customer went on making payments towards the amount overdrawn. It was held that from June 1929 the character of the account was changed and it no longer remained a mutual account (*Bengal Burma Trading Co.* v. *Burma Loan Bank Ltd.*, A 1937 Rang 340). The same view has been taken in *Basant Kumar* v. *Chota Nagpur Banking Association*, A 1948 Pat 18, where it was held that each overdraft should be regarded as a separate transaction to which Article 57 of Limitation Act, 1908 (corresponding to Article 19 of Limitation Act 1963) should apply.

In a suit on a mutual, open and current account the plaint **must show the nature of the account between the parties, the items on either side**, either in the plaint or as particulars, **the date of the last item**, *and the date of the close of the year of account* should be mentioned as that on which the cause of action accrued. Such suits are always for the balance due and not in respect of a particular item. If the account upon which a suit is based is a forgery, no decree can be passed even on the sum admitted by the defendant (*Nagina Rai* v. *Raghubar Singh*, 173 IC 256, A 1938 Pat 42).

If the account is not mutual, a suit can be brought only for those items which are within the period of three years. If there have been payments, the same can, of course, be appropriated towards discharge of the earlier items on the debit side. In fact in all cases of running account, payments are assumed to go to liquidate the earlier items in order of time (*Jiban Ram* v. *Sagarmal*, A 1933 Pat 267, 145 IC 611). As to how far it is necessary to plead balances, if any, struck during the course of dealings, *see* the next note under "Account Stated".

Particulars : Full particulars of the account which is the basis of the suit should be given in the plaint, or, if long, may be appended to the plaint. It is not sufficient that copies of ledger and day book are attached to the plaint, as they are not particulars but merely evidence of particulars. It will be convenient to specify the account by mentioning all items on debit side and on credit side in parallel

ACCOUNT STATED *(c)*

No. 8—Suit on an Account Stated

1. The plaintiffs carry on business as grain dealers at Kanpur and the defendants carry on business as sugar merchants at Muzaffarnagar.

2. The plaintiffs used to order from the defendants raw sugar from time to time on credit, and the defendants used to order *arhar* (pulse) from the plaintiffs from time to time on credit.

3. On April 20, 1983, Ramlal, the managing proprietor of the defendants came to the plaintiffs' shop and, after going through the accounts on each side, agreed that there was a balance of Rs.2,440 in favour of the plaintiffs. The said balance was entered on page 8 of the plaintiffs' *khata bahi*, and was duly signed by the said Ramlal.

4. The defendants have not paid anything since April 20,1983.

The plaintiffs claim :

Judgement for Rs.2,440 with interest from date of suit to that of payment at such rate as the court deems reasonable.

columns, with particulars of date and amount in each case, thus :

	Credit	*Rs.*		*Debit*	*Rs.*
14-7-84	Cash	1,000	20-6-84	2 qtl. of wheat	1,400
13-8-84	1 qtl. sugar	1,600	20-7-84	1 qtl. of rice	2,000
14-11-84	1 qtl. molasses	600	03-8-84	1 qtl. of ghee	8,000
15-12-84	1 qtl. gur	700	10-10-84	20 qtl. of cotton	2,000
	Total Rs.	3,900		Total Rs.	13,400
	Balance due Rs.	9,500			

(c) Where a plaintiff sets up a case on account stated, it is incumbent on him to say so in clear terms or at least to allege and prove that there were reciprocal items of accounts which were settled and adjusted between the parties and that the balance found due to the plaintiff was the result of an agreement to set-off items on one side of the account against those on the other (A 1949 Oudh 48).

'Account Stated' is an admission of a sum of money being due from the defendant to the plaintiff on account of balance of cross demands on either side. There should be a mutual account between the parties. As held by the Privy Council in *Bishun Chand* v. *Girdhari Lal*. A 1934 PC 147, 150 IC 6, "the essence of account

No. 9—Suit on Original Account, with Alternative Claim on Account Stated

1. The plaintiffs carry on business as grain dealers at Agra, and the defendants is a sugar merchant at Meerut.

2. In the month of May, 1991, it was agreed between the parties by exchange of letters that the plaintiffs would send as much *arhar dal* to the defendants as the latter would order, and the defendants would send as much raw sugar to the plaintiffs as they would, from time to time, order in writing, and that at the end of the year, an account would be made of the price and cost of the *dal* and raw sugar supplied by the plaintiffs and defendants respectively and the balance due from one party to the other would be paid in cash. It was also agreed that interest would be calculated on each item at 9 per cent per annum.

3. From June 1, 1991 to April 10, 1993, Rs.54,560 became due to the plaintiffs from the defendants on account of the price and other charges of *arhar* purchased by the defendants from the plaintiffs, and Rs.52,120 became due to the defendants on account of the price and other charges of sugar purchased by the plaintiffs from the defendants from time to time.

---

stated is not the character of the items on one side or the other; but the fact that there are cross items of accounts and that the parties mutually agree to the several amounts of each and by treating the items so agreed on one side as discharging the items on the other side *pro tanto*, go on to agree that the balance only is payable". The rule does not depend on the character or the origin of the debits or credits on either side.

"Account Stated" furnishes a distinct cause of action for a suit, and fresh time of three years is allowed from the date of such account, if made in writing and signed by the defendant or his duly authorised agent or, if there is a simultaneous agreement in writing and signed as aforesaid making the debt payable at a future date, then from such future date (Article 26), even though some of the items were time barred when the account was made and a suit for them would not have been maintainable independently (*Ashby* v. *James*, (1843) 11 M & W 542; *Ram Lochan* v. *Ram Narain*, 167 IC 652, A 1937 Pat 348; *Nabendranath* v. *Shasibindu*, A 1941 Cal 395; *Bishun Chand* v. *Girdharilal*, A 1934 PC 147—cases decided with reference to Limitation Act, 1908, Article 64). But if the account stated is not signed, the plaintiff can succeed only in respect of such items as are within the ordinary period of limitation, as Article 64 or Article 26 would not apply (*Thakurya* v. *Sheo Singh*, 2 A 872; see also, *Raghunath* v. *Kanailal*, A 1962 Cal 97; *Naranappa* v. *Gurappa*, A 1954 Mys 23; *Puttilal Kunjilal* v. *Jagnnath*, 1935 ALJ 33, A 1935 All 53; *Abdul*

Full particulars of items on each side of the account are given at the foot of the plaint (*or*, are appended to the plaint, and the plaintiffs pray that they may be treated as part of the plaint).

4. The mutual account between the parties has been kept according to the calendar year and the last entry in the aforesaid account was that of April 10, 1993.

5. On May, 30, 1993, Ramlal, the managing proprietor of the defendant's shop came to the shop of the plaintiffs, and, after going through the accounts on each side, agreed that there was a balance of Rs.2,440 in favour of the plaintiffs. The said balance was entered by the said Ramlal, on page 8 of the plaintiffs' *khata bahi*, and was duly signed by him.

6. The defendants have not paid the amount or any part thereof, and the plaintiffs claim it either as balance due on the original account or, in the alternative, balance found due to the plaintiffs on account stated between the parties.

The plaintiffs claim :

(1) Judgment for Rs.2,440 principal and Rs.881 interest; and

Aziz v. *Munnalal*, A 1921 All 325 DB; *Firm Gulabrai* v. *Firm Habibux*, A 1945 All 185; *Atmaram* v. *Lalji*, A 1940 Bom 158; *H. Naik* v. *Panchanam*, A 1954 Ori 7).

Strictly speaking, an "account stated" should extinguish all previous demands and the only suit that could be brought should be on the account stated, but it has been held in some cases that an "account stated" does not itself extinguish or supersede or alter the previous debts (*Fidgett* v. *Penny*, 1 CM & R 108; *Smith* v. *Page*, 15 M & W 683; *Bhatu Das* v. *Mt. Bibi*, 63 IC 280 Pat). It is sometimes safer to base a claim alternatively on the original demands and the account stated, for, if the plaintiff fails to prove the former, or any flaw is found in the latter, the suit may not fail (*see chapters* VII and VIII of Part I, *ante*). But the suit on original demand can be brought only subject to its being within limitation. There is a broad distinction between the position where an account is rendered and where an account is stated or settled. In the former case the accounting party must satisfy the court that the account was correctly rendered but in the latter case the person entitled to an account is bound by the account unless it can be reopened (*Ramlal Sao* v. *Tansingh Lal Singh*, A 1952 Nag 135). See further under "Defence" below.

Suits on Balance : If a balance struck is "not an account stated" but a mere acknowledgment of the correctness of the creditor's account, it cannot form the basis of suit, which should be brought on the original transactions (*Gaya Prasad* v. *Ram Dayal*, 23 A 502; *Shanker* v. *Mukta* 22 B 513; *Dukhi* v. *Mahomed*, 10 C 284; *Reotiram* v. *Lachman*, 23 ALJ 900, A 1926 All 155, 89 IC 402; *Deodat* v. *Mahraj Lal*,

(2) Interest from the date of suit to that of payment at such rate as the court deems reasonable.

No. 10—Similar Suit between Principal and a Commission Agent

1. In the month of *Baisakh* 2039 *Sambat* (corresponding to .....), at Delhi it was verbally agreed between the plaintiff and the defendant that the plaintiff would act as the *pucca arthia* or commission agent of the defendant in Delhi on *inter alia* the following terms and conditions:

(a) That the plaintiff would supply to the defendant cloth, silver, gold. lace, *gota* and other articles of general merchandise and the defendant would pay to the plaintiff the value thereof and the charges as stated below:

A 1928 Oudh 529), unless it is accompanied by a promise to pay and the acknowledgment of balance cannot be pleaded except to save limitation, though it may be proved at the trial to show the truth of the plaintiff's claim and to throw the *onus* on defendant to explain why he did so (*Muhammad Bakeh* v. *Shadi*, 100 IC 60, 27 PLR 768, 8 Lah 123, A 1927 Lah 272 DB). But if the acknowledgment is accompanied by a promise to pay, it becomes a new contract on which a suit can be brought (*Marimuthu* v. *Saminatha*, 21 M 366; *Sheogobind* v. *Jai Sri Singh*, 130 IC 503, 8 OWN 126, A 1931 Oudh 97). The promise may be oral or in writing but if the acknowledgment is of a barred debt, the promise must be in writing (Section 25 (3), Contract Act). It is not necessary that in the writing itself the consideration is described as past debt so long as it was such debt and was known to the debtor as such (*Kastur Chand* v. *Manak Chand*, A 1943 Bom 447). In this case the debt which was undoubtedly a time-barred debt was described as a cash loan. The promise need not be express but it may be implied from the writing or from the conduct (*Bajranglal* v. *Anandi Lal*, A 1944 Nag 124). In some decisions, it has been *held* that an acknowledgment of the correctness of balance always implies a promise to pay and a suit can be based on it (*Chunilal* v. *Laxman*, 23 BLR 606, 63 IC 923; *Belgaum Bank* v. *Bandu*, A 1945 Bom 359; *Gopal Das* v. *Ramnath*, 124 IC 624; *Punjab Ram* v. *Jowaya*, A 1933 Lah 47, 141 IC 425; *Bai Shanta* v. *Trikamalal*, A 1944 Bom 19; *Ram Shah* v. *Lalchand*, A 1940 PC 63, 187 IC 233; *Ratan Lal* v. *Rajmal*, 1939 AMLJ 137; *Mohan Lal* v. *Ram Chandra*, 1939 AMLJ 147). But it has been held in other decisions that the promise implied in acknowledgment cannot operate on a barred debt as it cannot be said to be in writing (*Suraiya Begum* v. *Hamid Ali*, A 1949 Oudh 48; *Shiva Ram* v. *Gulab Chand*, A 1941 Nag 100, 194 IC 806; *Ganesh Prasad* v. *Mt. Rambali*, A 1942 Nag 92). But if there is a promise to pay interest, it will be sufficient as that implies a promise to pay principal also (*Tulsiram* v. *Zaboo Bhima Shanker*, A 1949 Nag 229). The promise referred to in section 25 (3) of Contract Act, must be an express one (*Govinda* v. *Achuttan*, A 1940 Mad 678, 1940 MWN 443; *N. Ethirajulu Naidu* v. *K.R. Chinnikrishnan*, A 1975 Mad 333;

Name of Commodity		*Charges*
Cloth	Commission	at .....p.c.
	Dharmada	at .....p.c.
	Gaushala	at .....p.c.
	Cartage	at .....per package
	Iron hoops	at .....per package
	Sewing charges	at .....per package

State of Orissa v. *Chandan Singh*, (1976) 42 CLT 244; *Jeev Raj* v. *Lalchand*, A 1969 Raj 192 FB; *Tulsi Ram* v. *Same Singh*, A 1981 Delhi 165).

Two cases were decreed by the Allahabad High Court in which the suits appeared to have been brought on balance struck, but that was not because a suit merely on a balance or acknowledgment was held to be maintainable, but a point was stretched and the facts that there was a general reference to old accounts and that the plaintiff had given evidence of it were held to be sufficient indications of the plaintiff's intention to sue, not on the balances, but on original account (*Bholanath* v. *Net Ram*, 3 ALJ 800; *Kallu* v. *Bhagirath*, 40 IC 58). The headnote of 40 IC 58 is misleading. Similar was the case of *Ganpat Rai* v. *Nihal Devi*, 89 IC 366, A 1926 Lah 160. But the plaints in all these cases were bad according to the principles of pleading, as they did not contain particulars of the old accounts, and as it is not always easy to persuade courts to condone such defects in pleadings, and therefore, it will not be expedient to regard them as precedents.

When, therefore, there has been no fresh promise to pay, a suit should be brought not on the balance, but on original transactions which should be pleaded with particulars, and the striking of balance need not be pleaded, except when necessary for extension of limitation. If the intention is merely to extend limitation, even then it will require a stamp (*Pachkodi* v. *Krishnaji*, A 1947 Nag 145; *Culia Manilal Moti Ram* v. *Natwarlal Gokuldas*, A 1947 Bom 337, 49 BLR 81). Where a promise to pay it, or to pay interest, is also expressly added, the entry need not be pleaded, except when necessary for extension of the period of limitation. If a suit is brought on the balance and the new promise both should be alleged with sufficient particulars. When there is an "account stated", or a balance made and signed by the debtor and an agreement to pay it endorsed under the balance, in the course of large dealings, it is unnecessary to plead the account or transactions previous to such account stated or striking of balance, but the latter alone need be pleaded along with subsequent transactions. A suit may be based in the alternative on such new contract and on the old transactions. It must, however, be kept in view that

Gold and Silver	Commission	at .....p.c.
Lace and *gota*	Commission	at .....p.c.
General merchandise	Commission	at .....p.c.
	Dharmada	at .....p.c.
	Gaushala	at .....p.c.
	Packing and forwarding charges	at actual

(b) That the plaintiff would sell the commodities sent by the defendant to him and would credit the sale proceeds to the defendant and would be entitled to the following charges in respect thereof:

Commission	at	..... p.c.
Brokerage	at	..... per qtl.
Dharmada	at	..... p.c.
Gaushala	at	..... p.c.
Weighment and labour charges	at	..... per qtl.

(c) That the defendant would pay to the plaintiff all other usual and incidental charges and expenses beside the charges mentioned above.

(d) That the plaintiff would, at his discretion, advance sums of money, and supply articles of personal use, to the defendant and the defendant would repay the money so advanced and pay the price of articles supplied.

(e) That one account would be kept of all the dealings and transactions between the parties.

(f) That the account would be adjusted in Delhi at the close of every *Sambat* year and the dues of the plaintiff would be paid in Delhi.

(g) That the plaintiff would send from time to time to the defendant accounts of the dealings and transactions, and if no objection be raised by the defendant within a month of the receipt of any account, the same should be treated as correct.

---

mere balance of accounts in a book of account does not, by itself, constitute an account stated, much less does it constitute an account settled (*Sheo Bhagwan* v. *Mst. Durga Bai Devi*, 1974 MPLJ 689; see also, *Bansidhar* v. *A.C. Banerji*, (1935) 40 CWN 130; *Pratapchand* v. *Purushottam*, (1915) 8 BLR 124; *Tripathi* v. *Rama Reddy*,

(h) That interest on all dues would be paid at one per cent per month compoundable every year.

2. That business between the parties commenced from *Baisakh Badi* 2039 and continued up to *Bhadon Badi* 2, 2044 on the aforesaid terms. Particulars of the account between the parties are given in the account appended to the plaint which should be considered as part hereof. The last item in the account is of date *Bhadon Badi* 2, 2044 (corresponding to .....).

3. Accounts were adjusted from time to time. The last of such adjustments took place on *Bhadon Sudi* 13, 2044 (corresponding to .....) and the sum of Rs.6,954.62 was found due by the defendant to the plaintiff. The defendant acknowledged in writing his liability to pay the same with interest. The said acknowledgment was endorsed on the plaintiff's *Khata Bahi* at page 8 and was signed by the defendant.

4. According to the account appended to the plaint, as well as according to the account stated referred to in para 3 of this plaint there is now due and owing by the defendant to the plaintiff the sum of Rs.6,954.62 for principal and Rs.182.33 for interest, total Rs.7,136.95 which or any portion whereof the defendant has not paid.

The plaintiff claims:

(1) Judgment for Rs.7,136.95.

(2) Interest from date of suit to date of payment at such rate as the court deems reasonable.

---

21 Mad 49; *Govind* v. *Balwant Rao*, 22 Bom 986; *Hiralal* v. *Badpulal*, A 1953 SC 225).

A balance of account, or account stated, written in the creditor's book and signed by the debtor should be stamped with requisite revenue stamp, as an "acknowledgment", if the intention of the writing is to supply evidence of the debt, but if the intention is only to admit the correctness of the balance, then revenue stamp is not necessary and then it will not amount to "acknowledgment." If the intention is merely to extend limitation, even then it will not require a stamp (*Manilal* v. *Natwarlal*, A 1947 Bom 337). Where a promise to pay it, or to pay interest, is also expressly added, the entry always requires to be stamped as a bond or promissory note (*Prahlad* v. *Bhagwan Das*, 100 IC 593). **As an unstamped acknowledgment or promissory note cannot be admitted in evidence even on payment of a penalty**, it should never be made the basis of a suit, otherwise the suit will necessarily fail. An acknowledgment, coupled with a promise to pay, if attested by a witness becomes

No. 11—Suit for Reopening Account

1. The plaintiff owns several houses, shops and other estates in Mussoorie which are specified in Schedule A appended to the plaint and the defendant is a house agent.

2. By an agreement in writing contained in his letter dated the 20th October, 1990 to the defendant, the plaintiff appointed the defendant as his house agent at Mussoorie. It was agreed that the defendant would realise the rent of the said houses, shops and other estates and after defraying the necessary expenses of repairs, taxes and cost of establishment and deducting his own commission at 5% on rents and 5% on the cost of repairs, would pay the balance to the plaintiff. It was also agreed that he would submit accounts of receipts and expenditure annually in the month of January.

3. On the 15th January, 1992, the defendant submitted a statement of account for the year 1991 and the plaintiff accepted the said statement of account without scrutiny.

4. The plaintiff has lately discovered that there are various fraudulent entries and omission in the said statement of account. The false entries and omissions so far discovered are detailed below:

1.

2.

3.

4.

---

a bond, and can be admitted in evidence on payment of stamp deficiency and penalty. If a suit is brought, not on the basis of a balance but on the original transaction entered in the plaintiff's *bahi khata* the transactions alone, with particulars, need be pleaded. The entries supporting them need not be referred to in the plaint, as is generally done because that would be referring to the evidence of the claim. It is equally wrong to designate such suits on the basis of *bahi khata*. Such suits are either for money lent or for the price of articles delivered and *bahi khata* is only evidence of them.

Limitation is governed by Article 26.

Defence : Balance written in plaintiff's *bahi khata* and signed by the defendant is not always stamped. Want of stamp, if the balance is over Rs. 20, is an excellent defence to a suit on the balance. The defendant may plead that the balance was wrong as there were substantial mistakes in the items, but he should give particulars of such mistakes or he may show the plaintiff's fraud in inducing

The plaintiff claims :

(1) That the said account be reopened, or that liberty be given to him to scrutinise the account to falsify the items in the said account on the ground of fraud and for material error.

(2) Payment to the plaintiff of such sum as may be found due to him on the taking of accounts.

AGENT *(d)*

No. 12—Suit by an Agent for his Commission

1. By an agreement in writing, dated January 22, 1994 the defendant appointed the plaintiff as his agent for sale of an estate known as the Chandala Estate and agreed to pay to the plaintiff as his commission.

him to believe that the items were correct, e.g., that the rates entered in the account-books were wrong and different from the market rates, as it is always permissible to reopen even a settled account, if mistake or fraud is shown (*Bhagwan* v. *Damodarji*, 42 A 230, 59 IC 20, 18 ALJ 100; *Baney Madhub* v. *Subal*, 11 CWN 776; *A. Rahim* v. *H. V. Low & Co*, 3 R 1, A 1925 Rang 210; *Jaigovind* v. *Mt. Hiria*, A 1941 Pat 433, 196 IC 220). Grounds for reopening the account must be specified or substantial mistakes or fraud should be alleged, mere unreasonableness of certain items is not fraud (*Bajranglal* v. *Anandilal*, A 1944 Nag 124). He may show that there was no consideration for the transactions for which the account was stated, or that it was illegal or that the agreement was void, e.g., that the transactions were wagering contracts. It is not necessary in order to seek reopening of a settled account that fraud should be shown. It is sufficient if error of sufficient magnitude and in sufficient number can be shown (*Bachhey* v. *Gundoo*, A 1933 Oudh 557). But it is no defence that there was a subsequent account stated showing a balance in defendant's favour. In such a case a definite plea of payment should be raised. That there are other unsettled accounts between the parties is also no defence (*Ram Nath* v. *Pitamb Deb*, 34 C 733, 21 CWN 632, 31 IC 430).

(d) Section 211-225 of the Contract Act lay down the duties of a principal to his agent and of an agent to his principal. Any breach of any such duty furnishes cause of action for a suit even though no fraud is proved. In every suit between principal and agent, **fact and particulars showing how and when the relation of principal and agent arose should be set out in the plaint.** All the terms of the agency need not be set out, but only those which are material to the case should be alleged. **The breach of statutory or contractual duty which is the cause of action for the suit should be definitely alleged.**

As no consideration is necessary to create an agency (section 185, Contract Act), it is not necessary to allege the consideration in the plaint, unless it is material to the suit. For example, in a suit for damages against an agent for not using due

5 per cent on the price received by the defendant for the said estate in the event of the plaintiff introducing a purchaser acceptable to the defendant.

2. The plaintiff accordingly introduced one Ram Bihari Lal as a purchaser of the estate for a price of Rs.5,00,000. A sale deed was executed by the defendant in favour of the said Ram Bihari Lal, in respect of the estate, and the said Ram Bihari Lal paid Rs.5,00,000 in cash to the defendant at the time of sale-deed, on April 28, 1994.

3. The defendant has not paid the commission due to the plaintiff under the terms of the agreement of January 22, 1994 or any part thereof.

The plaintiff claims judgment for Rs.25,000 and interest from date of suit to that of payment at such rate as the court may deem reasonable.

No. 13—Suit Against *del credere* Agent for Price of Goods

1. By an oral agreement made on the 2nd March, 1987 the plaintiff appointed the defendant his agent for the sale of plaintiff's books upon the terms that he would be paid 15 per cent commission on all sales, and that he would be responsible to the plaintiff for the discharge by the buyers of their contractual obligations.

2. Between the 2nd March, 1987 and the 18th May, 1988 the plaintiff under instructions from the defendant delivered books to various buyers but the buyers have not yet paid the price. The names of the buyers and the books sent to them, with the dates on which they were sent respectively and also the price are mentioned in the Schedule appended at the foot of the plaint.

3. As per statement in the schedule at the foot of plaint a sum of Rs.____ is due to the plaintiff.

---

care and diligence, or for disregarding instructions, it is not necessary to allege the commission fixed, but in a suit by an agent for recovery of the commission, it would be necessary to allege what commission was fixed by the contract. Even if an agent is appointed to enter into wagering contracts on behalf of his principal, the contract of agency is not void, and the agent can, therefore, recover his commission and can be indemnified for any loss he has suffered (*Sobhagmal* v.*Mukund Chand*, A 1926 PC 119, referred to in *Ram Prasad* v. *Ramjilal*, 25 ALJ 736; *Perosha* v. *Monekji*, 23 B 899; *Bankeylal* v. *Bhagirath*, 1939 AWR (HC) 819, 1939 ALJ 1073, A1940 All 95, 186 IC 511; *Gopaldas* v. *Manik Lal*, A 1941 Cal 125, 193 IC 603). Even if loss is

The plaintiff claims Rs.____ with interest from date of suit to that of realisation at ten per cent per annum.

No. 14—Suit against an Agent for disregarding Instructions

1. By a letter, dated December 20, 1983, the plaintiff employed the defendant as his commission agent to purchase, at Kiratpur market, 200 quintals of best white sugar at a price not exceeding Rs.400 per quintal, and to despatch the same to the plaintiff at Patna. The plaintiff had also expressly notified to the defendant, by the same letter, that there was no market at Patna for any but white sugar, and therefore the defendant should not send any but the best white sugar.

2. The defendant, although he could easily have purchased for plaintiff, at Kiratpur market, 200 quintals of best white sugar within the said limit of price, neglected to do so. He purchased for the plaintiff 200 quintals of sugar of much inferior quality at Rs.350 per quintal and despatched the same to the plaintiff.

3. The plaintiff has suffered damage to the extent of Rs.4,000.

Particulars : After defraying all expenses, the plaintiff would have made a profit of Rs.20 per quintal (or Rs.4,000 in all) by the sale of the best white sugar at Patna. With great difficulty he has been able to sell the sugar sent by the defendant at the cost price and thus the plaintiff did not make any profit.

---

incurred in the wagering contracts and the agent has actually paid it to a third person, he can recover it from the principal (*Shibhomal* v. *Lachman*, 23 A 165), but in such cases, he should definitely allege in the plaint not only the loss, but the fact of his having paid it. If profit results from the transaction and it is realised by the agent, he is liable to pay it to the principal (*Hardeo* v. *Ram Prasad*, 25 ALJ 223; *Nagendrabala* v. *Gurudayal*, 30 C 1011).

A *pucca arhtiya* or a *del credere* agent is, however, not a commission agent in this sense but is in essence a principal; accordingly, he cannot recover damages for breach of a wagering contract (*Firm Sagar Mal* v. *Bishambher Sabei*, A 1947 All 14; see also, *Sheonarain* v. *Bhalla*, A 1950 All 352; *C.S.T.* v. *Bishambhar Singh*, (1981) 2 SCC 27). In case of misconduct or negligence the principal can sue for damages, and this is in addition to forfeiture of commission (*Vasanta* v.*Gopala*, 1939 MWN 1046(2)). When an agent was employed to purchase the property on behalf of his principal and he does so in his own name, then, upon conveyance or transfer of the property to the agent, he stands as a trustee for the principal. The

The plaintiff claims Rs.4000 as damages, with interest from the date of suit to that of payment at such rate as the court deems reasonable.

No. 15—Suit for Breach of Contract Alternatively Against a Principal and an Alleged Agent

1. On the 1st March, 1988, defendant No. 2 orally represented himself to be the agent of defendant No.1 for the purchase of wheat and thereby induced the plaintiff to sell to the defendant No.1, two thousand bags of wheat (each containing one quintal) at Rs.205 per quintal and it was agreed that the said bags would be taken delivery of at the plaintiff's godowns in Hapur Mandi on payment of the price on or before the 15th May, 1988.

2. Defendant No. 2 by his said representation impliedly warranted his authority to buy the said goods from the plaintiff on behalf of defendant No.1 and the plaintiff entered into the said contract of sale of wheat on the faith of such warranty.

3. Neither of defendants took delivery of the bags of wheat nor paid the price. On the 15th May, 1988, the plaintiff wrote to the defendant No. 1 offering delivery of the said goods and demanding the price thereof. Defendant No.1, however, denied that he had authorised defendant No.2 to buy the goods from the plaintiff and refused to take delivery or pay the price of the goods.

4. By reason of the premises the plaintiff has suffered damages, particulars of which are given below.

---

property in the hands of the agent is for the principal and the agent stands in the fiduciary capacity for the beneficial interest he had in the property as a trustee. The agent has a duty and responsibility to make over the unauthorised profits or benefits he derived while acting as an agent or a trustee and property account for the same to the Principal. Section 4 of the Benami Transactions (Prohibition) Act does not stand in the way of the plaintiff's suit for declaration of title and possession of the suit property (*P. V. Sankara Kurup* v. *Leelavathy Nambiar*, A 1994 SC 2694, (1994)6 SCC 68).

Where the principal sells export licence or quota paper granted under the Export Control Order to a third party by resorting to subterfuges and thereby circumventing the provisions of Export Control Order, he cannot recover from the agent the price and profits realised from such sale, because both the parties are in *pari delicto* and the mixim *ex turpi causa* would apply. The court would not lend its help to a party who bases his claim upon an immoral act (*Nathmal Bhirobux & Co.*,

Particulars

Contract price of 2,000 bags	Rs. 4,10,000
Market price on the 15th May, 1988 at Rs. 190 per quintal	Rs. 3,80,000
Difference	Rs. 30,000

5. The plaintiff claims Rs. 30,000 as damages from defendant No.1 if it is found that defendant No.2 was his agent to buy the wheat from the plaintiff, and alternatively from defendant No.2 in case it is found that he was not the agent of defendant No.1, with interest from the date of suit to that of payment at such rate as the court deems reasonable.

No. 16—Suit by an Agent for Money paid on behalf of the Principal

1. The plaintiff carries on business as a commission agent at Delhi, and the defendant carries on grain business at Rohtak.

2. The defendant, by his letter dated October 25, 1994, appointed the plaintiff as his commission agent for the purchase and sale of grain under the instructions of the defendant and by the same letter, agreed to pay a commission of one per cent on every transaction of purchase and sale, and interest on any sum spent by the plaintiff for the defendant at one per cent per mensem (*or*, agreed to pay the "usual" commission and interest, and the usual and customary rate of commission on such transactions then was one per cent and the customary rate of interest was one per cent per mensem).

3. The defendant, by the said letter, also instructed the plaintiff to purchase for him 200 bags of wheat and to keep them with the plaintiff until further orders.

---

v. *Kashi Ram*, A 1973 Raj 273).

The position of a broker is that of an agent. A broker engaged to purchase shares stands for his principal to purchase the shares. When a man is authorised to do a certain act it must necessarily be presumed that he has been authorised to do all such acts as must be performed to complete the transaction (A 1951 Hyd 47, 7 DLR 28 Hyd).

It is obvious that an agent is not personally bound by a contract entered into on behalf of disclosed principal in the absence of a contract to that effect; but every

4. The plaintiff purchased the said quantity of wheat for the defendant at a cost of Rs.____ particulars of which are given in the account at the foot of the plaint.

5. The defendant by letter dated November 30, 1994 instructed the plaintiff to sell the said 200 bags of wheat at the market rate. The plaintiff sold the said bags of wheat and realised Rs.____ as per account given below.

6. The defendant sent Rs.____ to the plaintiff on November 4, 1994, and has not paid the rest, or any part thereof.

The plaintiff claims :

(1) Rs.____ on account of the balance of what he had to spend for the defendant, and his commission and interest as per account given below.

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

Particulars of Account

* * *

No. 17—Like Suit by a Commission Agent in Respect of *Khatti* Transactions

1. The plaintiff has an *arhat* shop at Shamli and deals in the purchase and sale of *khattis*, or grain-pits as commission agent of others.

2. The custom of the market at Shamli, with regard to the purchase of *khattis*, is that the purchaser pays to the agent, through whom he makes the purchase, Rs.5,000 per *khatti* of wheat and Rs.6,000 per *khatti* of gram as advance money, that if the agent finds the market going down and loss on the transaction imminent, he is entitled to call upon his principal (the purchaser) to deposit more advance money as security against loss. and in case the principal fails to comply with the demand, the agent is empowered to sell the *khattis* at the market rate, and to recover from his principal any loss he has in consequence to pay on his behalf. It is also the

---

agent who undertakes personal responsibility for payment is personally liable and be sued in his own name on the contract unless the other contracting party elects to give exclusive credit to the principal (*Babu Lal* v. *Jagat Narain*, A 1952 VP 51).

Under section 230 of the Indian Contract Act, in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on

custom of Shamli market that on *khatti* transactions the principal pays to his commission agent commission at one per cent, brokerage at ten paise per cent, charity at 3 paise per cent and *gaoshala expenses* at 2 paisa per cent, contribution to school at 2 paisa per cent, and servant's expenses (*shagirdi)* and correspondence expenses, each at ten rupees per *khatti.* It is also the custom of the Shamli market that the commission agent receives interest on money spent on behalf of his principal, and pays interest on money realised, at one per cent per mensem.

3. On July 28, 1982 the defendant purchased through the plaintiff two grain-pits of wheat at Rs.210 per quintal and two of gram at Rs.250 per quintal from Sada Sukh, and deposited Rs.22,000 as advance money.

4. At the time of the aforesaid purchase, the plaintiff had verbally informed the defendant that the purchase would be subject to the conditions of the custom mentioned in para 2 above and the defendant had expressly agreed to all those conditions. The plaintiff bases his claim alternatively on the said custom or on the verbal agreement alleged in this paragraph.

5. The rate of wheat and gram began to fall soon after the aforesaid purchase and on September 6, 1982, the rate of wheat was Rs.205 and that of gram Rs.220 per quintal.

6. On the said September 6, 1982 the plaintiff sent by registered post, a notice to the defendant calling upon him to send more advance money and expressly notifying to him that in case of non-compliance with the demand within one week of the receipt of notice, the plaintiff would sell the *khattis.* This notice was delivered to the defendant on September 8, 1982.

7. No reply was received from the defendant and the plaintiff then, on September 20, 1982 sent a reminder through a special messenger Ram Sukh, a servant of the plaintiff.

8. On this, the defendant sent his *munim* Mussaddi Lal on September 25, 1982, and the said Mussaddi Lal asked the plaintiff, on the defendant's behalf to sell the *khattis.*

---

behalf of his principal nor is he personally bound by them. Such a contract shall be presumed to exist in the following cases - (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad (2) where the agent does not disclose the name of his principal, and (3) where the principal

9. The plaintiff sold the *khattis* to Ram Bilas at the market rate on September 25, 1982, i.e., wheat at Rs.206 and gram at Rs.222 per quintal.

10. Alternatively, if it be not proved that the said Mussaddi Lal instructed the plaintiff to sell the *khattis*, or if it turns out that Mussaddi Lal had no authority on behalf of the defendant to give such instructions, the plaintiff states that the sale by him was in exercise of his power under the custom alleged in para 2, or under the verbal agreement referred to in para 4 of this plaint.

11. The plaintiff has paid Sada Sukh the price of the *khattis* on behalf of the defendant, and after deducting from the same the sum the defendant paid as advance and that realised by sale of the *khattis*, Rs._____ is due to the plaintiff from the defendant.

Particulars of the account are given at the foot of the plaint (or appended to the plaint, and the plaintiff prays that the same may be treated as part thereof).

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

No. 18—Suit Against an Agent for Secret Commission Received by Him (Impleading the other Principal)

1. The plaintiff is, and at all material times was, the proprietor of the Flour Mill known as the Star Flour Mill situated at Meerut.

2. By an oral agreement made between the plaintiff and defendant No.1 on 3rd February, 1988, the plaintiff appointed the defendant No.1 as his agent at Hapur for the purchase of wheat for the said flour mill and the terms of the said agreement were that before the beginning of the wheat season the defendant No.1 would obtain tenders from sellers of wheat for delivery at the factory and pass them on to the plaintiff with his recommendation, the plaintiff would enter into contracts with the tenderers whose tenders would be accepted by him and the defendant No.1 would

---

though disclosed cannot be sued. [*Radakrishna* v. *Tayibali*, A 1962 SC 538, 546]. Where the principal is disclosed but he could not be sued eg., the foreign sovereign or Ambassador, the agent will be presumed to be personally liable (*Abdul Ali* v. *Ghodstein*, 43 PR 1910; *Ramchand* v. *Ismail Khan*, 113 IC 345).

Limitation : for most of the suit between principal and agent is three years, under one of the following articles— 1, 2, 3, 23, 55—where the suit is based on

be paid by the plaintiff a commission of two per cent on the price paid by the plaintiff for the wheat purchased by him from tenders obtained by the defendant No.1.

3. On the 14th March 1988, defendant No.1 sent to the plaintiff a tender of defendant No.2 for sale of 10,000 quintals of wheat at Rs.180 per quintal and advised that the said tender be accepted.

4. The plaintiff accepted the said tender on the 25th March, 1988 acting on the advice of defendant No.1, and entered into a formal contract with defendant No.2.

5. Between the 15th April, 1988 and 20th May, 1988 the whole of 10,000 quintals of wheat was delivered by defendant No.2, and the plaintiff paid him Rs.____ as price and on the 1st June, 1988 paid defendant No.1 Rs.____ as his commission.

6. On the 10th July, 1988, the plaintiff discovered that before submitting his above-mentioned tender, defendant No.2 with a view to inducing defendant No.1 to recommend his tender for acceptance by the plaintiff corruptly agreed to pay to defendant No.1 a secret commission at the rate of Rs.5 per quintal on the quantity of wheat contracted to be purchased by the plaintiff and inserted in the tender a rate which was in excess of forward contract rate of wheat at the time in Hapur Mandi and of the rate at which defendant No.2 would have himself otherwise tendered by Rs.5 per quintal. Defendant No.1 was induced by the said secret commission or bribe to recommend the tender of defendant No.2 to the plaintiff.

---

breach of term of an agreement, even if it is registered, Limitation would be three years under Article 55 of the Limitation Act 1963.

To suits for misappropriation Article 3 applies and not Article 4, as "misconduct" referred to in the latter does not include everything that in ordinary parlance be called "misconduct" but means only misconduct of the agent in the business of the agency (*Kinattinkara* v. *Manavikrama*, 109 IC 332. A 1928 Mad 906 DB, decided with reference to Articles 89 & 90 of the old Act). A savings bank clerk of a bank has been held to be the bank's agent and if he misconducts himself and the bank suffers losses, the bank's suit was held to be governed by Article 90 (*The Benares Bank* v. *Ram Prasad*, 1930 ALJ 1153). If the agent sends accounts to his principal and admits certain sum to be due from him, a suit for the sum was held to be governed by Article 64 of the Act of 1908 (corresponding to Article 26 of Act of 1963) (*Lachminariain* v. *Murlidhar*, A 1937 Cal 535).

7. The price paid by the plaintiff to defendant No.2 for the said wheat exceeded by a sum of Rs.____ the price which the defendant No.2 would have received had it not been for the payment of the secret commission.

8. Defendant No.1 has secretly and corruptly received the said commission of Rs.____ from defendant No.2 on the 25th May, 1988.

The plaintiff claims Rs.____ from the defendants.

No. 19—Like Suit Against Agent alone

1. On September 4, 1994, the plaintiff verbally employed the defendant as his agent to buy furniture for him on commission.

2. The defendant as such agent, bought for the plaintiff, furniture worth Rs.42,000 from Abdul Ali, furniture merchant of Bareilly, on September 20, 1994, and, in effecting such purchase, secretly and corruptly received for himself, from the said Abdul Ali a commission of Rs.2,200, which he has not paid over to the plaintiff.

The plaintiff claims Rs.2,200 with interest from date of suit to that of payment.

No. 20—Suit Against an Agent for Damages for not Using Due Care and Diligence

1. On June 14, 1993, the plaintiff employed the defendant as his paid *karinda* to collect rents from the tenants of the plaintiff's shops in the Palika Bazar Commercial Complex at Ghaziabad.

2. The defendant did not collect all the rents, and has conducted his work so negligently that the plaintiff has suffered damage.

Defence : In an agent's suit the principal may plead that the agent acted in disregard of his instructions, or that he acted on his own account in the business of the agency and that therefore the defendant is entitled to repudiate the transaction (section 215 Contract Act). If the suit is for recovery of what the agent had to pay on behalf of the principal on account of wagering transactions, the defendant may show that the plaintiff entered into the contracts with the defendant on his own account and not as an agent. In a suit for remuneration by the agent, the principal may plead that the business of the agency has not yet terminated or that the agent has been guilty of misconduct (section 219, 220, Contract Act), e.g., that he made secret profits (*Harivallabh Das* v. *Bhai Jiwanji*, 26 B 689). Particulars of the alleged misconduct must be given. To a suit for damages for breach of duty or negligence in the performance of duty it is no defence that the defendant's motives were

Particulars :

(i) The defendant neglected to demand payment of Rs.3,750 due as rent for July, 1993 from Raju Traders, and the claims for the said rent has become time barred.

(ii) The defendant neglected to realise Rs.3,200 from Krishna Electronics who sold away all his movable and left the place and is untraceable, and the amount has thus been lost to the plaintiff.

The plaintiff claims Rs.6,950 with interest from the date of suit to that of payment.

ASSIGNMENT *(e)*

No. 21—Suit by an Assignee of a Debt

1. The defendant No.1 borrowed Rs.2,000 from defendant No.2 on a bond dated October 25, 1992, and agreed to repay the loan, with interest at one per cent per mensem, within six months of the date of the bond.

2. The said defendant No.2 assigned the debt due under the said bond from the said defendant No.1 absolutely to the plaintiff by a sale-deed dated April 20, 1995.

---

untainted with fraud (*Richard Phillip* v. *W.F. Barns*, 171 IC 487, A 1937 PC 314), but to a suit on the ground of instructions, agent may plead that his acts were the acts of a prudent man and were performed at a time of emergency (*Har Kishen* v. *National Bank*, A 1940 Lah 412).

(e) An assignment of a debt or other "actionable claims" is valid and the assignee can sue for it in his own name, even if it is an assignment of part of a debt (*Travancore N.Bank Co.*,v. *T.N. Q.Bank*, 1939 MWN 1054), but an assignee of a part cannot sue for that part only, he must sue for the whole (*Tulsiram* v. *Firm Gianchand*, A 1940 Lah 96; *Mohanlal* v. *Bala Bux*, A 1940 Lah 279, 189 IC 253). To such a suit, the assignor is not a necessary party (section 130, Transfer of Property Act), though as a matter of practice, he is usually impleaded as a *proforma* defendant, but where the plaintiff is assignee of a part of the debt, the assignor or transferees of other part must be impleaded (*Firm Ram Kishen* v. *Firm Gurdial*, A 1941 Lah 337; *Murlidhar* v. *Rikhi Ram*, 43 PLR 444). But if no notice of assignment, as provided by section 131, is given to the debtor, and the debtor was no party to the assignment, he can pay the debt to the assignor in spite of the assignment. In such cases, if there is a suspicion that the assignor has realised any portion of the debt or the debtor has given out that he has paid it to the assignor it is always better to implead the assignor also as a defendant and to claim from him whatever may be

3. The defendant No.1 has not paid the debt due from him or any part thereof.

The plaintiff claims:

(1) Judgment against defendant No.1, for Rs.2,000 on account of principal, and Rs.720 on account of interest up to the date of suit.

(2) If the said defendant No.1 proves that he has paid any part of the said sum to the said defendant No.2, judgment for the said amount with interest from the date of such payment to the date of suit at one per cent per mensem against defendant No.2.

(3) Interest from date of suit to that of payment at such rate as the court deems reasonable.

No. 22—Like Suit, When the Assignment was of Sum Due and of Other Money to Become Due in Future

1. By a contract in writing dated June 20, 1994, it was agreed between the defendant and one Murad Ali that the said Murad Ali should construct, for the defendant, a shop in the New Muzaffarnagar according to a plan which is embodied in the said agreement, for a sum of Rs.55,000

found to have been realised by him. If a plaintiff has to implead the assignor and to claim this relief from him, by reason of the debtor's allegation of payment to the latter, and no such payment is established, the debtor, and not the plaintiff, should be made liable for the costs of the assignor. The promisee of the promissory note who endorsed it to the plaintiff is a necessary party to the suit for recovery of the dues under the note from the promisor (*Thambusami Raddiar* v. *Savarimutham*, A 1954 Mad 960).

An "actionable claim" can be transferred only by a written instrument which need not be registered, but a negotiable instrument may be transferred by endorsement. The form of endorsement will decide whether only the pronote has been transferred or also the debt. In the former case assignee cannot sue on debt (*Mohd. Sharif* v. *Abdul Rahman*, A 1966 Mad 50). In Punjab where the Transfer of Property Act did not apply oral assignment of pronote has been held valid (*Brijlal* v. *Dhanna*, 164 IC 271, A 1936 Lah 547). As Transfer of Property Act does not apply to transfers by order of court, assignment by Judge of a security given under the Guardians & Wards Act does not require a written instrument and Judge's order may be construed as a valid assignment (*Mani Devi* v. *Anupurna*, A 1943 Pat 218, 206 IC 226). A debt secured by mortgage of immovable property, or hypothecation or pledge of movable property, not being an "actionable claim", can be transferred in the way in which any other property can be transferred. Right to recover a partner's share in a partnership is an actionable claim (*Pulchand* v. *Sham Das*,

to be paid by the defendant to Murad Ali as follows : Rs.5,000 when the foundations have been filled up; Rs. 22,000 when the outer room and verandah have been constructed; and Rs. 28,000 on completion of the whole building.

2. The said sums of money were absolutely assigned to the plaintiff by the said Murad Ali, by a sale-deed dated September 21, 1994.

3. At the time of the said assignment, the said foundation had been all filled up, and Rs.5,000 had become due to Murad Ali under the said agreement on August 20, 1994 and after the said assignment and before this suit, all the buildings have, according to the plan given in the said agreement, been constructed and finally completed, i.e., the outer room and verandah had been completed on November 21, 1994 and the rest on July 20, 1995 and the said two further sums of Rs.22,000 and Rs.28,000 respectively have become due from the defendant under the said agreement.

A 1941 Sindh 731). An order for payment of money is not an assignment (*Kisen Gopal* v. *L.J. Bavin*, A 1926 Cal 447, 42 CLJ 43, 89 IC 735 DB), nor does a deposit of a cheque amounts to an assignment (*D.B. Ballabhdas* v. *Seth Narain Prasad*, A 1926 Nag 206). The particular mode of transfer should be specified in the plaint and, if the transfer was by a writing, the writing must be identified. It should be stated whether the assignment was absolute or by way of security for a loan.

But a transferee of a *mere right to sue* (not amounting to an actionable claim) cannot maintain a suit, as such transfer is legally void (section 6, Transfer of Property Act), e.g., a right to sue for unliquidated damages as mesne profits or for compensation for a tort is not transferable (*Abu* v. *Chunder*, 36 C 345; *Hari Chand* v. *Nem Chand*, 47 B 719; *Gopala* v. *Gopalaswami*, 22 MLJ 207, 10 IC 320; *Prag* v. *Fatechand*, 5 A 207; *Niadar* v. *Mukhtar*, 17 ALJ 837; *State of Madhya Pradesh* v. *Bahmanchi Byamji*, 1976 MPLJ 535). But assignment of rent due under a lease is valid. (*Chidambaram* v. *Doraiswamy*, 31 IC 473 Mad).

An agreement specifying a future fund for payment may amount to an equitable assignment and give the assignee preference over other creditors (*P. Venkat Rao* v. *M. Chinna Venkatna Pully*, A 1965 AP 410). An endorsement on the bill for realisation of the amount coupled with power of attorney amounted to an equitable assignment and for that reason the attachment of the amount of the bill by another creditor was not upheld (*Bharat Nidhi* v. *Takhat Mal*, A 1969 SC 313).

Transfer of an actionable claim in favour of a judge, legal practitioner or an officer of the court is invalid, and such transferee cannot maintain a suit (section 136, Transfer of Property Act). For example, if a pleader purchases a property, and arrears of rent in respect thereof by a sale-deed, he cannot bring a suit for the

4. The defendant has not paid the said sums or any part thereof.

The plaintiff claims:

(1) Rs.55,000 principal and Rs.2,350 interest, calculated separately on the three sums from the dates on which each became payable, at the current rate of interest which is 12 per cent per annum.

(2) Interest from the date of suit to that of payment at such rate as the court deems reasonable.

---

arrears (*Hiralal* v. *Tripura*, 40 C 650, 17 CWN 679, 17 CLJ 438, 19 IC 129), or if an Honorary Magistrate purchases a bond (*Sitlabux Singh* v. *Mahabir Pd.*, 162 IC 229, A 1926 Oudh 275).

A contract of purchase and sale of goods is not an actionable claim and is not assignable except with the consent of the other party to the contract, in which case it becomes a novation of contract. Therefore an assignee of such a contract cannot sue for damages for its breach (*Tod* v. *Lachmidas*, 16 B 441). But a debt due to the vendor's creditors and left by the vendor with the vendee for payment to his creditor but not paid to him, may be assigned by the vendor (*Agrenath* v. *Ramratan*, A 1938 All 544, 177 IC 700, 1938 ALJ 851).

No notice of assignment is necessary to be given to the debtor, and if one has been given, it need not be alleged in the plaint. It can be proved, if necessary, in reply to the defendant's plea of payment to the assignor. To plead before hand that, if the defendant has paid anything to the assignor, the payment does not absolve him from liability as he had been given notice of assignment would be "leaping before you come to the stile".

In a suit by an assignee, the date of assignment is sometimes mentioned as that of accrual of the cause of action for the suit. The assignment is no doubt part of the cause of action of the plaintiff, but the date on which the cause of action for the suit arises is the date on which breach is committed by the defendant, entitling the other party to bring the suit. For instance, in a suit for money due on a bond payable on demand instituted by an assignee of the bond, the date of the bond should be mentioned as that on which the cause of action arose.

Limitation is the same whether the suit is filed by the assignee or by the assignor.

Defence: Any defect in the form of assignment may be pleaded. It may be shown that the right was not assignable, e.g. that it was a mere right to sue, or that it offended section 136, Transfer of Property Act. The defendant may plead payment to the assignor, if he was not a party to the assignment and no valid notice of assignment was given to him. As an assignee takes subject to all the equities to which the assignor was subject, the defendant may claim any set off which he might have claimed against the assignor (section 132). The defendant cannot plead that the assignment was without consideration (*Sathu* v. *Dagdu*, 9 BLR 462; *Baldeo* v. *Behari*, 13 ALJ 19; *Narain Food Products* v. *Tikam Chand*, A 1933 All 573). He

BOND *(f)*

No. 23—Suit on a Simple Money Bond

1. On January 2, 1992, the defendant borrowed Rs.2,500 from the plaintiff, and, in consideration of the loan, executed a bond agreeing to pay Rs.2,500 on demand with interest at 12 per cent per annum, with half yearly rests (*or*, in consideration of Rs.2,500 due to the plaintiff from the

---

can, however, in a suit on a promissory note plead want of consideration for the assignment if he wants further to plead that the promissory note was itself without consideration, for he cannot raise the latter plea in a suit by an assignee for consideration (*Hazarilal* v. *Tulsiram*, 11 ALJ 481, 19 IC 637). He can, therefore, raise the latter plea only if he is prepared to raise the former. The Bombay High Court, however allowed, the plea that the transaction was colourable and was intended to defraud the defendant (*Mulji* v. *Nathubhai*, 15 B 1).

(f) A bond may provide for payment of money by the obligor, either on demand, or at a certain specified time, or on the happening of a contingency. There are mainly two kinds of bonds: (1) simple money bonds without any condition or penalty, and (2) bonds with specified condition, i.e., annuity bonds or security bonds. In a suit to enforce any bond, **the fact of its due execution by the obligor, the passing of the consideration, the rate of interest, if any, and the terms, and the breach thereof which has given rise to the occasion to sue must be stated in the plaint.** But no condition or term of the bond which is not necessary for the purpose of the suit need be stated. In case of an instalment bond **the due dates of the instalments, and if any have been paid, the actual dates and amounts of such payments should be given as particulars. Where** there is a condition of the whole becoming due, in case of default in payment of any instalment, and the suit is brought after the expiration of the period of limitation from the date of the default, it is better to give the precise words of the bonds as to the condition of acceleration, so as to show whether the plaintiff was bound to sue for the whole on the occurrence of the default or the suit was optional. If the plaintiff has waived his right to enforce payment of the whole money, and he claims money payable on account of the unpaid instalments or brings a suit for the whole by reason of any subsequent default, **he must clearly allege the waiver in the plaint,** for, if no waiver is alleged, one will not be presumed from mere abstention to sue (*Bahuram* v. *Jodha*, 11 ALJ 89; *Jadav* v. *Bhairab*, 31 C 502; *Venkata* v. *Naidu*, 5 MLJ 241; *Kanhai* v. *Amrit*, 23 ALJ 424, 87 IC 927, A 1925 All 499). The burden of proving the waiver, if denied by the defendant, will be on the plaintiff. If the waiver was made by an express agreement between the parties, the agreement should be pleaded in the plaint with all necessary particulars, like any other agreement. If the waiver is sought to be inferred from the plaintiff's conduct, such as that of accepting payment of overdue instalments, the plaintiff should give particulars of that conduct, along with the allegation of waiver of the benefit of the acceleration clause. For example, if the act of waiver relied upon

defendant on account of price of cloth purchased, the defendant executed a bond on January 2, 1992, agreeing to pay to the plaintiff, on or before April 2, 1992, the sum of Rs.2,500 with interest at 12 per cent per annum).

---

the acceptance of overdue instalments, those must be mentioned with particulars as to date, amount, etc. **Demand of payment** of money due under a bond is not necessary to be pleaded even when the bond is payable on demand, for *a previous demand is not part of the cause of action*, and a suit cannot be dismissed merely on the ground that no such demand was made. If the defendant pleads that he did not pay the money as the same was not demanded, and he pays it into court, the question whether the plaintiff had made a previous demand or not can then be inquired into in order to determine whether the plaintiff should or should not get his costs. The plaintiff will not, in such a case, be debarred from showing that he had demanded the money by the fact that it was not alleged in the plaint. If however, money is made payable under the bond at a specified time after demand, a previous demand would be necessary and it should be pleaded with specification of date, as the cause of action in such case arises from the expiry of the specified period after the demand.

Suits on security bonds also are brought in the same way as on ordinary simple bonds, **the conditions of the security, and their breach being clearly specified as far as possible in the terms of the bond.** A regular suit lies even for the enforcement of a security bond given for the performance of any decree or part thereof, or for the restitution of any property taken in execution or for the payment of any money or for the fulfillment of any condition imposed on any person under an order of the court in any suit or any proceedings consequent thereon. In such cases the decree or order can also be executed against the surety to the extent of his personal liability under the bond (section 145, C.P.C.), as an alternative remedy. Where a security bond is offered under O. 41, R. 6 and property worth more than Rs. 100 is mortgaged such a security bond is not exempt from registration (*Bishnath Sahu* v. *Prayagdin*, 1958 ALJ 353; *Sonatun Shaha* v. *Dina Nath Shaha*, 26 Cal 222; *Nagarum Sambayya* v. *Tangatur Subayya*, 31 Mad 330; *River Steam Navigation Co.* v. *Jaim Mulla*, A 1957 Assam 157).

A proceeding under section 145 C.P.C. cannot be for anything but for enforcing the personal liability of the surety (*Thankamma* v. *Parameshwaram Achari*, 1971 KLR 440). If the security bond is not personal but is a hypothecation bond, a regular suit for its enforcement will be necessary (*Amir* v. *Madhadeo*, 39 A 225, 15 ALJ 76, 38 IC 33.). But see *Beti Mahalakshmi* v. *Chaudhri Badan Singh*, 21 ALJ 604, in which it has been held that even a hypothecation security bond can be enforced against the executant in execution proceedings. Section 145 C.P.C. does not apply to proceedings for the enforcement of a surety bond taken by the decree-holder outside the court, and such bond has to be enforced by suit (*Subbarya* v. *Sathanath*, 24 MLT 516, 48 IC 940, 1918 MWN 764). A security bond given by a

2. The defendant has not paid the loan, or any part thereof (*or*, the defendant has paid Rs.1,100 on February 2, 1993, Rs.400 on May 3, 1993 and Rs.400 on August 4, 1994 but has not paid the rest of the debt or any part thereof).

1. The plaintiff claims :

(1) Rs. _____ as per account given below.

(2) Interest from the date of suit to date of payment at such rate as the court may deem reasonable.

Account

* * *

No. 24—Suit on an Instalment Bond

1. On May 2,1981 the defendant in consideration of a loan advanced to him by the plaintiff, executed in favour of the plaintiff an instalment bond for Rs.1,200 agreeing to pay the said amount in monthly instalments of Rs.200 each on the first day of every month beginning from July 1, 1981 (*or*, in the following instalments: July 1, 1981, Rs.200; July 1,

---

guardian of a minor to the court appointing him, can, on breach of the undertaking by the guardian, be enforced by any person, as trustee for the ward, to whom the court assigns it under section 35, Guardians and Wards Act. This assignment can be made even after the ward has attained majority but must be made before the suit (*Mani Devi* v. *Anpurna*, A 1943 Pat 218, 206 IC 226). A security bond given in favour of court can be proceeded with in execution by the decree-holder even without an assignment (*V.S. Swaminatha Iyer* v. *K.S. Srinivasa Ammal*, (1970) 2 MLJ 636). If the undertaking of the surety in the bond is that the amount can be recovered from him if the defendant failed to pay, then the liability of the surety can be enforced in execution on failure of judgment debtor to pay (*Ram Gopal* v. *Parbati Devi*, 1979 All WR 392).

Limitation for a suit on a simple money bond is three years from the date fixed for payment, or if no such date is fixed, from the date of its execution (Articles 28 and 29 of the Act of 1963). The limitation for an instalment bond is prescribed by Article 36 and 37 of the Act.

The language of Articles 36 and 37 of the Act of 1963 is identical with that of Articles 74 and 75 of the Act of 1908. Article 36 will apply to cases where the suit is for the recovery of instalments as such and not for the recovery of the whole amount on the basis that it has fallen due because of some default. On the other hand, where the whole amount falls due on one or more defaults being committed and the whole amount is claimed in the suit the proper Article to be applied will be Article 37. In cases where there is default clause making the whole due on one or

1982, Rs.200; July 1, 1983, Rs.200; July 1, 1984, Rs.200; July 1, 1985, Rs.200; and July 1, 1986, Rs.200). The defendant further agreed by the said bond that, in case default was made in the payment of any instalment, the whole amount then remaining due should at once become payable.

2. The defendant paid the first instalment on the due date. He did not pay the second instalment on the due date, but when he came to pay it three days later, i.e., on July 4, 1982, the plaintiff accepted the payment and verbally agreed to waive the benefit of the acceleration clause in the bond, in so far as that default was concerned.

3. The defendant has not paid any other instalment, and the plaintiff, therefore, claims the whole amount under the acceleration clause by reason of default in payment of the third instalment.

The plaintiff claims Rs.800, with interest from the date of suit to that of payment at such rate as the court deems reasonable.

No. 25—Suit on a Bond for the Fidelity of a Clerk

(Form No. 18, App. A., C.P.C.)

1. On the__day of_____19__, the plaintiff took *EF* into his employment as a clerk.

2. In consideration thereof, on the __ day of _____19__, the defendant agreed with the plaintiff that if *EF* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding _____ rupees.

(*Or*, 2. In consideration thereof, the defendant by his bond of the

more defaults it is open to the creditor to waive the benefit of the provision relating to defaults. If there is such waiver, limitation under Article 37 will start from the date of a fresh default which is not waived. Whether a default has been waived or not is essentially a question of fact (*Jawahar Lal* v. *Mathura Prasad*, A 1934 All 661 FB; *Sukhlal* v. *Bhura*, A 1934 All 1039; *Gokul Mohton* v. *Sheo Prasad Lal Seth*, A 1939 Pat 433 FB; *Arjun Sahai* v. *Pitambar Das*, A 1963 All 278). The distinction in the earlier Act between registered and unregistered bonds has been removed under the Act of 1963, and the limitation for both kinds of bonds is three years only.

Defence : In a suit on a bond for cash consideration, the defendant may plead that he did not receive full or any consideration. He may plead a payment, or discharge, or satisfaction. If breach of any condition is alleged in the plaint, he may

same date bound himself to pay the plaintiff the penal sum of ___ rupees, subject to the condition that if *EF* should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void).

(*Or*. 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed).

3. Between the __ day of _____ 19__, and the ___ day _____ of 19__, *EF* received money and other property amounting to the value of _____ rupees, for the use of plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

No. 26—Suit on a Security Bond

1. On November 20, 1990, the plaintiff took one Khuda Baksh into his employment as a *karinda* for collection of rent.

2. In consideration thereof, the defendant, by his bond of the same date agreed with the plaintiff that if the said Khuda Baksh should not faithfully perform his duties as a *karinda* to the plaintiff or should fail honestly to account to the plaintiff for all monies received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss the plaintiff might sustain by reason of the said *Khuda Baksh's* said default not exceeding the sum of Rs.4,000 with interest at 6 per cent per annum.

3. The said Khuda Baksh did not during his said employment faithfully discharge his duties as a *karinda*, nor did he honestly account for nor pay over to the plaintiff, all moneys coming to his hands on behalf of the plaintiff. Between November 20, 1990 and June 15, 1992 Khuda Baksh collected rents amounting to Rs.1,900 for the plaintiff, and the same still remains due and unpaid.

---

deny the breach or may plead any valid excuse for it. If the Bond is enforceable on the happening of any contingency, the defendant may plead that the contingency has not yet happened. He may plead that he was a surety for the other executant (*Mulchand* v. *Madho*, 10 A 421; *Sheo Prasad* v. *Govind Prasad*, 49 A 464 at p. 468); but the Calcutta and Rangoon High Courts have held that evidence is inadmissible to prove that an executant who purports to be a principal was really a surety (*Maung Kogyi* v. *U. Kyaw*, 103 IC 79; *Harekchand* v. *Bishanchandra*, 8 CWN 101).

The plaintiff claims a decree for Rs.1,900 principal and Rs.___ interest, with further interest from the date of suit to that of payment at such rate as the court deems reasonable.

CANCELLATION OF AN INSTRUMENT *(g)*

No. 27—Suit for Cancellation of a Sale Deed Executed by a Minor

1. The plaintiff was born in 1985, and therefore is, and on June 3, 1995, was a minor.

2. On June 3, 1995, the plaintiff executed a deed of sale of his farm (*khasra* No.83) in village Rasulpur in consideration of the defendant promising to pay him Rs.51,000 in three months.

3. The defendant on June 5, 1995 applied to the Tahsildar for mutation of his name, and the plaintiff has reasonable apprehension that if the sale-deed is left outstanding [illegible] possession of the said farm of the plaintiff.

The plaintiff claims to have the said sale-deed adjudged void and cancelled.

No. 28—Suit for Cancellation of a Deed of Gift Obtained by Undue Influence

1. The plaintiff's son Ram Kumar was, in June 1994 employed by the defendant as *karinda* to collect rents from his tenants.

2. On June 13, 1994 the said Ram Kumar realised as such *karinda* Rs.2,000 on account of rents due to the defendant from a tenant Krishna.

He may plead that the bond was delivered conditionally or for a special purpose or as a collateral security for another undertaking. Evidence of this defence would be admissible under proviso 3 to Section 92, Evidence Act (*Sheo Prasad* v. *Govind Prasad*, 49 A 464, 100 IC 332).

(g) Some of these suits also fall under the heading "Suits for Torts" as they are based on fraud or undue influence. In a suit for cancellation of an instrument, the plaintiff must show— (1) that the instrument is void or voidable at his option, and (2) that he has a reasonable apprehension that the instrument, if left outstanding, may cause him serious injury (section 31 Specific Relief Act of 1963). A plaint in such a suit should, therefore, contain (i) **a short reference to the instrument and its effect, (ii) a recital of facts making it void or voidable, and (iii) an allegation of the occasion for the suit, showing the serious injury the instrument is likely to cause to the plaintiff.** There should be a definite prayer for cancellation. It is not sufficient

The said Ram Kumar did not credit the said item of Rs.2,000 in the account books, nor did he account for it to the defendant, but converted the money to his own use.

3. The defendant threatened the plaintiff that unless the plaintiff paid him Rs.2,000 and further made a gift of his house in Banker's Street, Meerut, to him, the defendant would prosecute the said Ram Kumar.

4. The plaintiff was, at the time, in great mental distress, and had no independent advice, and was, by reason of the said threat of the defendant, induced to execute a deed of gift in respect of the said house in favour of the defendant on July 20, 1994.

5. The defendant has sent a notice to the plaintiff calling upon him to deliver possession of the house to the defendant and the plaintiff apprehends that if the deed of gift is left outstanding the plaintiff will be deprived of the possession of the said house.

The plaintiff claims to have the said deed of gift adjudged void and cancelled.

No. 29—Cancellation of a Sale-deed Obtained Without Plaintiff's Consent and by Defendant's Fraud

1. The plaintiff is a *pardanashin* and illiterate widow, and the defendant is her brother's son who has been managing her property ever

---

to ask for a declaration that the deed is null and void in cases of voidable instruments (*Varadachar* v. *Dasappa*, 14 Mys LJ 256). Such a suit can be brought also by the legal representative of the person who had executed the instrument (*Shravan* v. *Kashiram*, 100 IC 932, 51 B 133, 29 BLR 115), or even by a person not a party to the instrument (Abdul *Jabbar* v. *Ganesh*, 1938 MLJ 54; *Indramani* v. *Hena Dibya*, A 1977 Ori 88). In a case, where plaintiff is seeking to have the document avoided or cancelled, necessarily, a declaration has to be given by the court in that behalf. Until the document is avoided or cancelled by proper declaration, the duly registered document remains valid and binds the parties (*Ramti Devi* v. *Union of India*, 1995 All CJ 99 SC).

It is neither sufficient, nor necessary to say that the instrument is void or voidable, for that is after all an inference of law, but facts which make it voidable, should be alleged, e.g., that the plaintiff was a minor or a person of unsound mind when he executed it or that it was executed under coercion or undue influence. Any instrument which is not legally enforceable is void whether it is so for any reason given in the Contract Act or for any other reason, e.g., because it is a forgery

since the death of her husband three years ago, and the plaintiff always reposed implicit confidence in him and had no other independent advice.

2. On December 20, 1994, the defendant verbally represented to the plaintiff that it would facilitate the transaction of the plaintiff's business by the defendant if the plaintiff executed a general power of attorney in defendant's favour. The plaintiff assented to the proposal, and asked the defendant to have a proper deed drawn up.

3. On December 22,1994 the defendant brought to the plaintiff a document and represented that it was a general power of attorney and induced the plaintiff by such representation to affix her thumb mark to it.

4. Later on the same day, December 22, 1994, the defendant brought the Sub-Registrar of Ghazipur to the plaintiff's house. The said Sub-Registrar did not read out or explain the contents of the deed to the plaintiff but simply asked her whether she had put her thumb mark on it. The

(*Venkata* v. *Kadambi*, 7 MLJ 270).

When an instrument is not wholly void or voidable, it may be cancelled partially (Section 32, Specific Relief Act of 1963). But plaintiff cannot get any relief by pleading his own fraud which has been carried out (*K.M. Esof* v. *Hamida Bibi*, 163 IC 671, A 1936 Rang 218; *Nawabsingh* v. *Saljitsingh*, 162 IC 958, A 1936 All 401; *Hafizulla* v. *Ally Mulla*, 164 IC 914, A 1936 Rang 405; *Nambippa* v. *Muthuswamy*, 163 IC 711, A 1936 Mad 630).

The injury apprehended should be real and not imaginary and the apprehension must be reasonable, for instance, when a sale deed is registered at the request of the vendee inspite of the denial of execution by the vendor (*Mohima* v. *Jugal Kishore*, 7 C 736), or where the defendant makes an application for entry of his name in the village register under the void deed. But, where a suit on the forged bond is already pending and the plaintiff has set up a plea that the bond is void, a suit for cancellation is not necessary (*Chogan* v. *Dhondu*, 27 B 607).

A sale-deed of a holding, not legally transferable is void, but it can do no injury to the vendor, so long as he remains in possession, and need not, therefore, be cancelled. When the plaintiff is in peaceful possession of the property, in spite of an instrument which the defendant is setting up against a third person in a proceedings which will not be binding on the plaintiff, the plaintiff cannot be said to have any reasonable apprehension of injury (*Narendra* v. *Basudeo*, 14 IC 81 Oudh). Where thumb impressions of an illiterate lady are obtained on the sale deed representing that she was executing gift deed in favour of her daughter, the misrepresentation was as to the character of the document, the sale deed was a totally void document and not a voidable document (*Dularia Devi* v. *Janardhan Singh*, A 1990 SC 1173).

Minor : A minor's contract is void, hence he can have it cancelled. If the

plaintiff admitted having done so, and the Sub-Registrar thereupon got her thumb mark affixed at another place on the said deed.

5. The representation of the defendant that the deed was a general power of attorney was false. The plaintiff has now, on January 30, 1996 learned that the deed was a deed of sale in favour of the defendant in

---

minor was old enough to commit a fraud by inducing others to think that he was of age, he cannot take advantage of it, and if the court cannot restore the parties to their original footing the minor would be bound by his contract as if he were an adult (*Leslie Ltd.* v. *Sheill*, (1914) 3 KB 607, 83 LJKB 1145, 111 LT 106, 58 SJ 453, 30 TLR 460; *Mahommed Syedol* v. *Yeob*, 39 IC 401, 21 CWN 257, 1917 MWN 162, 19 BLR 157). But this rule is not applicable where the minor has not received any advantage and the effect of avoiding the transfer will only be to restore the parties to their original position (*Ganganand* v. *Sir Rameshwar Singh*, 102 IC 449 Pat). A contract by a minor being void, the fact that he made a false representation as to his age at the time of the contract, cannot make a difference. There is no estoppel and no rule of equity entitling the court to enforce the contract (*Ajodhia Prasad* v. *Chandar Lal*, A 1937 All 610 (FB)).

Simply allowing another person to deal with him as if he was an adult or doing acts which only an adult can properly do, is not, however, sufficient to constitute a fraudulent misrepresentation on the part of the minor (*Ganganand* v. *Sir Rameshwar Singh*, 102 IC 449 Pat). Where a person under the guardianship of Court of Wards simply stated that he was 20 years of age without disclosing the fact that he was a ward of the Court of Wards, it was held that the suppression amounted to misrepresentation (Budha v. *Lakshmi*, A 1929 Lah 880, 30 PLR 584 DB).

It has been held that even when the minor has represented that he was of age and the other party acted on such representation, still the minor is not estopped from proving his minority (*Koduri* v. *Shumuluir*, 94 IC 853, A 1926 Mad 603; *Radha Kishan* v. *Bhorey*, 26 ALJ 837, 110 IC 373, A 1928 All 626; *Ajodhia Prasad* v. *Chandar Lal*, A 1937 All 610; *Gulabchand* v. *Chunnilal*, A 1929 Nag 156; *Gadigeppa* v. *Balangowda*, 55 B 741, 33 BLR 1313, A 1931 Bom 561; *Manmatha Kumar Saha* v. *Exchange Loan Co.*, A 1936 Cal 567; *Rangarai* v. *Sant Chogmal Verdi Chand & Co.*, A 1934 Mad 560; *Ganga Nand Singh* v. *Rameshwar Singh*, A 1927 Pat 271 DB; *Lala Somnath* v. *Ambika Prasad Dubey*, A 1950 All 121). But in such cases the benefit received by the minor under the sale-deed should be refunded before the sale is set aside though ordinarily a minor is not required to refund the benefit received under a void contract (*Hanmatha Rao* v. *Sitaramayya*, 1938 MWN 1076, 48 LW 604; *Abdul Subhan* v. *Nusrat Ali*, 165 IC 523, A 1937 Oudh 170; *Manmath* v. *Exchange Loan Co.*, 165 IC 363, A 1936 Cal 567). But if he made no representation or was not guilty of any fraud, he is not liable at all for mere failure to reveal his age when no inquiry was made from him (*Sherkhan* v. *Akhtarkhan*, 168 IC 730, A 1937

respect of the plaintiff's share in land in village Nalagarh.

6. The defendant well knew that the said representation was false, and he made the same fraudulently with a view to inducing the plaintiff to affix her thumb mark on the deed and to admit the execution of the deed before the Sub-Registrar.

7. The plaintiff has learned that the defendant has made an application to the Tahsildar for mutation of his name on the plaintiff's said land in village Nalagarh and she apprehends that she will be deprived of the said property.

Lah 598), and if the vendee knew of the vendor's minority, he is not entitled to refund of the price paid (*Mt. Bachai* v. *Hayat Mohammad*, A 1940 Oudh 119, 185 IC 337), nor is he liable by reason of merely making a false representation unless the transaction had been the consequence of such representation (*Ko Maung U.* v. *Ma Hai On*, A 1939 Rang 399).

When the minor has made a false or fraudulent representation as to his age and has thereby obtained some advantage, the court in the exercise of its equitable jurisdiction intervenes in such cases and restores the parties to original position. In this connection section 33 of the Specific Relief Act (Section 41 of the old Act) may be referred to. The Court directs the minor to restore the benefit obtained by him (*Appasami* v. *Narayana Swami*, A 1930 Mad 945; *Ajudhia Prasad* v. *Chandar Lal*, A 1937 All 610 FB), when the minor is the plaintiff and brings suit for cancellation of a document. But when the minor is a defendant, section 33 of Specific Relief Act would not apply and it would not be possible to pass a decree for money against a minor because that may amount to enforcing a void contract, although where a contract of transfer of property is involved such property can be ordered to be restored to the plaintiff (*Manmatha Kumar Saha* v. *Exchange Loan Co.*, A 1936 Cal 567; *Tikki Lal* v. *Komal Chand*, A 1940 Nag 327).

Court-fee : A suit for cancellation of an instrument is one for a declaration with a consequential relief, and court-fee is payable on the amount at which the relief sought is valued. Document executed by guardian not only for himself but also on behalf of minor, the minor is also a party to the document and court fee is payable under section 7(iv)(a) (*Surajparsad* v. *Gangannath Parasad*, 1954 ALJ 710). If the plaintiff was no party to an instrument, e.g., if the suit is by a Hindu son for setting aside a deed of gift made by his father, there need not be a prayer for cancellation, but a declaration that the deed is null and void will be sufficient. A prayer for cancellation is properly necessary when the plaintiff was himself a party to the instrument, or if he was a minor and his duly appointed guardian made a transfer on his behalf with the permission of the court. Even if the plaintiff was a party to the deed, he can allege that the deed was sham and nominal and confers no title on the defendant and claim a declaration of his own title and injunction against

The plaintiff, therefore, claims to have the said deed of sale adjudged void and cancelled.

No. 30—Cancellation of Will Executed while Executant was not in his Proper Senses

1. One Ram Prasad, who owned considerable property, died on April 16, 1995.

2. The plaintiff is the daughter of the said Ram Prasad, and no

---

defendant's interference with his possession, and he need not in such a case pray for cancellation of the deed (*Sahid Hameed* v. *K.C.P. Mohindeen*, A 1948 Mad 451, 1948 MLJ 270, 1948 MWN 259). But, in either case, for the purpose of court-fee the suit should be regarded as one for declaration with a consequential relief (*Babu Rao* v. *Balaji Rao*, 118 IC 465, A 1929 Nag 71; *Arunachalam* v. *Rangasamy*, 38 M 922). Even if the suit is framed as one for declaration, if cancellation is necessarily implied, court-fee must be paid *ad valorem*, e.g. in a suit for declaration that a compromise decree is not binding on the plaintiff, cancellation of the decree is implied (*A.C.T.N. Chidambaram* v. *A.D.T.N. Nagappa*, A 1944 Mad 478). A suit for declaration that property purchased by plaintiff was not subject to *waqf* without an express prayer for cancellation of *waqfnama* was held to be in essence one for cancellation (*Kamala Devi* v. *Sunni Central Board*, A 1949 All 63). It has been held that court is merely to look at relief as framed and that court-fee cannot be ordered to be paid in respect of implied consequential prayers (*Khatoon Iqbal Begum* v. *State of U.P.*, 1971 All WR 719). If in a suit for cancellation of a deed of gift, relief of possession is also added, no court-fee on the latter relief is required as that is only ancillary to the main claim (*Thangochi* v. *Moideen*, A 1933 Mad 231; *Hajrabi* v. *Md Ibrahim*, A 1948 Nag 219). Where the plaintiff as a minor is a a party to a deed executed by the guardian he must sue for cancellation and also for possession (*Shanker Narayan Pillai* v. *Kandesami Pillai*, A 1956 Mad 670 FB).

Limitation is three years under Article 59 of Act of 1963, but if a document is null and void or evidences a transaction which is so from its very inception, it is not necessary to have it cancelled and a suit for a declaration that it is null and void may be brought within three years under Article 113 and a suit for possession of property conveyed by it can be brought within 12 years. The three years period of limitation is to be computed from the date when the facts entitling the plaintiff to have the instrument or decree set aside or cancelled became first known to him (*Cheddi* v. *Indrapati*, A 1972 All 446). For cases on this point under the Limitation Act, 1908, see, *Muhammad Nazir* v. *Mt. Zulaikha*, 6 ALJ 289, 50 A 510, A 1928 All 267, 109 IC 54 DB; *Krishna Swami* v. *Kuppu*, A 1929 Mad 478, 30 MLW 796; *Mst.* v. *Kundan*, A 1945 All 37. For cases under Limitation Act 1963, see *Dashrath* v. *Shatruhan Singh*, 1977 MPLJ 167; *Bilat Das* v. *Babuji Das*, 1981 BLJR 556).

Defence : In such cases defence is generally the denial of facts making the

nearer relation of the latter was in existence at the time of his death. The defendant is his sister's son.

3. The defendant has applied for mutation of his name on the property of the said Ram Prasad on the basis of a will alleged to have been executed in his favour by the said Ram Prasad on April 15, 1995.

4. The said will set up by the defendant was never executed by the said Ram Prasad.

5. In the alternative, the said will was not executed by the said Ram Prasad while he was in his proper senses; the said Ram Prasad had suffered a stroke of cerebral thrombosis about a month before his death and had, during the week before his death, became extremely weak in body and mind and was unable to move from his bed and was incapable of understanding his affairs and of forming any rational judgment concerning them. During the last three days of his life, i.e., April 14, 15 and 16, 1995, he was totally unconscious and could not hear or talk to any one.

The plaintiff claims:

(1) A declaration that the said will was never executed by said Ram Prasad.

(2) In the alternative to have the said will adjudged void and cancelled.

CARRIERS see Railways and Carriers, *post*.

---

contracts void or voidable. The defendant may claim refund of the benefit received by the plaintiff under the instrument as a condition precedent of its cancellation (section 33 Specific Relief Act of 1963) (*Abdul Majid* v. *Ramiza*, 1931 MWN 150, A 1931 Mad 468, 131 IC 153, case under section 41 of the Specific Relief Act 1877). It may be pleaded that the suit is unnecessary as the instrument is void in law and cannot do any harm to the plaintiff, as a sale-deed of an occupancy holding; or that the decree would be useless as when the defendant is in possession of the property conveyed under the instrument. He may plead that both the parties were equally guilty of fraud (*Bindeshri* v. *Lekhrai*, 33 IC 711, 1 Pat LJ 48). In a suit where the plaintiff bases his title on inheritance, as in precedent No. 30 above, he has to show that the deceased had left no nearer heir (*Dulhin Mahabati Kuer* v. *Raghunandan*. A 1958 Pat 249). Even if the defendant has failed to plead any nearer heir but has merely denied the plaintiff's title it is open to the defendant to take advantage of facts showing that the plaintiff was not the nearest heir (*Jagdish Narain* v. *Nawab Said Ahmed*. A 1946 PC 59).

CHARGE *(h)*

No. 31—Suit for Enforcement of a Charge

1. The defendant and one Ram Lal are the sons of the plaintiff.

2. By a private deed of partition, dated September 20, 1994 to which the plaintiff, defendant and the said Ram Lal were parties, the whole property left by the plaintiff's husband was divided equally between the defendant and Ram Lal, and the defendant and the said Ram Lal agreed that each of them should pay a monthly allowance of Rs.400 to the plaintiff for her life. It was further agreed that the amount of the said monthly allowance should be a charge on the shares allotted to the defendant and the said Ram Lal respectively.

3. The defendant has, since the aforesaid partition, been in possession of the share of property allotted to him and mentioned fully at the foot of the plaint.

(h) "**Charge**" differs from a mortgage in the essential circumstance that in latter there is a transfer of an interest in specific immovable property which is absent in a charge. Another distinction is that while a charge can be enforced only against a person with notice, a mortgage being a transfer of an interest in property can be enforced against subsequent transferees even if they have no notice of it. Ordinarily charge negatives a personal liability and the remedy of the chargeholder is against the property charged only, but when there is also in addition a personal covenant, the security is collateral to the personal covenant and the transaction would become a simple mortgage (*Benares Bank* v. *Har Prasad*, 163 IC 69, A 1936 Lah 482). A charge may be created by agreement as a mortgage, as well as by operation of law (e.g., the charge for unpaid purchase money on the property sold or a charge created by a decree). A charge-holder's remedy is the same as that of a simple mortgagee (Section 110, Transfer of Property Act); i.e., he can sue for realisation of his money by sale of the property charged with him.

Full Particulars of the Charge, *i.e.* when and how it was created, the property charged, the amount for which it was charged, the persons by whom, and those in whose favour, the charge was created must be mentioned in the plaint. There is no form in the Code of Civil Procedure for a suit to enforce a charge.

Any one in whose favour or for whose benefit a charge is created may sue although he was no party to the agreement (*Khwaja Muhammad Khan* v. *Hussain*, 32 A 410, 7 ALJ 71, 14 CWN 865, 12 CLJ 205, 20 MLJ 614, 12 BLR 638 PC). But a charge for unpaid purchase money cannot be so enforced as section 55 (4), Transfer of Property Act makes the property chargeable "in the hands of the buyer" (*Gur Dayal* v. *Karam Singh*, 38 A 254; *Gayatri Prasad* v. *Board of Revenue*, 1973 ALJ 412) or any transferee without consideration or any transferee with notice of non-payment.

4. The defendant has not paid aforesaid monthly allowance of Rs. 400 or any part thereof, ever since the aforesaid partition.

The plaintiff claims payment of Rs._____, principal and Rs. _____, on account of interest from the date of the partition deed, under the Interest Act at the rate of 12 per cent per annum, total Rs. _____, or in default, sale of the property mentioned at the foot of the plaint.

[For precedent of a suit for unpaid purchase money see under Sale of Land; for interest, see precedents and notes under (r), post].

CONTRIBUTION *(i)*

No. 32—Suit for Contribution Between Co-Judgement Debtors

1. The plaintiff and the two defendants are, and in 1990 were joint tenants in equal share of house No.15, Civil Lines, Mathura.

2. Ram Adhin, the landlord of the said house, obtained a decree (No.104 of 1991) from the court of the Civil Judge, Mathura, for arrears of rent of the said house for the year 1990 against the parties jointly.

3. The plaintiff and both the defendants were in default for the whole rent of the year 1990.

A charge cannot be enforced against property in the hands of a *bona fide* transferee for consideration and without notice of the charge (section 100), but a property subject to a recurring charge and sold for arrears payable in respect of the sum charged can be sold for future payments (*Jennendra Nath* v. *Sashi Mukhi*, A 1940 Cal 60; *Lakkalakrishnama Naidu* v. *Lakkala Lakshmamma*, 1973 An WR 80). For the doctrine of constructive notice and its applicability to charge on property for payment of Municipal Taxes, see *Ahmedabad Municipal Corporation* v. *Abdul Gafar Haji Hussainbhai*, A 1971 SC 1201. When the suit for money has once been brought, there is nothing to prevent a subsequent suit to enforce the charge (*Bank of Bihar Ltd.* v. *Omitave Chatterji*, 186 IC 221 Pat).

Limitation is 12 years from the date when money sued for becomes due, under Article 62 of the Act of 1963 (*Narayanbhai Mahijibhai Patel* v. *Dolatram Chouharmal*, A 1972 Guj 166).

(i) The basis of a suit for contribution is the joint liability of the parties for payment of a sum of money to a third person and payment by the plaintiff in excess of his liability. Until a plaintiff has paid more than his share of the liability, there is no right of contribution (*Dhirendra Nath* v. *Harendar Nath*, 64 CLJ 55). Where the plaintiff had merely executed a bond in favour of the creditor and had not actually

4. The said Ram Adhin put the said decree in execution and realised the whole decretal amount, viz. Rs.9,000 from the plaintiff alone.

The plaintiff, therefore, claims Rs.3,000 from the each defendants with interest from the date of suit to that of payment.

No. 33—Suit for Contribution Between Co-Sureties

1. By a bond executed on December 10, 1991, the plaintiff and the two defendants jointly and severally became sureties for one Balak Ram who had at the time, been appointed Nazir in the Munsif's Court at

---

paid the money due to the creditor from him and the defendant, it was held he could not sue for contribution (*Raghubar Dayal* v. *Abdul Ghaffar*, 161 IC 152, A 1936 Oudh 253). If there are several defendants, the plaintiff cannot get a joint decree against them as that would result in a multiplicity of such suits (*Moti Chand* v. *Bajran Sahai*, 17 IC 45, 16 CLJ 148). In a suit for contribution, therefore, **the plaintiff should allege (1) facts showing the joint liability of the parties; (2) the plaintiff's share of liability for the joint debt; (3) that he has paid more than his liability and the amount of the excess; and (4) the respective liabilities of each of the defendants to contribute to the excess which the plaintiff has paid.** If the plaintiff settled the creditor's claim at a lesser amount than what was due, all the debtors must be given advantage of the reduction and contribution should, in all cases be made on the basis of what the plaintiff has actually paid. If any of the defendants has also paid a portion of the debt, he should be given credit for the same, and account of contribution should be made on the basis of the total sum paid by him and the plaintiff. Unless the account by which the liability of each defendant is worked out is a very simple one, it should be given in details as particulars of the liabilities of the defendants. The creditor or other person to whom payment has been made by the plaintiff is not a necessary party to suit for contribution.

Where, however, there is no joint liability, there is no basis for a suit for contribution. For instance, if one of the heirs of an owner of property incurs expenses in litigation against third parties, he cannot sue the other heirs for contribution to expenses, even if the latter have been incidentally benefited by the result of that litigation (*Rahaman* v. *Dillu*, 103 IC 299 Lah). But if it is shown that the plaintiff did not incur the expenditure gratuitously, he can be allowed contribution, as in case of a co-owner repairing a joint well (*Bibi Baratan* v. *Mt. Chandramani*, 167 IC 42, A 1937 Pat 103).

Question of contribution generally arise between co-debtors, co-mortgagors, co-owners, co-sureties, co-trustees, joint-tort feasors or persons having a joint liability. Except under special circumstances (e.g., the case of a definite undertaking by one partner to indemnify another) there is no contribution between partners (*Debesh Chandra* v. *Benoy Kirshna*, 43 CWN 1214). As between co-judgment debtors the judgment is conclusive as to the right of the plaintiff to the amount

Muzaffarnagar, in the penalty of Rs.1,000, for the due performance of the said Balak Ram's duties as such Nazir.

2. The said Balak Ram misappropriated Rs.600 of the Government money and a decree (No.20 of 1994) for the said amount and costs was obtained by the State Government from this court against the plaintiff.

3. The plaintiff paid Rs.696 on May 24, 1995 on account of the said decree and costs.

The plaintiff claims Rs.232 from each of the two defendants, with interest from the date of suit to that of payment.

No. 34—Suit for Contribution between Joint-Tort-Feasors

1. The plaintiff and the defendant purchased, on July 4, 1990 a house in equal shares from one Ram Narayan, in good faith believing the said Ram Narayan to be the adopted son of the former owner, Sant Lal, and remained jointly in possession of the said house from the date of purchase.

---

decreed, but not as to liability of each of the defendants, unless the same has been adjudicated upon. So it is open to one co-judgment debtor to show that he is not liable for contribution as he was a surety for the other. Even if a creditor exempts one debtor from the suit and obtains a decree against the other, the latter can bring a suit for contribution against the former, in spite of the fact that a claim on the original debt would be barred against him at the time he is called upon to contribute. So, if a suit is dismissed against one defendant on the ground of limitation and is decreed against the other, whose liability was kept alive, the latter can sue the former for contribution, if he had to pay more than his share of liability (*Abraham* v. *Raphial*, 39 M 288, 17 MLJ 746, 27 IC 337, 16 MLJ 569). This rule will equally apply to a mortgage decree (*Bibari* v. *Indra*, 104 IC 206, 45 CLJ 571, 31 CWN 985, A 1927 Cal 665 DB). A decree for contribution, except one between co-mortgagors, is always personal and no charge can be claimed on the property in respect of which the plaintiff had made the payment (*Bindeshri* v. *Girdhar*, 34 IC 91 All).

Costs : Generally there is contribution in respect of costs provided the suit was *bonafide* (*Ramdeo* v. *Rai Baijnath*, 58 IC 31; *Ramsarup* v. *Baijnath*, 43 A 77, 18 ALJ 872, 58 IC 324). There is no contribution, if the parties had joined in bringing a deliberately false claim (*Kalanath* v. *Jadu Nandan*, 58 IC 28). The general rule is that there will be contribution for costs unless the defendant can show some equity which entitles him to exemption (*Baburam* v. *Badridas*, 24 ALJ 720; *Kulada Prasad* v. *Gribala*, 40 CWN 1089). For instance, he can plead that he had admitted the claim and costs were incurred simply on account of the plaintiff's contest (*Bhawani Prasad* v. *Ram Prasad*, 167 IC 913, A 1937 All 227; *Bishambhardeo* v. *Hitnarayana*, 160 IC 796, A 1936 Pat 49).

2. One Sri Narayan brought a suit (being suit No.14 of 1994) against the parties in the court of the Civil Judge at Varanasi, on the allegations that the said Ram Narayan was not the adopted son of the said Sant Lal, and that the said Sri Narayan was, nephew and heir of Sant Lal, real owner of the said house.

3. The plaintiff and the defendant agreed to defend the suit jointly but the plaintiff incurred all the costs amounting to Rs.3,200.

4. The said Sri Narayan obtained a decree for ejectment, mesne profits and costs against the parties, and realized Rs.14,000 on account of mesne profits and costs from the plaintiff.

If costs are awarded against several independent trespassers claiming under separate titles, there is no right of contribution between them (*Nand Lal* v. *Beni Madho*, 40 A 675, 16 ALJ 689, 47 IC 980; *Parsottam* v. *Lachmi Narayan*, 40 A 99, 20 ALJ 890, 69 IC 688).

Joint-tort-feasors: A suit for contribution by one tort-feasor, who has made a payment occasioned by the tort against another tort-feasor is maintainable. (*Kushal Rao* v. *Bapu Rao*, A 1942 Nag 52; *Dharnidhar* v. *Chandrasekhar*, A 1951 All 774 (FB); *Edra Venkatrao* v. *Edra Venkayya*, A 1943 Mad 38). The liability of joint tort-feasors is joint and several. The plaintiff can recover the whole of the damage from one of the joint-tort-feasor, who cannot insist on apportionment (*Ahsanali* v. *Kazi Syed Hifazatali*, A 1956 Nag 146; *Prasani Debi* v. *State of Haryana*, (1973) 75 PLR 811).

Co-mortgagors. As several properties mortgaged to secure one debt are, as between the owners, liable to contribute rateably to the debt secured if whole debt is realised from some property, the owner of such property has a right to call upon the owners of the other properties, to contribute rateably to the amount which he had to pay in excess of that due from his property (section 82 and 95, Transfer of Property Act). This liability of the owners of the other properties is not personal but is limited to the property mortgaged, in other words, there is a charge of the rateable mortgage money on each property and the suit for contribution must, therefore, be for the enforcement of that charge (*Ibn Hasan* v. *Brij Bhukan*, 1 ALJ 148; *Hira* v. *Palku*, 3 Pat LJ 490.). The prayer should be for sale of the property, subject to the charge, *and not for a simple money decree*. The rateable mortgage money charged on each property should be determined by the ratio of the values of the several properties *at the date of the mortgage*. The value should be the market value, *minus* the amount of any prior encumbrances to which the property was subject. The money which the plaintiff had to pay or which was realized from his property and which has to be distributed over all the properties is the legitimate mortgage money or cost of a mortgage decree or execution, but not any other money, e.g., if the plaintiff got the auction sale of his property set aside under O.21, R.89, by paying an

The plaintiff claims from the defendant a moiety of the amount paid by him to Sri Narayan and of that spent by him as costs, *i.e.*, Rs.8,600 in all, with interest from the date of suit to that of payment.

No. 35—Suit for Contribution between Co-Mortgagors

1. One Ram Lal was the owner of two houses bearing municipal numbers 25 and 26 in Katra, Allahabad.

2. The said Ram Lal hypothecated house No.25 by a bond dated January 21, 1986 to one Roshanlal.

---

additional 5 per cent for the purchaser, he cannot claim contribution in respect of it (*Bhagwan Singh* v. *Md. Mazahar*, 12 ALJ 394; also see, *Subodh Chandra Das* v. *Satish Chandra Das*, 1978 ALJ 628).

If, however, one of the two mortgaged properties has been sold by the mortgagor, no suit for contribution will lie against the purchaser, if the whole mortgage money is realized from the property left with the mortgagor (section 56, Transfer of Property Act). But if the latter property had also been sold to another person, such person could claim contribution from the first purchaser (*Dih Dayal* v. *Lursaran*, 42 A 336; *Magniram* v. *Mehadi*, 31 C 102). The release by mortgagee of any part of the mortgaged property does not absolve that part of the liability from contribution under section 82 (*Shah Ram Chand* v. *Prabhu Dayal*, A 1942 PC 50).

If a part of the mortgaged property is sold subject to the mortgage, the owner of the other part has a right of contribution from the purchaser (*Rama Shankar* v. *Ghulam Husain*, 19 ALJ 584). But there is no right of contribution, as against a part of the property sold in execution of a decree on the mortgage (*Karamat Ali* v. *Gorakhpur Bank*, 44 A 488). The remaining property is liable for the whole balance of the mortgage debt (*Bhora Thakurdas* v. *Collector of Aligarh*, 32 A 612). It has been held by the judges of the Allahabad high Court (Banerji, J. dissenting) in *Ibn Husain* v. *Brij Bhukan*, 29 A 407, that no charge arises unless the whole mortgage money is satisfied by plaintiff's property and if only a portion is satisfied, no charge for the excess arises in favour of the plaintiff.

The amount to be charged on each property should be carefully worked out by the plaintiff according to the above principles, and, if the working is complicated, it should be given separately in the plaint as "Particulars of the amount claimed".

Parties : As the respective liabilities of all parties is to be determined in such a suit, once for all, all interested persons should be impleaded (*A. James* v. *Achaibar Singh*, A 1940 Pat 119, 185 IC 297.).

Limitation : A suit for contribution must be brought within three years of the payment (Article 23 or 48 of the Limitation Act 1963) or within 12 years if the charge is enforced (Article 62 of Act of 1963).

Defence : The defendant may deny his liability in toto or in part, for which the

3. By a subsequent bond dated November, 18, 1989, the said Ram Lal hypothecated both the houses No.25 and 26, to one Pran Sukh.

4. On June 20, 1990, the said Ram Lal executed, for consideration, a sale-deed in favour of the plaintiff in respect of his equity of redemption in house No.26.

5. On March 20, 1991, the defendant purchased the equity of redemption in house No.25 in execution of a simple money decree against the said Ram Lal.

6. Pran Sukh, mortgagee of both the houses Nos.25 and 26 obtained a decree No.410 of 1994 for sale of both the said houses, on foot of his bond, dated November 18, 1989, and in execution thereof, purchased house No.26 for Rs.90,000 which was the amount of his decree.

7. The plaintiff claims Rs.30,000 to be the rateable charge of the said mortgage debt of Pran Sukh on house No.25.

Particulars : The market values of houses Nos.25 and 26 on the date of Pran Sukh's mortgage were Rs.80,000 and Rs.1,00,000 respectively. As the amount of the prior charge of the said Roshanlal on house No.25 was on the date of Pran Sukh's mortgage, Rs.30,000, its contributing value was of Rs.50,000. Houses Nos.25 and 26 were, therefore, liable to contribute towards Pran Sukh's mortgage debt of Rs.90,000 in the ratio of Rs.50,000 to Rs.1,00,000, *i.e.* the proportionate charge on house No.25 was Rs.30,000.

The plaintiff claims Rs.30,000, with interest from date of suit to date of payment, or, in default, sale of the house No.25.

---

decree was passed against the parties was payable by the plaintiff himself. The Calcutta High Court has held that a defendant against whom a decree for rent had been passed jointly with the plaintiff could not show that he had no interest in the tenure (*Debendra* v. *Prosonna*, 95 IC 41, A 1926 Cal 951 DB). He may plead that the plaintiff has not paid the whole decretal amount, but has obtained a reduction from the decree-holder by private settlement, or that both parties had paid the debt through the plaintiff. The mode of determining the respective liabilities of the parties adopted by the plaintiff may be attacked. Where the parties are partners, defendant may plead that the suit is not maintainable without a claim for dissolution of the partnership (*Damodara* v. *Subaraiya*, 43 IC 217 Mad), or that the claim is barred by laches (*Gattulal* v. *Gulab Singh*, 1985 (1) SCC 932).

DECREE *(j)*

No. 36—Suit for Damages for not Certifying Payment of a Decree

1. On January 20, 1992, the plaintiff paid to the defendant, and the defendant accepted the sum of Rs.1,200 in full satisfaction of the defendant's claim under decree No.520 of 1990, passed by this court and there was thus an implied agreement that the defendant would certify the payment to court and would not take out execution of the decree.

2. In spite of the aforesaid satisfaction, and in breach of the said implied agreement, the defendant put the said decree in execution and got a warrant of attachment of the plaintiff's movable property issued by this court. The plaintiff had thus to pay, and he did pay, on May 26, 1992, the sum of Rs.1,276, being the decretal amount and costs entered in the warrant of attachment.

The plaintiff claims Rs.1,276 as damages, with interest from the date of suit to that of payment.

No. 37—Suit for Refund of an Uncertified Payment

1. On January 20, 1992, the plaintiff paid Rs.800 to the defendant in part payment of the latter's decree No.520 of 1990 passed by this

(j) No uncertified payment can be recognised by the execution court and the decree must be executed in spite of any payment having been made by the judgment-debtor. The only remedy of a judgment-debtor against such a dishonest decree-holder is by a regular suit. Even if the act of the decree-holder is fraudulent, still the judgment-debtor can have no redress in the execution proceedings (*Biroo* v. *Jainurat*, 13 IC 63, 16 CWN 923).

But the suit which a judgment-debtor can bring is not one to enforce an uncertified payment (*Abdul Rahman* v. *Khoja*, 11 B 6), or for an injunction to restrain execution (*Lal Das* v. *Kishor Das*, 22 B 463). **It is a suit for breach of an implied contract to certify payment** and not to take out execution for the amount received out of court (*Krishna* v. *Savuri Muthu*, 36 MLJ 396, 42 M 338, 50 IC 584; *Gopalaswami* v. *Nammalwar*, 36 MLJ 175, 48 IC 810; *Hanmatt* v. *Sobbohat*, 23 B 394; *Ramdas* v. *Sukhdeo*, 178 IC 196). In this view, the mere fact of applying for execution would, though amounting to a breach of the contract, gives no cause of action unless any damages have accrued to the plaintiff. If he is made to pay any money or is put to any loss on execution, he can recover it. The money paid to the decree-holder and not applied by him to the purpose for which it was paid can be recovered on the ground of failure of consideration (*Genda* v. *Nihal*, 30 A 464, 5 LJ

court, and the defendant agreed to credit the money towards the said decree.

2. On June 20, 1992, the defendant applied for execution of the said decree in full, and did not give credit for the sum of Rs.800 paid to him as aforesaid.

3. The plaintiff had raised the said sum of Rs.800 by a loan from Ram Narain of Khatauli at an interest of 12 per cent per annum.

The plaintiff, therefore, claims refund of Rs.800 with Rs.40 on account of interest from the date of payment to the date of suit at 12 per cent per annum, by way of damages and further interest from the date of suit to that of payment.

No. 38—Suit for an Injunction to Restrain Execution

1. The defendant instituted a suit in this court against the plaintiff, being suit No.148 of 1995, for recovery of Rs.2,000.

2. On June 22, 1995, during the pendency of the said suit, the parties verbally agreed with each other that if the plaintiff did not contest the said suit and allowed a decree to be passed *ex parte* the defendant would accept Rs.1,800 only, in satisfaction of his whole claim, if paid within a year of the decree and would not execute his decree.

475; *C.K. Xavier* v. *Bharaaj Singh*, A 1987 Ker. 145 (DB); *Mahbub Ali* v. *M. Syed Md. Husain*, 104 IC 419 All; *Shyama Charan* v. *Chairanya*, 11 IC 1 Cal). In this view, a suit for refund of the money will lie as soon as the decree-holder puts in an application for execution without crediting the payment, *i.e.*, even before the judgment-debtor had been made to pay the money twice over. It would, however, be safer for the judgment-debtor to institute his suit only after depositing the decretal amount in the execution court, and then he can bring a suit for damages instead of one for refund, or the suit can be brought in the alternative for damages.

Limitation : Three years under Article 55 of Limitation Act, 1963 for suits for damages for breach of contract. If the suit is framed as one for failure of consideration, three years from failure under Article 47 of the Act of 1963. In order to attract Article 47 three things must be established; firstly, the suit must be for money paid by the plaintiff to the defendant; secondly, such money must have been paid upon a consideration which was in existence at the time of payment; and thirdly, the consideration should have afterwards failed (*Veerbhadra Pillai* v. *Rajeshwari Vedachalam*, (1974) 2 MLJ 398).

Defence : Defendant may plead that no damages have, occurred to the plaintiff, or that the payment was not made specifically towards the decree, hence the

3. The plaintiff did not contest the said suit and an *ex parte* decree was passed against him for Rs.2,000 and costs.

4. The defendant has, on August 20, 1995, in breach of his aforesaid agreement, put in an application for execution of the said decree and threatens to realise the whole amount of the said decree by execution proceedings.

5. The plaintiff claims an injunction restraining the defendant from executing the said decree except in case the plaintiff fails to pay the defendant Rs.1,800 within one year of the said decree.

(*For suits to set aside decree see under "Fraud" "Minor"*).

DEPOSIT *(k)*

No. 39—Suit for Recovery of Deposit

1. The defendant is a firm carrying on business at Saharanpur.

2. On April 20, 1988. the plaintiff deposited a sum of Rs.2,000 with the defendant on condition that the defendant would repay the said sum with interest at 6 per cent per annum on demand.

3. On April 19, 1995 the plaintiff demanded payment of the principal and interest due to him but the defendant did not pay the amount or any part thereof.

---

defendant has appropriated it towards another debt, or that the payment was specifically made towards another debt.

An agreement anterior to the decree cannot be pleaded as a bar to the execution of a decree but a suit lies for injunction to restrain the decree-holder from executing the decree in contravention of the agreement (*Panchananda* v. *Brojendra*, 126 IC 265, A 1930 Cal 356, 34 CWN 150; *Bhaskar* v. *Nilkanth*, A 1938 Nag 265, *Coop. Bank* v. *Ram Sarup*, A 1953 Punj 267; *Mulla Ramzan* v. *Mg Po Kyaing.*, A 1926 Rang 140; *Krishnaraj Trading Corpn.* v. *Ram Saran Das*, 1962 ALJ 442). The Madras and Andhra Pradesh High Courts are of a different opinion and hold that such a pre-decree agreement can be enforced in execution (*Butchiah Chetty* v. *Tayar Rao*, A 1931 Mad 399; *Sait Hemraja* v. *Katta Subramanyam*, A 1960 AP 324).

(k) See also 'Suits for money lent', post. The test to distinguish a loan from a deposit is whether there was an obligation on the debtor to seek out the creditor and repay him (in which case it is loan) or whether he was to keep the money till the creditor asked for the same (in which case it is a deposit). This essential character of the deposit does not change even if it is for a fixed term (*Md. Akbar* v. *Attar Singh*, A 1936 PC 171; *Ram Janki Devi* v. *Juggilal Kamlapat*, A 1971 SC 255; *Mansa Ram & Sons* v. *Janki Das*, A 1984 All 267).

The plaintiff claims:

(1) Payment of Rs.2,000 principal and Rs.840 interest up to the date of suit; and

(2) interest from the date of suit to that of payment.

DOWER DEBT *(l)*

No. 40—Suit for Prompt Dower

1. The parties are Sunni Mohammedans.

2. On December 20, 1981 the plaintiff was married to the defendant and at the time of the marriage it was verbally agreed between the plaintiff and the defendant (*or*, between Sadulla, father of the plaintiff acting for the plaintiff who was then a minor and Chand Khan, father of the defendant,

---

The conditions on which the deposit was made be stated. As cause of action in such cases arises from the date of demand, demand and refusal must also be alleged, and it is in this latter feature that a deposit differs from a loan (*Ghurcharan* v. *Ram Rakha*, 171 IC 506, A 1937 Lah 81, case under Article 60 of the Act of 1908; *D.B. Brijmohandas* v. *Narsinghdas*, A 1971 MP 243 case under Article 22, Limitation Act 1963). Such demand may be waived by repudiation of liability; but a defendant cannot both repudiate the liability and plead want of demand (*Nirpendra Nath* v. *Arunchandra*, A 1940 Pat 129). Article 60 was held to apply not only to a suit against a regular banker, but against every one who is, with regard to the particular transaction in suit, a banker as regards the particular plaintiff (*Motigavri* v. *Naranji*, 102 IC 408, 19 BLR 423), and when the deposit was made under an agreement that it should be payable on demand (*Ammalu* v. *Narayanam*, 111 IC 210, 51 M 549, A 1929 Mad 509; *Firm Pt. Ram Prasad* v. *Bai Rewa*, A 1970 Guj 269). When the deposit is made for a fixed period the money is payable on the expiry of that period and no demand was held to be necessary, Article 115 (and not Article 60) was held to apply to such cases (*Safema* v. *Banerji*, 164 IC 412, A 1936 Rang 338), but the Patna High Court held that in such cases the money was payable on demand after the fixed time and Article 60 was applicable (*Nokhlal* v. *Mojiban*, 182 IC 831, A 1939 Pat 261). Now Articles 60, 66 and 115 have been replaced in the Act of 1963 by Articles 22, 28 and 55 respectively.

Defence: If the defendant is not a regular banker, he may raise a question of limitation by pleading that it was a case of loan and not of deposit. A banker may plead that there was a condition of a previous notice before payment.

(l) Dower, under the Mohammedan Law, is a debt which must be paid according to agreement. The court has no power to reduce the contractual amount, except in Oudh and Ajmer-Merwara (*Mahomed Sultan* v. *Sarajuddin*, 161 IC 300, A 1936 Lah 183). A widow obtaining possession of her husband's property in lieu of dower has a lien on the property for the dower, and may retain it until the debt is

acting for the defendant who also was then a minor) that the dower debt of the plaintiff should be Rs.15,000 out of which sum Rs.5,000 should be prompt (*or*, that Rs.15,000 should be the dower debt. It was not specified what portion of the said amount was to be prompt, but the plaintiff claims that Rs.5,000 be held to be prompt), (*or*, by a *Kabinama* dated December 20, 1981, executed by the defendant at the time of his marriage with the plaintiff the defendant agreed to pay Rs.5,000 as prompt dower).

[*N.B.*- These are three precedents for separate suits based on different allegations. A plaintiff may base her suit alternatively on the express contract or on her right to have a portion of the dower adjudged as prompt. In that case, after setting out the allegations as in para 2 (without the matter within the second brackets) the plaintiff should add the following para :

"Alternatively, if it be found that there was no agreement that Rs.5,000 should be prompt, that plaintiff will ask the court to hold in the circumstances, that Rs.5,000 should be declared to be prompt."]

3. On August 22, 1982, the plaintiff demanded of the defendant payment of Rs.5,000, but the defendant refused to pay it and has not paid it or any part thereof.

---

paid, but such possession must have been lawfully obtained and not adversely to the other heirs (*Isbar Fatima* v. *Anwar Fetima*, 182 IC 801, A 1939 All 348). It is immaterial whether she came in possession as creditor for dower debt or otherwise. Not only she but her heirs also can retain possession until the debt is paid (*Mt. Haliman* v. *Md. Manir*, A 1971 Pat 385). This lien is according to some High Courts, negotiable and transferable (*Cooverbai* v. *Hayatbi*, A 1943 Bom 372; *Beeju* v. *Moorthuja*, A 1920 Mad 666, 53 IC 905, 43 Mad 214 FB). The correctness of this view was doubted by Privy Council in *Mst.Mina* v. *Ch. Vakil*, A 1925 PC 63, 86 IC 579. Even in such cases, she has no charge on the property and a suit for dower is always one for a personal decree (*Kaniz Fatima* v. *Ramanandan*, 21 ALJ 269, 45 A 384; *Muniram* v. *Mukhtor*, A 1940 All 521, 1940 ALJ 789; *Zabunnissa* v. *Nazir Hasan*, A 1962 All 197), and a *bona fide* purchaser for value from the heirs gets an unassailable title (*Saiad Qasim* v. *Habibur Rahaman*, 27 ALJ 777, 31 BLR 879, 33 CWN 926, 57 MLJ 361, A 1929 PC 174), but a widow in possession can ask the court ordering execution sale of the property to declare her right to retain possession until payment of dower (*Mt. Ghafooran* v. *Ramchandra*, A 1934 All 168). In Punjab it has been held that if there are no outstanding debts, dower debt will be a charge on the husband's assets (*Mt. Nawab Begum* v. *Husain Ali*, 171 IC 831, A 1937 Lah 589). If it is against the heirs of the husband, the suit should be for recovery of the money from the assets of husband. If all the assets are in her own possession she

The plaintiff claims Rs.5,000 (*or*, Rs.5,000 or any other sum this court may hold to be reasonable as the plaintiff's prompt dower), with interest from the date of suit to that of payment.

No. 41—Suit for Dower after Dissolution of Marriage

1. The plaintiff was married to defendant (*or*, to Sadulla, the deceased father of the defendant) on June 20, 1981, and it was verbally agreed, at the time of the marriage, between Iftikhar Uddin, father and guardian of the plaintiff, acting for the plaintiff who was then a minor, and Abudulla, father and guardian of the defendant (*or*, of Sadulla), who was also then a minor, that the plaintiff's dower should be Rs.8,000 out of which half was to be prompt and half deferred.

2. The defendant divorced the plaintiff at her father's house on August 3, 1984 by uttering the words "I divorce you" three times before the plaintiff. (*or*, the said Sadulla died on August 3, 1984, and plaintiff and the defendant have since then been in possession of the whole of his property, according to their legal shares).

3. The defendant has not (*or*, the said Sadulla has not, *or*, the defendants have not) paid the said sum of Rs.8,000 or any part thereof. The plaintiff never made any demand of her prompt dower during the continuance of the marriage.

---

cannot sue the heirs for dower (*Mirza* v. *Shahzadi*, 19 CWN 502). A widow in possession of her husband's property in lieu of dower cannot sell the property and if she does, the heirs can recover it without paying the debt (*Sitaram* v. *Ganesh*, 101 IC 683, 4 OWN 330).

Prompt dower can be demanded at any time after marriage and consummation is not a condition of its payment (*Husain* v. *Gulab*, 35 B 386, 11 IC 558, 13 BLR 511; *Pukhraj* v. *Hidayat*, A 1938 Pesh 72, 178 IC 182), nor does consummation of marriage debar a wife from suing for her prompt dower (*Mohammad Taqi* v. *Farmoodi*, A 1941 All 181, 195 IC 353, 1941 ALJ 118). It should be claimed within three years of the demand being refused, but, if it is not demanded and refused, it can be claimed along with the deferred dower. Some times the nature of the dower is not specified in the contract. The whole of it is then taken to be prompt under Shia Law (*Masthan* v. *Assan*, 23 M 371 PC), but under the Sunni Law, the court can declare any reasonable portion to be prompt and the rest will be deferred (*Mohammad Subban Ullah* v. *Sagbir*, 17 ALJ 625, 50 IC 740). The proportion will depend on custom, and in the absence of custom, on the status of the parties and the amount of dower (*Mangat*

4. The plaintiff has made a deduction of 1/8th of the debt from her claim, in view of the fact that she is herself owner and is in possession of her legal 1/8th share in the property of the said Sadulla and is thus liable to 1/8th share of his debts.

The plaintiff claims Rs.8,000 (*or*, Rs.7,000) with interest from the date of suit to that of payment, from the defendant (*or*, from the assets of Sadulla in the hands of the defendants).

No. 42—Suit for Dower by Wife's Heirs Against Husband's Heirs

1. On April 20, 1968, one Khuda Baksh was married to one Mt. Ilahi Jan, and, by a verbal agreement between the said Khuda Baksh and the said Mt. Ilahi Jan, it was agreed, at the time of the marriage, that the said Mt. Ilahi Jan should have deferred dower of Rs.10,000.

2. The said Khuda Baksh died on December 10, 1994, and left the defendants, who are his sons by another wife, and Mt. Ilahi Jan, widow, as his only heirs.

3. The said Mt. Ilahi Jan died intestate on January 15, 1995 leaving the plaintiff, her mother, as her only heir.

---

v. *Mst. Sakina*, 141 IC 1211, A 1934 All 441; *Maimuna* v. *Sharafatulla*, 131 IC 115, 1931 ALJ 197, A 1931 All 403; *Nasiruddin* v. *Amatul Mughni*, A 1948 Lah 135, ILR 1947 Lah 565). It has been held in *Nasiruddin* (ibid) that in the absence of any evidence presumption of half and half may be raised. The court has even power to award the whole amount as prompt (*Husain Khan* v *Gulab*, 35 B 386). In Madras it has been held that the whole will be prompt even if the parties are Sunnis (*Sheikh Mohamed* v. *Ayeesha*, 1937 MWN 1077; *Masthan* v. *Assan Bibi*, ILR 23 Mad 371 FB).

A wife can base her claim on an express agreement about prompt dower and in the alternative, on Muhammedan Law, and even if she brings a suit on an express agreement she can, in the event of the finding going against her, rely on Muhammedan Law (*Mohbooban* v. *Mahomed*, 8 Pat 645, A 1929 Pat 207, Contra *Bhuri* v. *Asghari*, 94 IC 959). If the suit is brought after dissolution of marriage, this question becomes immaterial unless limitation on the ground of demand and refusal during the marriage is pleaded by the defendant. A dower can be fixed even after marriage and the amount fixed at marriage can even be varied by a post-nuptial agreement (*Fatima* v. *Laldin*, 171 IC 421, A 1937 Lah 345; *Chan Pir* v. *Fakar Shab*, A 1940 Lah 104, 189 IC 725). If a Sunni governed by Hanafi Law, divorces his wife before consummation, the wife can get only half the dower, even though the whole is prompt (*Tajbi* v. *Nattar*, A 1940 Mad 888, 1940 MWN 864). Dower under the

4. The dower debt of the said Mt. Ilahi Jan has remained unpaid.

5. Mt. Ilahi Jan was in possession of only one house (being No. 25, Cotton Street, Calcutta) out of the estate of the said Khuda Baksh, and the plaintiff is at present in possession of the said house. The whole of the rest of the estate is in the possession of the defendants. The plaintiff offers to surrender possession of the said house.

Mohammedan Law is an obligation imposed upon husband as a mark of respect for his wife. The right to claim prompt dower precedes cohabitation. The wife can refuse to live with husband and permit him to have sexual intercourse so long as prompt dower remains unpaid (*Nasra Begum* v. *Rajwan Ali*, 1979 AWC 722).

In a suit for dower, **it should be stated when and how the amount was fixed, whether before, or after, or at the time of marriage, and whether with the husband himself or his guardian. It should also be stated whether the dower was prompt or deferred.** If prompt dower is claimed, a demand and refusal must be alleged as that is a part of the cause of action (*Rance* v. *Rance*, 2 IA 235; *Musammat Muluka* v. *Musammat Jameela* , 11 Beng LR 375). A previous demand is not necessary if the amount of prompt dower is unascertained (*Mohammad Taqi* v. *Farmoodi* A 1941 All 181, 105 IC 353, DB; *Bibi Rehana* v. *Iqtidar*, A 1943 All 184 DB).

If there was no specification in the contract, and the plaintiff claims a portion as prompt, the fact should be stated and it should be alleged that the parties are Sunnis. If the suit is brought after the dissolution of marriage, the date of dissolution should be given, and if any portion of the dower was prompt, it must be alleged that it was not demanded during the continuance of the marriage, or that it was demanded and refused within three years before the suit. Proper dower to be fixed by the court can be claimed even if there was no contract for a dower. If there is no satisfactory evidence of dower, the court will be justified in awarding *Sharai* dower only (*Iftikhar* v. *Sharif Jehan*, 102 IC 838, 4 OWN 150, A 1927 Oudh 194). The amount of dower cannot be less than 10 dirams, (*Asma* v. *Abdul Samad*, 32 A 167). In any case, it is not necessary to allege the social status of the parties or the amount of dower of other members of the family of the wife, as they are mere evidence.

Heirs or legal representatives of wife can bring suit for recovery of dower debt after the death of wife (*Mohd. Janudul Haque* v. *Mohd. Zubair Haider*, A 1981 Patna 345). When a wife's heirs after her death brings a suit against the husband, reduction must be made in proportion to the husband's legal share as one of the heirs of his wife. When a claim is brought after the death of the husband there should be a reduction in proportion to the share of assets inherited by, and in possession of, the widow. If there is an apprehension of other creditors of the husband taking away the property in plaintiff's hands as assets of the husband, it is preferable to claim a decree against the whole assets, as, otherwise the plaintiff may be deprived of her share of property and also a part of her dower debt.

If a widow is in possession of an undistributed portion of her husband's estate, she can still sue the other heirs in possession of the remainder provided she

The plaintiff claims a decree for Rs.10,000 and interest from date of suit to that of payment against the entire estate of Khuda Baksh in the hands of the parties to be realised in any way the court directs. (*or*, the plaintiff claims that an account may be taken of the property of the said Khuda Baksh, deceased, and that the same may be administered under the decree of court).

---

offers to surrender possession of the portion which is in her possession (*Ghulam* v. *Sagir-un-nissa*, 23 A 432), or she may bring an administration suit. In the former case also, the suit really assumes the character of an administration suit. The nature of such a suit and how it should be tried has been duly explained in *Mirza* v. *Shahzadi*, 19 CWN 502. In an administration suit the widow can also ask for partition of the residue of the estate amongst all the heirs (*Amir Bi* v. *Abdul Rahim*, 110 IC 276, A 1928 Mad 760, 55 MLJ 266). In taking accounts of the profits of property in the hands of the plaintiff, the latter is entitled to have reasonable interest on the dower debt, which may ordinarily be 12 per cent per annum, set off against the profits (*Mirza* v. *Shahzadi*, 19 CWN 502; *Hamira* v. *Zubeda*, 38 A 581 PC). Interest from date of suit to that of realisation may be awarded (*Mamuna* v. *Sharafatulla*, 1931 ALJ 197, 131 IC 115, A 1931 All 403). The heirs of a Muslim dying intestate succeed to the estate of the deceased as tenants-in- common. They are liable to the extent of the shares they inherit in the estate of the deceased (*P.N. Veetil Narayani* v. *Pathummal Beevi*, A 1991 SC 720).

Limitation : Under the Act of 1908 was three years and ran in the case of prompt dower from the time when the dower was demanded and refused or, when no demand had been made during the continuance of marriage, from the time when the marriage was dissolved (Article 103) and, in the case of deferred dower, from the date of dissolution of marriage (Article 104), or if a time was fixed for payment, then from the expiry of that time (*Sarb Krishan* v. *Mt. Fatima*, A 1937 Lah 859). If the contract was by a registered instrument, the limitation was extended to six years (*Asiatulla* v. *Danes Md.*, 50 C 253). Under the Act of 1963 all such suits will be governed by the residuary Article 113, and the limitation would be three years from the date when the right to sue accrues. Dissolution once made gives a cause of action which cannot be renewed if after divorce the parties again live as husband and wife and subsequently the husband again divorces the wife (*Mt. Hayat Khatun* v. *Abdullah Khan*, A 1937 Lah 270). When demand and refusal were made, not on one date but on different dates, limitation runs from the date of refusal (*Razina* v. *Abida*, 1936 ALJ 1328, 1939 AWR 1049; also see, *Ahmadi Bibi* v. *Md. Mabood*, A 1979 All 37).

Defence: In addition to the usual plea disputing the amount of dower in all cases, the defendant may, in a suit for prompt dower, plead that no portion, or a very small portion, was agreed to be prompt. In other suits, it may be pleaded that a substantial portion was prompt, and that the same had been demanded and refused more than three years before the suit and claim for it is time-barred. The defendant

GUARANTEE *(m)*

No. 43—Claim on Guarantee of a Debt

1. On January 14, 1994, one Ram Ratan was indebted to the plaintiff in the sum of Rs. 4,640 on account of rent of a house.

2. On the said date, by a guarantee in writing and in consideration that the plaintiff would give time to the said Ram Ratan for payment of his said debt and would forbear from suing the said Ram Ratan for the said debt until May 14, 1994, the defendant agreed to pay to the plaintiff the said Rs.4,640 on May 14,1994, if the said Ram Ratan failed to do so.

3. The plaintiff gave time to the said Ram Ratan and forbore to sue him. The said Ram Ratan failed to pay the said sum on the said day and the same is still unpaid.

---

may plead that the widow has been in possession of the estate of the husband in lieu of dower debt and must account for the profits. He may plead that the wife had relinquished her dower debt in consideration of obtaining a divorce from the husband. But no relinquishment is valid unless the woman was at the time major not according to the Muslim Law but according to the Majority Act (*Nejumnissa* v. *Sirajuddin*, 17 Pat 303, 1938 PWN 144; *Abidhunnisa* v. *Md. Fathi*, 35 MLJ 648). The Allahabad and the Calcutta High Courts have taken a contrary view (*Qasim* v. *Kaniz Sakina*, A 1932 All 649 ; *Mazharulal* v. *Abdul Ghani*, A 1925 Cal 322). But the minority of the husband cannot be pleaded against his contract of dower, for section 2 of the Indian Majority Act does not affect the capacity of any person to make a contract for dower (*Sayab* v. *Bibi Khathoo*, 29 IC 587; *Mazharulal* v. *Abdul Ghani*, A 1925 Cal 322).

(m) See sections 124 to 147 Contract Act. For difference between *Guarantee* and *Indemnity* see *Ramchandra* v. *Shapurji*, A 1940 Bom 315. Briefly speaking, a contract of guarantee differs from that of indemnity in that it implies the existence of three parties and that it is entered into for the security of the creditor and not for the reimbursement of a loss. The guarantee should be a definite undertaking to indemnify and the mere saying by A that B may safely do business with C will not constitute A surety for C (*Mahommed Shamsudin* v. *Shaw Wallace and Co.*, 184 IC 153, A 1939 Mad 520). A person sought to be made liable as surety should undertake to perform the promise or discharge the liability of third party in case of his default (*Bitton Bibi* v. *Kuntee Lal*, A 1952 All 996) The surety may be sued separately or along with the principal and the decretal amount can be realised against the surety alone in the first instance in execution proceedings if there is a decree against both the debtor and the surety (*Bank of Bihar* v. *Damodar Prasad*, A 1969 SC 297; *State Bank of India* v. *Indexport Registered*, A 1992 SC 1740). **The contract of guarantee must be alleged as any other contract. Then the facts showing the default of the principal should be alleged.**

The plaintiff claims Rs.4,640 with interest from May 14, 1994 at the rate of 1 per cent per mensem upto date and further interest upto the date of payment.

No. 44—Suit Against Surety for Payment of Rent

(Form No. 12, Appendix A, C. P. C.)

1. On the ___ day of _____19__, EF hired from the plaintiff, for the term of _____ years, the house No._____, _____ Street), at the annual rent of _____ rupees payable (monthly).

2. The defendant agreed, in consideration of the letting of the premises to EF, to guarantee the punctual payment of the rent.

3. The rent for the month of_____19__, amounting to _____ rupees, has not been paid.

[*If by the terms of the agreement, notice is required to be given to the surety, add*--]

The liability of a surety being co-extensive with that of the principal, the plaintiff can, in the absence of a clear intention to the contrary, sue either of them without suing the other (*Depak Datt* v. *Secy. of State*, 118 IC 429), and it is not necessary that the creditor should exhaust all remedies against the debtor or should give notice of the principal's default to the surety (*Sankanna* v. *Virupakshappa*, 7 B 146; *Nagpur Nagrik Sahakari Bank Ltd.* v. *Union of India*, A 1981 AP 153); nor is it necessary to make a demand upon the principal before proceeding against the surety, unless such notice is stipulated in the contract (*Walton* v. *Mascall*, 1844 M & W 452). Where the contract provided that if the mortgage money could not be realised from mortgage property, mortgagee may realise it from the surety, it was held that the mortgagee could not proceed against the surety without first proceeding against the mortgaged property, and accordingly, time begins to run against the surety when the mortgagee fails to recover the whole money from the mortgaged property (*Daljit* v. *Har Kishan*, A 1940 All 116, 187 IC 152). A contract of guarantee cannot be enforced beyond the time provided in its terms (*State of Maharashtra* v. *M. N. Kaul*, A 1967 SC 1634). If the guarantee is for a limited amount only, the limit must be specified in the plaint as the surety cannot be made liable for more.

A bank guarantee is not extinguished even if the principal debtor company goes into liquidation (*Maharashtra S. E. Bd.* v. *Official Liquidator*, A 1982 SC 358). A bank guarantee stands independent of any claim or counter claim between the contracting parties and its enforcement cannot be prevented on any ground of alleged claim by the party on whose behalf the bank guarantee was given against the party in whose favour it was given (*National Project Construction Corp.* v. *G. Ranjan*, (1985) 98 CWN 186- case law discussed). A bank giving an irrevocable

4. On the ____ day of _____19__, the plaintiff gave notice to the defendant of the non payment of the rent, and demanded payment thereof.

5. The defendant has not paid the same.

No. 45—Suit Against Principal as well as Surety for Price of Goods

1. On January 4, 1995, the defendant No.1 verbally agreed that if the plaintiff supplied any goods upto a limit of Rs.16,000 to defendant No.2 on credit, defendant No.1 would be responsible to the plaintiff for the due payment of their price.

2. The plaintiff accordingly supplied to defendant No.2 the goods worth Rs. 5,900 from January 4, 1995 to January 31, 1995.

Particulars:

Date	*Goods Supplied*	*Price*
*	*	*

3. The plaintiff sent his bill to defendant No. 2 and a copy of the same to defendant No.1 on February 1, 1995, and intimated in that bill that if the same was not paid within one week of presentation, the plaintiff would charge interest at 1 per cent per mensem.

4. Neither of the defendants has paid the plaintiff the said sum of Rs. 5,900 or any part thereof.

---

unconditional guarantee to pay upon the demand of the party in whose favour it is given cannot question the demand on the ground that the occasion for invoking the guarantee had not arisen (*Vinay Engineering* v. *Neyveli Lignite Corpn.*, A 1985 Mad 213; *D.T.H. Construction* v. *S.A.I.L.*, A 1986 Cal 31). But this does not bar a suit or application against the party which is seeking to invoke the bank guarantee to restrain it by injunction from doing so (*Union of India* v. *Meena Steels Ltd.*, A 1985 All 282 DB).

Limitation : The question as to when the time begins to run against the surety has to be decided on the terms of the contract of guarantee in each case. Where the contract of guarantee is clear that the creditor must first proceed against the principal debtor and that only when he fails to realise the whole amount due from the principal debtor, he is to proceed against the surety, the time begins to run against the surety only from the date when the creditor fails to realise the amount (*Daljit Singh* v. *Harikrishnan Lal*, 1940 All 116). The liability of the surety may be kept alive by his making payments towards the debt or his acknowledgment of

The plaintiff claims:

(1) Rs.5,900, with Rs.350 as interest from February 8, 1995 to date of suit.

(2) Further interest from date of suit to that of payment.

(For precedents of suit on security bonds see under "Bonds" and for interest, see precedents and note under (r), post)

---

liability. But any payment made by the principal debtor will not start a fresh period of limitation against the surety, the reason being that the relation of principal and surety does not give rise to an implied authority on the part of the principal debtor to make payment on behalf of the surety (*Kobal Dalji* v. *Kobal Sonu*, 28 Bom 248). The fact that the payment by the principal debtor was made with the knowledge and consent of the surety and even at his request makes no difference (*Brajendra Kishore* v. *Hindustan Cooperative Insurance Society*, 44 Cal 978). For the same reason an acknowledgment by the principal debtor cannot extend the limitation against the surety (*Dialu* v. *Nand*, 13 Lah 240, A 1931 Cal 691).

Defence: The surety can plead any fact making the guarantee invalid, e.g., misrepresentation concerning a material part of the transaction or concealment of a material circumstance (sections 142 and 143). He may plead that he has been discharged by any act or conduct of the plaintiff. Such act or conduct should be specifically alleged and it is not sufficient merely to say that he has been discharged. Acts and conduct which operate as a discharge of surety are laid down in sections 133 to 139 and 141, Contract Act. An unauthorised material alteration by promisee whether by adding anything to or by striking out anything from a written contract avoids the contract against the surety. In a document of guarantee, if the blank spaces relating to the amount for which the person stands as surety and the rate of interest are filled up without his consent, such filling up amounts to material alteration and discharges the surety (*S. Perumal Reddiar* v. *Bank of Baroda*, A 1981 Mad 180). If the employer of a servant whose fidelity has been guaranteed, continues to employ him even after a proved act of dishonesty without notice to guarantor, the surety is discharged (*Radha Kant Pal* v. *United Bank*, A 1955 Cal 217). It is well settled that a surety is not discharged by the discharge of the principal debtor by operation of law such as of the provisions of the Madras Agricultural Relief Act or the Insolvency Act. (*Jaganath* v. *Shivanarayan*, A 1940 Bom 247; *The Nellore Cooperative Urban Bank* v. *Mallikarjunayya*, 1947 II MLJ 487; *Subramaniam* v. *Chinnamuthu*, A 1942 Mad 145). The creditor's omission to sue debtor within the period of limitation does not operate as discharge of the surety (*Sankana* v. *Virupakshap*, 7 B 146; *Krishto Kishore* v. *Radhe Raman*, 12 C 330; *Subramania* v. *Gopala*, 33 M 350; *Narain Das* v. *Nanu*, 116 IC 421, A 1929 Nag 145).

(n) **An heir is not personally liable for the debts of his ancestor,** not even a Hindu son (*Lalta* v. *Gajadhar*, 1933 ALJ 550, A 1933 All 235; *Baijnath* v. *Banwari*, 134 IC 160, 12 Pat 961). Ordinarily the assets of the debtor are liable and the plaintiff

HEIR *(n)*

No. 46—Suit on a Bond Against the Executant's son who was Member of a Joint Hindu Family

1. The defendant is the son of Ramadhin deceased and was a member of a joint Hindu family with the said Ramadhin at the time of the latter's death. The said Ramadhin died on August 8, 1993, and defendant is in possession of the property of the said joint family.

2. On January 2, 1992, the said Ramadhin borrowed Rs.2,500 from the plaintiff, and in consideration of the loan, executed a bond agreeing to pay Rs.2,500 on demand, with interest at 12 per cent per annum with half-yearly rests.

The plaintiff claims a decree for Rs. _____ as per account given below, with interest from date of suit to that of payment against the joint family property of the defendant and the said Ramadhin in the defendant's hands.

---

should claim a decree not against the heir but against the assets of his debtor in the hands of the heir. It is not necessary to specify the assets or to prove them, if a legal heir is sued (*Shanker Lal* v. *Abdul Rahman*, 20 IC 407 Nag; *Shanker Lal* v. *Ganesh Singh*, A 1929 Nag 170, 89 IC 236; *Rajaram* v. *Nathu*, 120 IC 333 Nag). It has, however, been held that if it is proved that the defendant has not received any assets, the suit must be dismissed (*Tara Chand* v. *Dharman*, 1936 AWR 32). The plaintiff should allege in the plaint and prove, if it is not admitted, that the defendant came into possession of any property of the deceased before any decree can be passed (*Bhagmal* v. *Garimju Mal*, 83 IC 810, A 1923 Lah 471 DB).

If any person, who is not a legal heir, is sued on the ground that he is in possession of the assets, the plaintiff must allege and prove that the defendant is in possession of any assets of the debtor and is, therefore, a legal representative, otherwise no decree can be passed. Even in cases where the assets are in possession of an intermeddler, it is safer to join the legal heir also as a defendant with the intermeddler. The risk of not joining the legal heir is well illustrated in *A. Narasimaiah* v. *Jawantharaj*, 101 IC 110, 52 MLJ 229, where both were sued but the plaintiff exempted the real heir and obtained a decree against the intermeddler who was in possession of the assets. Afterwards the real heir sued the intermeddler and obtained possession, and the plaintiff decree-holder could not follow the property in the hands of the real heir as the latter had been exempted from the decree. A decree against a supposed heir is not binding on the real heir (*Angad* v. *Neelana*, 93 IC 625 Mad). But if a plaintiff, without any fraud or collusion, sues a person who would ordinarily be the legal representative in ignorance of

No. 47—Like Suit Against a Son who was not a Member of Joint Family, and Against Another not Heir

1. The defendant No.1 is the son of Ramadhin deceased, and defendant No.2 is the widow of Sheo Prasad, a predeceased son of the said Ramadhin.

2. *As in the last precedent.*

3. The said Ramadhin died on August 8, 1993.

4. On the death of the said Ramadhin, the defendant No.2 has got her name entered in the municipal assessment register on a half share in house No.812 situated in Shivaji Marg, Lucknow and left by Ramadhin, and she is in possession of the said half share.

---

circumstances, making another person the legal representative, then the decree obtained against the former will be binding on the latter (*Pulikku* v. *Thappaili*, 108 IC 409, A 1928 Mad 243 DB). In certain circumstances persons wrongly impleaded as legal representative have been held to represent the estate and the decree has been held to be binding on the true representatives when the plaintiff acted *bona fide* (*Mt. Chandri* v. *Hira Lal*, A 1933 Rang 73, 144 IC 663; *Jogeshwar Dass* v. *Sundar Shau*, (1973) 1 CWR 166), but in all such suits plaintiff must be diligent to find out and implead all the representatives (*Mt. Karan* v. *Matwal*, A 1933 Lah 380, 141 IC 580). Where only some heirs of deceased defendant are made party after *bonafide* enquiry made by the plaintiff the estate of the deceased is sufficiently represented and the decree would bind all the heirs (*Khaja Begum* v. *Khaja Mohuddin*, (1975) 2 APLJ 79, 1975 An LT 973).

Where a person takes possession of the estate of the deceased and appropriates or disposes it, he is an intermeddler and a decree can be passed against him as legal representative, and if the property of the deceased is not forthcoming in execution proceedings, the decree can be executed personally against him to the extent of the value of the property which has come to his possession (section 52(2), C.P.C.).

The Allahabad High Court took a very strict view and held that when the deceased was a member of a joint Hindu family with his son, his creditor could not obtain any kind of decree against a separated brother who had appropriated the deceased's crops (*Lachmi Chand* v. *Suraja*, 103 IC 338). It was held that the family being joint, there were no estate of the deceased with which the brother could intermeddle, until decree was passed which alone could make it an asset of the father under section 53 C.P.C.

If the defendant was a member of a joint Hindu family with the debtor at the time of the latter's death, he can be sued if the deceased had any separate property

The plaintiff claims decree for Rs.____ as per account given below with interest from the date of suit to that of payment against the assets of the said Ramadhin in the hands of the defendants.

No. 48—Like Suit Against a Member of a joint Hindu Family not being the son, when the Executant had no Separate Property

1. The defendant No.1 is the brother and defendant No.2 is the nephew of one Ramadhin.

2. The said Ramadhin died on August 8,1993 and was, at the time of his death, a member of a joint Hindu family with the defendants, and was the karta and manager of the said family. The defendants are in possession of the property of the said family.

3. *Same as para 2 of Precedent No.46.*

4. The said Ramadhin had taken the said loan for the expenses of the marriage of his daughter Km Raj Kali.

The plaintiff claims decree for Rs.____ as per account given below

---

and the defendant is his legal heir or is in possession of the assets. But the joint family property will not be liable unless— (1) the defendant who is in possession of the property is the son, or (2) the debtor was the manager of the family *and* the debt was contracted for the benefit of the family. If the defendant is the son, the plaintiff need not allege the necessity for the loan, as the defendant cannot contest his liability to pay the debt from the joint family property unless he alleges and proves that the debt was illegal or immoral. In any other case, the plaintiff must allege that the debtor was a member of a joint Hindu family and was its manager, and must also allege the legal necessity for loan.

Defence usually is a denial of the debt. This may be coupled with plea of discharge in the alternative, as this inconsistency is permissible to defendant because he is a stranger to the transaction. If he was a member of a joint Hindu family with the debtor and was not the latter's son and the plaintiff has not alleged in the plaint that the debtor was the manager or that the debt was taken for family necessity, the defendant should simply plead that on the plaintiff's own showing the family property is not liable. If the defendant is debtor's son, he may plead that the debt was illegal or immoral, but a mere plea that it was not taken for family necessity is not available to him. If an heir is sued on the allegation that he is in possession of assets, but really he has no assets, it is best to make a statement to that effect, although this would not prevent a decree being passed and cannot, therefore, be taken as plea in defence.

with interest from date of suit to that of payment against the joint family property of the time of the said Ramadhin in the hands of the defendants.

HIRE *(o)*

No. 49—Suit for Hire and for Damages for Breach of Agreement

1. By a verbal agreement between the parties on December 10, 1993 the plaintiff let certain articles of furniture and other goods on hire to the defendant for 16 days at Rs.500 and the defendant undertook to use them in a careful and reasonable manner during the continuance of such hiring, and to redeliver the same at the expiry of the term of hire to the plaintiff in as good a state and condition as they were, when let to him, subject to reasonable wear and tear incidental to such use.

2. The defendant used the said goods in so negligent and careless manner that they were greatly damaged and deteriorated otherwise than by reasonable wear and tear.

Particulars

(o) [On other forms of Bailment, see PLEDGE, RAILWAYS AND CARRIERS]. The position of a hirer of goods is that of a bailee, and he should take the same care as a man of ordinary prudence may be expected to take of his own goods of the same bulk, quality and value vide section 151, Contract Act (*Shantilal* v. *Tarachand*, A 1933 All 158, 142 IC 691). He can be sued for damages owing to his negligence or carelessness. In a suit for such damages or for hire money, **the agreement must be pleaded, and the terms, breach of which has been made by the defendant, must be pleaded with the exact nature of the breach.** If the breach pleaded is a statutory duty, the duty need not be pleaded as that would be pleading law. **It should be sufficient to plead the breach only.** Particulars of the damages claimed must be given.

Limitation : A suit for compensation for damage to the articles was held to be governed by Article 115 and not 36 of the Limitation Act, 1908 (Holloway v. Holland, A 1933 Oudh 518, 145 IC 1001). Under the Limitation Act of 1963, such a suit would be governed by Article 91 (b) or 55.

Defence : It is useless to deny the terms of the hire, if they are not extraordinary. The defendant may plead that the damage was caused by *vis major*, or that he had taken as much care of the goods, as a man of ordinary prudence would, under similar circumstances, take of his own goods, and that the damage was caused by pure accident or that the defects pointed out by the plaintiff existed at the time of hiring the goods.

(a) A hole was burnt in the middle of the green carpet thereby rendering it of no value. The carpet when delivered to the defendant was of the value of Rs.1,000.

(b) The glass stand of the big lamp was broken and will cost Rs.100 to repair.

(c) The velvet cushion was spoiled and rendered of no value by having kerosene oil spilt over it. When delivered to the defendant, it was of the value of Rs.400.

3. The defendant has not paid the hire money, or any part thereof.

The plaintiff, therefore, claims:

(1) Rs.500 on account of hire money.

(2) Rs.1,500 damages.

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

INDEMNITY *(p)*

No. 50—Suit on an Express Indemnity

1. On November 20, 1991, the defendant sold a house to the plaintiff representing that there was no encumbrance on it, and that the one originally created in favour of Ram Chandra had been discharged. By the sale-deed executed by the defendant the same day, the defendant covenanted that if any prior encumbrance was claimed by any one and the plaintiff had to pay anything on account of any such prior charge, the defendant should indemnify him against such loss.

2. The said Ram Chandra instituted in this Court a suit on the basis of his prior hypothecation bond, and on September 23, 1993, obtained a decree for sale of the said house.

(p) See Section 124, Contract Act. [*Also see* Guarantee *(m) ante*, for difference between guarantee and indemnity]. The contract may be express or implied. As to what damages a promisee can recover, *see* section 125, Contract Act. In a suit for damages for breach of contract of indemnity, **the contract must be alleged with details as to whether it was express or implied, whether it was oral or in writing; its terms, the breach of which is the cause of action for the suit, with the breach there of. should also be alleged, and then the damages with particulars.** A contract by an accused to indemnify his surety is not enforceable (*Prasanno Kumar* v.

3. The plaintiff had thus to pay, and he has in fact paid on January 26, 1994, Rs.23,500 in full discharge of the decree of the said Ram Chandra.

4. The defendant has not indemnified the plaintiff against the loss thus sustained by him.

The plaintiff claims Rs.23,500, with interest from the date of suit to that of payment.

No. 51—Ditto

(Form No. 20, Appendix A, C. P. C.)

1. On the ___ day of _____19__, the plaintiff and defendant, being partners in trade under the style of *AB* and *CD, dissolved* the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm.

2. The plaintiff duly performed all the conditions of the agreement on his part.

Prakash, 19 CWN 329). A purchaser subject to encumbrances impliedly agree to indemnify the seller against the encumbrances (*Rama* v. *Venkatalingam*,1933 MWN 486). Ordinarily cause of action for a suit for breach of contract of indemnity arises when the plaintiff has suffered damages by actual payment. It has however been held that the passing of a decree against the plaintiff was sufficient to give him a cause of action (*Chiranjilal* v. *Naraini*, 41 A 395, 17 ALJ 394, 51 IC 158). The question whether a new cause of action would accrue after the decree is realised and the plaintiff is actually indemnified was left open. If a purchaser undertakes to discharge an earlier encumbrance but fails to do so, the vendor has two alternative causes of action. He can, before suffering any actual damage, bring an action to have himself put in a position to meet the liability which the purchaser has failed to discharge. He can also if, as a result of that failure, he has already incurred loss, claim the amount of loss by enforcing the contract of indemnity (*Lala Shanti Saroop* v. *Janak Singh*, 1957 ALJ 875 FB). In a Madras case a debt of a mortgagee due from certain co-sharers was, on partition, divided between them in certain proportions and an indemnity deed was executed under which each agreed to indemnify the other against the liability imposed on him. The mortgagee threatened to sell plaintiff's property for realisation of the whole debt and defendants on being called upon by plaintiff did not pay the share due from them. On plaintiff's suit the plea of the defendants, that the suit was not maintainable as plaintiff has not yet suffered any damage was not accepted (*Ghulam* v. *Mohammad Ali*, A 1943 Mad 360). In a case

3. On the ____ day of _____19___, (a judgment was recovered against the plaintiff and defendant by *EF*, in the High Court of judicature at ___, upon a debt due from the firm to *EF* and on the ___day of ___19 ___), the plaintiff paid Rs.____(in satisfaction of the same).

4. The defendant has not paid the same to the plaintiff.

No. 52—Suit on an Implied Indemnity

1. The plaintiff sold shop No. 85 situated in Mohannagar, Lucknow, to the defendant by a sale-deed, dated July 15, 1991, and out of the consideration, left Rs.22,000 with the defendant, directing him by the said sale-deed to pay the same to one Ram Chandra, on account of principal and interest up to date, due to the said Ram Chandra from the plaintiff under a mortgage bond, and to obtain by such payment redemption of the mortgage for the plaintiff. The defendant accepted the sale-deed on the aforesaid terms and took possession of the property sold to him.

2. The defendant did not pay the said Rs.22,000 or any part thereof to the said Ram Chandra, though the plaintiff asked him by a registered notice dated September 20, 1992 to do so.

3. The said Ram Chandra obtained a decree on foot of the mortgage against the plaintiff and the plaintiff had to pay, and he did pay on June 4, 1995, to the said Ram Chandra, a sum of Rs. 24,543 on account of the debt and costs due under the decree.

4. The defendant has not indemnified the plaintiff against the loss thus sustained.

The plaintiff claims Rs.24,543 and interest from date of suit to that of payment.

---

like the one in precedent No. 52 when no time is fixed in the contract for payment, the undertaking should be taken to be to pay on demand either by the promisee or by the person to whom payment is to be made. Therefore, such a demand is necessary to complete the cause of action and should be made and alleged in the plaint.

Limitation : Under the Act of 1908, the suit would be governed by Article 116 or 115 (*Lala Shanti Saroop* v. *Janak Singh*, 1957 ALJ 875). Under the Act of 1963, the limitation will be three years under Article 55 or 113.

Defence : The defendant may plead any facts showing that he had been excused by the plaintiff, or was prevented by the plaintiff's own misrepresentations, from performing his contract. For instance, he may show that the money left with

INJUNCTION *(q)*

No. 53— Suit for prohibitory Injunction to Restrain Breach of Contract

1. The plaintiff let plots Nos.142 and 678 in village_____ to the defendant, by a deed of lease, dated July 6, 1990, for purposes of a nursery for 7 years, and the defendant agreed by the said deed of lease not to use the land for any other purpose.

2. The defendant has, since July 1, 1993 commenced to dig earth from the said plots for the purposes of his adjoining brick-kiln.

3. The defendant threatens and intends, unless restrained from so doing, to continue to dig earth from the a said plot.

The plaintiff claims a perpetual injunction restraining the defendant, his servants, or agents, from digging earth from any portion of the said plots Nos.142 and 678.

No. 54—Suit for an Injunction Restraining Waste

(Form No. 35 of Appendix A, C.P.C.)

1. The plaintiff is the absolute owner of *(describe the property)*.

2. The defendant is in possession of the same under a lease from the plaintiff.

---

him for a prior mortgage was insufficient and the mortgagee would not accept part payment, or that the plaintiff had asked him to make the payment in his presence but did not afterwards turn up.

(q) Injunctions which are necessary to prevent breach of a contract are dealt with here. Those necessary to prevent tort will be dealt with under plaints arising out of tort (e.g., Copyright, Easement, Nuisance). A negative contract, *i.e.*, an agreement not to do a certain act, is enforced by an injunction, which is either prohibitory or mandatory. Prohibitory injunction is necessary in such cases to ~~prevent multiplicity of suits. The plaint should allege the contract, and particularly~~ **the terms of the negative contract, breach of which is complained of, with the act of breach.** It should also be alleged **that the defendant threatens and intends to repeat the breach of contract complained of.** Circumstances from which such intention can be inferred should not be alleged as that would be pleading evidence. For instance, in the case of precedent No. 55 it would be tempting to plead that the defendant has prepared a plan of the building he wants to build on the plot, that he has filed that plan in the office of the Municipal Board, that he has obtained the Board's permission to build the house, and that he has given a contract for the building, but all these

3. The defendant has cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale, without the consent of plaintiff.

4. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

No. 55—Like Suit for Mandatory and Prohibitory Injunction

1. By a lease, dated January 20, 1991, the plaintiff let a plot of land lying to the west of his residential house in Mohalla Bisati, Bareilly, to the defendant, for 10 years for the purpose of using it for storing timber. The defendant executed a *kabuliat* on the same date, accepting all the terms of the lease and expressly agreeing not to use the land for any other purpose.

2. In the month of April, 1995, the defendant commenced to erect a house on the said land and has already constructed one room in the western portion of the plot.

3. The defendant further intends and threatens to cover the whole plot by other buildings, unless restrained from doing so.

The plaintiff claims :

(1) An order that the defendant pull down and remove the building which he has already erected on the said plot.

(2) A perpetual injunction restraining the defendant from erecting any other building on the said plot.

---

facts are only evidence of the defendant's intention and threat.

A prayer for injunction may be added to a suit for possession or damages, when there is a proper case for an injunction. This should be avoided unless the plaintiff can make out case for an injunction. When he claims it, he must disclose facts entitling him to it. There must be imminent danger, and the damage apprehended must be substantial. The fact that a plaintiff instituted the suit on the last date of limitation was itself regarded in a case as negativing an imminent danger (*Nathu* v. *Sheosa*, A 1926 Nag 25). Before a mandatory injunction is granted there should be an obligation on the defendant to perform the act. If a man trespasses on A's land and plants trees, the remedy of A is to sue for possession of land and not for removal of trees (*Ewin* v. *U. Po*, 104 IC 139, 5 R 404).

Under sections 38 and 39 of Specific Relief Act 1963, the plaintiff may pray for a perpetual or mandatory injunction to prevent the breach of an obligation existing in his favour. Where there is no obligation, contractual or otherwise on the

INTEREST *(r)*

No. 56—Claim for Contractual Interest

The defendant had at the time of taking the furniture on hire agreed by contract dated April 2, 1994 (*or*, verbally agreed) to pay interest on the amounts remaining unpaid after the tenth of every month at the rate of 15 per cent per annum.

---

part of the defendant towards the plaintiff, the plaintiff is not entitled to a mandatory or perpetual injunction (*Raman Hosiery Factory* v. *J.K.Synthetics Ltd.*, A 1974 Delhi 207).

Limitation : Three years under Article 113, Limitation Act, 1963. In some cases section 22, Limitation Act, 1963 will be of much help, but unreasonable delay may be fatal as the relief is discretionary (*Mt. Bhagwati* v. *Mohan Singh*, A 1934 Lah 147).

Court-fees : Valuation for both court-fee and jurisdiction purposes is that put upon his claim by the plaintiff himself. This is arbitrary. *See* also State amendments.

Defence : The defendant may plead that the breach is not a substantial one (*Shiam Sunder Sharma* v. *Ganga Prasad*, 5 DLR (All) 329), that it was only temporary, and, in case of prohibitory injunction, that he does not intend to do the act apprehended, or that he did all the acts complained of with the prior permission, express or implied, of the plaintiff. If the facts are such that he can show that he entertained a *bona fide* belief that he had a right to make the construction, he can plead acquiescence of the plaintiff in the acts complained of. (For the exact requirements of this plea, *see Chapter* XIV).

(r) The law relating to interest has been considerably simplified by the enactment of the Interest Act 1978 on the recommendations of the Law Commission of India. It replaces the Interest Act 1839. There had been a number of conflicting decisions on the interpretation of various provisions of the repealed Act. Those decisions need not, therefore, be referred to except in respect of meaning of expressions repeated in the new Act, which is much more comprehensive. Earlier, interest was not payable on unliquidated damages either for breach of contract or of tort even if a notice of demand was served under the Interest Act; now it is claimable under section 3 (1)(b). Under the Old Act the power to award interest under any agreement or any enactment or other rule of law or usage was saved. It has been saved now too by sections 3(3)(a) and 4(1); it has further been clarified in section 4(2) that in the following cases interest shall be allowed unless the court is satisfied that there are special reasons why it should not be allowed:—

(a) where money or other property has been deposited as security for the performance of an obligation imposed by law or contract from the date of the deposit;

(b) where the obligation to pay money or restore any property arises by virtue of a fiduciary relationship from the date of the cause of action;

No. 57—Claim for Customary Interest

It is a custom in the grain market at Shamli that on such transactions as aforesaid an interest of 15 (fifteen) per cent per annum is payable by the party in default.

(c) where money or other property is obtained or retained by fraud, from the date of cause of action;

(d) where the claim is for dower or maintenance, from the date of the cause of action.

These are really some of the grounds on which interest could be allowed on equitable considerations even while the old Act was in force (*B. N. Rly.* v. *Ruttanji*, A 1938 PC 67; *Trojan & Co.* v. *Nagappa*, A 1953 SC 235; *Satinder Singh* v. *Umrao Singh*, A 1961 SC 908). Section 4 (2), however, leaves out some of the situations in which interest could be awarded in equity, hence in view of this sub-section being without prejudice to the generality of the provision of sub-section (1), those remaining equitable grounds will survive the express enactment of some of the grounds in sub-section (2), with the only difference that while in the circumstances specified in sub-section (2), the award of interest is, save in exceptional cases, obligatory, it will continue to remain discretionary in respect of other situations calling for exercise of equitable jurisdiction, namely, (i) where a particular relationship exists, such as mortgagor and mortgagee, obligor and obligee on a bond, executor and beneficiary, principal and agent or principal and surety; (2) where a person who is an officer of the court such as a sheriff, a solicitor or a receiver wrongfully withholds money which he has obtained in the course of legal proceedings (See, *Mst. Kishwar Jahan* v. *Zafar Mohd.*, A 1933 All 186, 55 All 164; *N. V. Joseph* v. *Union of India*, A 1957 Ker 3; *L. M. Das* v. *State of W. B.*, A 1961 Cal 456). Interest of amount refundable under contract was allowed in *official Receiver* v. *Bineshwar Prasad*, A 1962 Pat 155 (case law discussed).

Where there is express contract regarding interest and its rate the court cannot depart from it except in cases governed by the Usurious Loans Act or any local money lending law or the Hindu law of Damdupat which does not apply where interest is allowed on equitable grounds against a trustee of public religious trust retaining funds but only to cases of loan (*Hukumchand Jain* v. *Fulchand Jain*, A 1965 SC 1692). For private trusts, see section 23 and 94, Trusts Act. Against a trustee of public or religious trust interest at 4% p. a. was awarded in *Hukumchand*, *supra* (para 22), on the basis of a statement in the third edition of Halsbury's Laws of England, but this rate may be reviewed in the light of subsequent escalation in rates of interest generally.

Section 2(c) of the Interest Act, 1978 also defines debt as an ascertained sum of money *(compare* 'sum certain' in the old Act), but it should cover a sum ascertainable by a simple calculation in accordance with the terms of the contract (*State of Rajasthan* v. *Raghubir Singh*, A 1979 SC 852, (1979) 3 SCC 102). In the same case it has also been held that a notice of demand for past interest should be

No. 58—Claim for Interest After Notice

The plaintiff sent a notice to the defendant on June 2, 1995, demanding the aforesaid sum due under the contract (*or*, on account of damages for breach of contract; *or*, on account of compensation; *or*, on

---

construed to imply a demand for future interest also under the Interest Act. If, however, the sum payable is contingent on the happening of an event which may never happen it is not a sum payable at the time (*Marine & New Brunswick Elec. Power Co.* v. *Alice M. Hurf*, A 1929 PC 185).

The new Act expressly includes an arbitrator and a tribunal in the definition of court, thus setting at rest the earlier controversy about power of arbitrator to award interest.

However, inspite of the liberalised provisions of the new Act, interest cannot be allowed merely because money due was detained or because arbitrator may consider it reasonable to do so unless the case falls under the recognised categories of equity or under contract, express or implied, or under custom or usage having the force of law or under a statutory provision including the Interest Act (see, *Thwardas Pherumal* v. *Union of India*, A 1955 SC 468; *Mahabir Pd.* v. *Durga Datt*, A 1961 SC 990; *Union of India* v. *Rallia Ram*, A 1963 SC 1685). Illustration (n) to section 73 Contract Act does not of its own force warrant a claim for interest as damages unless the same be otherwise claimable, e.g., after notice under the Interest Act.

If property is wrongfully retained and the owner is deprived of its profits or usufruct, a claim for interest is maintainable as an integral part of mesne profits (*Mahant Narayan Dasjee* v. *Tirupatti Devasthanam*, A 1965 SC 1231; *Hirachand Kothary* v. *State of Rajasthan*, A 1985 SC 998), but in a suit by a partner for his share of profits detained by another partner, interest was not allowed (*Vithaldas* v. *Rupchand*, A 1967 SC 188). Interest is also claimable in cases of compulsory acquisition of property even apart from sections 28 and 34, Land Acquisition Act (*National Insurance Co.* v. *L.I.C.*, A 1963 SC 1171; *Satinder Singh* v. *Umrao Singh*, A 1961 SC 908).

Claims of interest in respect of negotiable instruments are not governed by Interest Act, *see* section 3(3)(b)(i) but by section 80, Negotiable Instruments Act.

So far as transactions of sale of goods are concerned, section 61 Sale of Goods Act, 1930 provides that apart from any contract or other law (including equity and trade usage) under which interest is claimable the court may award interest on the amount of price (a) to seller from the date of tender of goods or date when price is payable, (b) to buyer in suit for refund of price in case of breach of contract, from date of payment. Thus where the price is payable on a day certain, even though delivery of goods may have been postponed interest can be awarded from that date. The reference to date of tender would be attracted where seller has option to deliver the goods during a stated period and the price is to be paid on delivery. But where the course of delivery shows that neither any date is fixed for

account of damages) and intimating the defendant that if payment was not made within one month of service of notice, interest at 18 per cent per annum would be charged.

No. 59— Claim for *Pendente lite* and Future Interest in a Commercial case

The rate at which moneys are presently lent or advanced by nationalised banks in relation to commercial transactions is seventeen and half percent per annum compoundable annually.

---

payment nor demand for interest is made by seller interest cannot be allowed (*Kalyan Sahai* v. *Lachmi Narmain*, A 1951 Raj 11).

On sale of immovable property the seller has a right to interest on unpaid price under section 54 (4) (b), Transfer of Property Act.

In claims for compensation arising out of motor accidents, interest can be awarded from date of claim under section 110, Motor Vehicles Act.

Award of *pendente lite* and future interest is governed by section 34, C.P.C. which has also been considerably liberalised by the Amending Act of 1976 and takes into account the prevailing bank rates of interest in respect of commercial transactions. Thus courts are expected to award not the low rates of interest of 3% or 4% as was the convention in the past but higher rates in the light of the amended provisions so that it may not be unduly profitable for the defendant/judgment debtor to delay payment of the amount due. It will be necessary to plead and prove the commercial rate as a fact (see precedent No.59) in order to take advantage of this provision (*Sri Sreenivasa Co.* v. *V.D.H.A. Setti*, (1984) 2 An WR 238, A 1985 AP 21). Section 34 does not warrant award of interest at a lower rate than the contracted rate in a mortgage suit; in view of the provisions of O.34, R.11 the plaintiff is entitled to interest at the agreed rate till the date of redemption (*State Bank* v. *Rashmi Industries*, 1984 Cutt LT 540 case law discussed).

In every claim for interest, the contract for its payment, or facts bringing the case within a particular rule of law under which it is claimed should be given. If it is claimed under a custom of trade, the custom must be alleged. If the claim is made on equity, facts entitling the plaintiff to the relief should be stated.

A claim for interest is generally added to that for principal. But if interest is payable under a contract before the principal, the same can separately sued for.

Defence : The defendant may plead absence of any of the elements making the claim fall with in any rule of law. He may plead tender of the principal money, the date from which his liability for interest ceases. He may plead that he was prevented by the creditor from making payment (*Gopeshwar* v. *Jadab*, 2 CWN 689). Against a contractual rate of interest, he can plead the aid of the Usurious Loans Act or of any State legislation regulating money-lending, or of sections 16 or 74, Contract Act or that the contract is void as the interest provided exceeds that prescribed by law. But in the absence of fraud or undue influence or anything to suggest that the creditor

No. 60—Suit for Interest only

1. The defendant borrowed Rs.1,000 from the plaintiff under a bond, dated June 9,1994, payable after 6 years, and by the same bond, the defendant agreed to pay interest on the said Rs.1,000 at 12 per cent per annum regularly every half year.

2. The defendant has not paid any interest. The plaintiff claims Rs.120 on account of interest for the first two half years.

JUDGMENT *(s)*

No. 61—Suit on a Foreign Judgment

(Form No. 11, Appendix A, C.P.C.)

1. On the ___ day of _____ 19__, at _____, in the State (*or*, Kingdom) of ___ the ____ court of the State (*or*, Kingdom),

---

took an undue advantage, mere excessiveness of the interest is no ground for its reduction (*Madhu Mangal* v. *Gouri Sunder*, 60 IC 733 Cal; *Nabin* v. *M. Rabeya*, 5 R. 619, 106 IC 181). Under the Usurious Loans Act court can reduce the interest even if defendant does not take the plea in the written statement (*Kaderbhai* v. *Fatmabai*, A 1944 Bom 25). Even under the Usurious Loans Act high rate is not necessarily regarded as excessive or unfair and creditor may show that the prevailing rate in the locality is nearly the same or that the high rate was justified by the risk the creditor was taking (*Babu Ram* v. *Jograj*, 27 ALJ 1174, 118 IC 375). In most states now money lending laws have been passed replacing the Usurious Loans Act. These laws are much more stringent and comprehensive, but if benefit of such law is to be sought then generally it is necessary to plead and prove that the loan had been advanced by the plaintiff in the regular course of money lending basis. Such Acts should be consulted in order to be able to take proper pleas. For the form of a plea under section 16 Contract Act, *see* "General Defences (Undue Influence)". If the contract is contained in written document, the defendant cannot plead that he had agreed to the rate as the plaintiff had represented to him that he would charge lower rate, as that plea would be barred by section 92, Evidence Act (*Sukh Lal* v. *Murari Lal*, A 1926 Oudh 273 DB). Where interest not contracted for is claimed, he can plead that it is excessive.

(s) A suit, on the basis of a judgment, would generally be necessitated only in cases of judgments of foreign countries. If the defendant resides in India and satisfaction of the decree cannot be obtained in the foreign territory, a suit may be brought in India on the basis of the foreign judgment. It is not necessary, in such cases, to allege the original cause of action, although a creditor can also bring suit on original cause of action because the foreign judgment does not extinguish the original cause of action for the debt (*Gopal Singh Hira Singh* v. *Punjab National, Bank*, A 1976 Delhi 115; *Badat & Co.* v. *East India Trading Co.*, A 1964 SC 538;

in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff _____ rupees, with interest from the said date.

2. The defendant has not paid the money.

No. 62—Suit on a Foreign Judgment

1. On the 20th day of March, 1980, the Queen's Bench Division of the High Court of Justice of England, in a suit therein pending between the parties (1980, B. No. 161), adjudged defendant to be liable to pay to the

---

Kobal Singh v. *Punjab National Bank*, A 1976 Del 115). **It is sufficient to allege the judgment and the liability of the defendant under it, and the fact that the defendant had not discharged that liability.**

It is also the practice to allege that the foreign court had jurisdiction over the parties or the case, but strictly speaking this is not necessary, such jurisdiction being presumed until the contrary is proved (*Robertson* v. *Struth*, 5 QB 941; *Henderson* v. *Henderson*, 6 QB 288; *N.K.R.M.A. Ramanathan* v. *S.V.K. Lakshmanam*, 49 IC 202 Mad). In order to determine the money claimed on a judgment of an English court, the rate of exchange prevailing on the date of judgment should be taken into account (*Madhavji* v. *Ramniklal*, 47 B 487).

Limitation : Three years from the date of judgment (Article 101), even though execution may be barred under the law of the foreign court (*Jaisukh Lal* v. *Mohammed Hussain*, A 1939 Bom 522). It cannot be extended by reason of any application for review or rehearing made in the foreign court. (*Hari Singh* v. *Muhammad Said*, 102 IC 523, 8 Lah 54, A 1927 Lah 200 DB) ; but if an appeal is preferred and dismissed, limitation will run from the date of appellate judgment (*Baijnath* v. *Vallabhdas*, A 1933 Mad 511, 1933 MWN 453, 65 MLJ 572, 144 IC 853). The original judgment merges in an appellate judgment and does not survive it.

Defence : To a suit on a foreign judgment, a defendant may plead any of the grounds mentioned in section 13, C.P.C. or he may plead reversal of the judgment by court of appeal or satisfaction of the decree by the defendant. Judgment given after striking off the defence for default in answering interrogations and after the suit had thus become an undefended one is not a judgment on merits within section 13 (b) and no suit can be brought upon it (*Keymer* v. *Vishwanatham*, 15 ALJ 92, 40 M 112, 32 MLJ 35, 19 BLR 206, 21 CWN 358, 25 CLJ 233, 10 Bur LT 175, 38 IC 683). Similarly, when a judgment was given under special rules prevailing in Penang, in an *exparte* case without taking any evidence and on plaint allegations only, it was held that no suit could be brought in India on such judgment (*R.E. Mohomed Kassim* v. *Seeni Pakir*, 100 IC 555, 52 MLJ 240, A 1927 Mad 265, 25 MLW 307 FB). A foreign judgment not based on merit is not conclusive (*R.M.V. Vellachi Achi* v. *R.M.A. Ramanathan Chettiar*, (1972) 2 MLJ 468; *Gurdas Mann* v. *Mohinder Singh Brara*, A 1993 P&H 92; *Algemene Bank Netherland* v. *Satish Dayalal Choksi*,

plaintiff the sum of £ 2,000 with interest from the date of judgment to that of realisation at 15 per cent per annum.

2. The defendant has not paid the said amount or any part thereof, nor has satisfaction for the amount or any part thereof been obtained by execution.

A 1990 Bom 170). An exparte decree obtained under the summary procedure of court of Ceylon (*Isidore Fernando* v. *Thommai Antoni Michael Fernando*, A 1933 Mad 544), or a decree obtained under the summary procedure after defendant's application for leave to defend was rejected by a foreign court (*O. P. Verma* v. *Lala Gehrilal*, A 1962 Raj 231; *K. M. Abdul Jabbar* v. *Indo Singapore Traders*, A 1981 Mad 118), are not conclusive, as they are not on merits. Similarly, a decree passed against a minor without appointing a guardian *ad litem* for him or after appointing guardian whose interest was adverse to the minor or after appointing the Nazir of the court as guardian when the minor lived in India (*Gajanan* v. *Shantabai*, A 1939 Bom 374, 185 IC 57), is opposed to natural justice and a suit cannot be brought upon it in the Indian courts (*Popat* v. *Damodar*, 36 BLR 844, A 1934 Bom 390). A judgment by a biased court is also opposed to natural justice and is a nullity (*R. Vishwanathan* v. *Rukn-ul-mulk Syed Abdul Wajid*, A 1963 SC 1). But a judgment cannot be said not to be on merits merely because it is passed *ex parte*, if it was based upon a consideration of the truth or otherwise of the plaintiff's claim (*Wazir* v. *Munshi*, 190 IC 545 Pat). A decision may be on merits even though passed *ex parte* if some evidence is adduced (*Abdul Rahman* v. *Mohamed Ali*, A 1928 Rang 319; *Sundaram* v. *Kandasami*, A 1941 Mad 387). An *ex parte* decree of a foreign court on default of depositing the amount which was made a condition of granting leave to defend seems to be one on merits. (*Shalig* v. *Firm Dowlat Ram*, A 1967 SC 379). In the field of private international law, courts refuse to apply a rule of foreign law or recognise a foreign judgment or a foreign arbitral Board if it is found that the same is contrary to the public policy of the country in which it is sought to invoked or enforced (*Renusagar Power Co. Ltd.*, v. *General Electric Co.*, A 1994 SC 860).

The fact that an appeal is pending from the foreign judgment is, however, no defence, though the court might, for the sake of justice, stay proceedings of the suit on being informed of the pendency of the appeal (*Hari Singh* v. *Muhammad Said*, 102 IC 523, A 1927 Lah 200 DB).

The defendant may plead that he was not the subject of the foreign state nor did he reside within the state nor did he submit to its jurisdiction, as in such a case the judgment is not, according to international law, binding, but the burden of proving these facts is on the defendant (*Ishri Prasad* v. *Shri Ram*, 105 IC 186, A 1927 All 510, 25 ALJ 887 DB). Submission to jurisdiction which makes a judgment binding should be before decision (*Narapa* v. *Govinraja*, 57 M 824, 149 IC 1168, A 1934 Mad 434, 1934 MWN 626). But he cannot plead that judgment was erroneous or obtained by fraud committed by witnesses; fraud committed by plaintiff alone can avail (*Popat* v. *Damodar*, A 1934 Bom 390, 36 BLR 844). Where a decree is a

The plaintiff, therefore, claims Rs. _____, being the Indian equivalent of £ 2,000 as principal and Rs. _____, as interest with further interest from the date of suit to that of payment at 15 per cent per annum.

LANDLORD AND TENANT

No. 63—Suit for Arrears of Rent *(t)*

1. By a deed of lease, dated June 22, 1993, executed by the plaintiff and defendant, the plaintiff let the house bounded as follows and situate in Mohalla Maliwara, Delhi to the defendant for a period of two years and

---

nullity on the day it is passed on the ground that the defendants neither resided within the court's jurisdiction nor had submitted to it, it cannot be executed against defendants, outside the jurisdiction of the court passing it. Article 261(3) of the Constitution has no application to such a decree (*Malo ji Rao* v. *Sankar Saran*, A 1958 All 775, affirmed by Supreme Court in, A 1962 SC 1737).

(t) In a suit for rent, **the agreement for rent must be alleged, and also the amount of arrears.** If the lease was for a fixed term and rent is claimed for that term, it is not necessary to allege defendant's possession during the period in suit, as he is bound to pay rent for the stipulated period of tenancy, but if the lease is not for a fixed term, the plaintiff must allege that defendant was in possession during the period in suit. It is not necessary to plead the plaintiff's title to the property in a suit on the basis of tenancy as the defendant is estopped from denying it (*Kumar Raj Krishna* v. *Barahhani Coal*, 62 Cal 346, A 1935 Cal 368), but if the plaintiff claims as successor of the person who had put the defendant in possession, the defendant can deny his title as such successor and therefore he should plead it (*Dalat Ram* v. *Haveli Shaba*, 182 IC 533, A 1939 Lah 49). The whole amount in arrears at the date of suit must be claimed. Otherwise O. 2 R.2, will bar a subsequent suit (see chaps, XI and XIV *ante* also for O.2 R.2,). One of several joint owners is not entitled to bring a suit for his share of rent. He may sue for whole rent (*Radhabinode* v. *Naba Kishore*, 94 IC 244, 30 CWN 415, A 1926 Cal 578 DB; *Manbodh* v. *Jaswant*, 20 PLT 282), and in such cases it is better to implead the others as *pro forma* defendants. If the lease is legally inadmissable in evidence for want of registration or other formal defect it is better to claim the rent in the alternative as damages for "Use and Occupation" (*see* Precedent under that heading) The suit must be for the whole rent of the whole holding, as a suit for rent of part of the holding does not lie (*Ram Chandra* v. *Ram Ghulam*, A 1938 Pat 305, 177 IC 529).

It must be taken as well established that a joint owner or cosharer is not entitled as such to sue for proportionate rent, but it has been held that though this is undoubtedly the established rule, nevertheless, if the parties, namely, the landholders and the tenants agree to accept and pay proportionate rent according to shares, there is nothing illegal in such an arrangement. Such agreement between the parties must be pleaded and proved in one or the other ways known to law

the defendant covenanted to pay Rs 2,000 per month on account of rent.

Boundaries of the said house

* * * *

2. The defendant has been in possession under the said lease during the period August 1995 to November 1995, but has not paid the rent for the said period, [or, (*if the suit is for period covered by the lease), the* rent for the period August, 1995 to November, 1995 is in arrears].

(*Venkatakrishna Reddi* v. *Govindraja Mudaliar*, (1953) 1 MLJ 814). A tenancy for a fixed period determines only by efflux of time, the death of the tenant, during the term, has absolutely no effect and his legal representatives continue to be tenant for the remainder of the term. However, a lease for an indefinite period is determined by the death of lessee (*Raman Lal* v. *Bhagwan Das*, A 1950 All 583, 1951 ALJ 179). A lease for less than a year is a lease for indefinite period (*Rattanlal* v. *Vardhesh Chandra*, A 1976 SC 588). A lease providing that the tenant would continue in possession so long as he pays rent is regarded as lease for the life time of the lessee (*B.P.Sinha* v. *Somnath*, A 1971 All 297), and consequently it would determine on the death of the tenant. But a lease by holding over is heritable (*K.Belchappada* v. *Vishnu Shanbhogue*, 1971 KLT 340, relying upon *Raman Lal* v. *Bhagwan Das*, A 1950 All 583 and *Ram Nath* v. *Neta*, A 1962 All 604).

Where a landlord actively continues the prosecution of the case or appeal with regard to ejectment of the tenant, mere acceptance of rent by him cannot be treated as waiver so as to to deprive him of the right of execution of ejectment decree (*Khumani* v. *Saktay Lal*, 1951 ALJ 331; *Hari Shankar* v. *Chaitanya Kumar*, 1968 ALJ 387; *Bhawanji Lakhamshir* v. *Himatlal Jamna Das Dani*, A 1972 SC 819; *Sharda Sharma* v. *Gulab Devi Ohwon*, A 1972 All 435; *Purohit Lakshmanchandji* v. *Vecha Shree Ramchandra Murty*, A 1976 AP 428).

On statutory tenancy under urban buildings rent control legislation, see *Sudhir Kumar Chakraborty* v. *Ashutosh*, A 1980 Cal 108; *Biswabani Ltd.*v. *S.K. Dutta*, (1980) 1 SCC 185; *Mani Subrat Jain* v. *R.R.Vohra*, A 1980 SC 299; *Tatoba Krishna* v. *Dikkayya*, 1980 Mah LJ 229). On service occupation (i.e., licence by employer to occupy his quarters in connection with service) as distinguished from tenancy (see *B.M. Lall* v. *Dunlop Co.*, A 1968 SC 175 ; *Lal Behari* v. State, 1955 ALJ 564).

Limitation : Three years from due date (Article 52).

Defence : The defendant may deny the tenancy, but, if he admits it, he cannot deny plaintiff's title to the property or right to receive rent but may even in that case deny the particular contract of tenancy set up by the plaintiff (*Mt. Nasiban* v. *Mohammad Sayed*, 164 IC 557, A 1936 Nag 174), or he may plead that the title of the plaintiff has passed to someone else after the commencement of tenancy (*Luckman* v. *Pearey Lal*, A 1939 All 670). If the suit is by an heir of the lessor, defendant may

The plaintiff claims:

(1) Rs.8,000 on account of rent.

(2) Rs.____ on account of interest at the rate of 1 per cent per mensem.

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

No. 64—Suit for Ejectment on Determination of Tenancy by notice, with Claim for Mesne Profits *(u)*

1. Under a verbal contract of March 25, 1992, the defendant held for the purpose of residence, the house described below, as a plaintiff's tenant from month to month, at a monthly rent of Rs.300. His tenancy commenced on March 25, 1992.

---

deny the heirship or may plead that the interest of the lessor was not heritable. The defendant may plead that he has not been put in possession of the whole property leased or has been dispossessed from a portion of it, and therefore a proportionate reduction should be made from the rent. In England, the rule in such cases is that the whole rent is suspended, but the doctrine of suspension of rent is not applicable in India and it will depend on the circumstances of each case whether the tenant is entitled to suspend the rent or remains liable to pay a proportionate part thereof (*Surendra Nath Bihra* v. *Stephen Court Ltd.*, A 1966 SC 1361; see also, *Apparel Trends* v. *Krishna*, A 1985 Del 1067). If the defendant was entitled to spend money on repairs and has spent it, he may claim adjustment of the same, and limitation therefor is six years under section 30 read with Article 113 (*Indumati* v. *Jhola*, A 1985 SC 369).

(u) In every suit for the ejectment of a tenant, it is **necessary to allege specifically the ground on which the ejectment is sought** (*Dariyai Singh* v. *Chob Singh*, A 1926 All 248 DB, 91 IC 863). In several states local Control of Rent and Eviction Acts have been passed, which restrict the right of ejectment. Where such an Act exists, facts should be stated in the plaint to show that according to it, the plaintiff has the right to sue for ejectment. A tenancy, which is neither permanent nor for a fixed term, can be determined by a notice to quit. The notice should be in writing, signed by, or on behalf of, the person giving it , and, if there are several lessors, all must join in the notice. But a notice to terminate the tenancy of a tenant of a trust need not be given by all the trustees (*Idol Shivji Lakherapura Bhopal* v. *Goppulal*, 1977 MPLJ 804). The notice should, however, purport to be on behalf of all the lessors, otherwise notice given by one joint lessor should not be sufficient to terminate the tenancy (*Jamil Ahmad* v. *Madhawanand*, A 1979 All 104). Notice to quit given under the signature of one joint lessor mentioning "we give you notice",etc., is valid as it must be taken to have been given on behalf of all the joint

Description of the House

* * * *

2. The plaintiff duly determined the said tenancy by serving on the defendant, by registered post, on September 27, 1994, a notice to quit

---

lessors (*Madhusudan Prasad Agarwal* v. *Sushma Bala Dasi*, A 1979 Pat 6; *S.P. Roy Choudhary* v. *K.B.Roy*, (1978) 2 SCC 89). Where one co-owner alone is landlord notice by him is sufficient, so also a suit by him (*Sri. Ram Pasricha* v. *Jagannath*, (1976) 4 SCC 184).

The notice should be served either personally on the tenant or on a member of his family or on a servant at the tenant's residence, or by post, or by affixing it to a conspicuous part of the property, if personal service is not practicable (section 106 Transfer of Property Act). Tender of the notice is sufficient though the tenant may refuse to accept it. If a notice is sent by post, proof of posting and non-return will raise a presumption of its service (*Harihar* v. *Ram Shahi*, 46 C 958 PC). This presumption is not displaced, if when a notice is sent by registered post, an acknowledgment is received purporting to be signed by someone else on behalf of the addressee (*Bodardoja* v. *Ajijuddin*, 33, CWN 559, 49 CLJ 555, A 1929 Cal 651 DB; *Bachalal* v. *Lachman*, 176 IC 393, A 1938 All 388). If there are several tenants in common the notice should be addressed jointly to all (*Budh Sen* v. *Sheel Chand*, A 1938 All 88) though service of such a notice on one is evidence of information to all (*Lila Dhar* v. *Ramji Das*, 1956 ALJ 650; *Shrinath* v. *Sarasvati Devi*, A 1964 All 52; *Kanji Manji* v. *Port Trust*, A 1963 SC 468). A decree for eviction obtained against some joint tenants is not binding against others who are not parties to the decree (*Mohd Mustfa* v. *Mansoor*, A 1977 All 239). Hence all the joint tenants must be impleaded as defendants in the suit.

Notice should show a definite intention to terminate the tenancy. When a notice is stipulated in the lease or is required by a local usage, it should conform to the contract or usage. In case of tenancy from year to year, 6 months and in case of tenancy from month to month, 15 days notice ending with year or month of tenancy, as the case may be is required unless there is a contract or custom to the contrary. Lease for agricultural or manufacturing purposes is presumed to create a tenancy from year to year and leases for other purposes, a tenancy from month to month. From the mere fact that an yearly rent is reserved there is no presumption that the tenancy was from year to year (*Chimiti* v. *Kirpa*, A 1941 Pat 488 , 194 IC 300). The six months or 15 days' time given by it is the minimum and there is no objection to giving a longer notice but it should expire with the year or month of the tenancy (*Bagchi* v. *Morgan*, 161 IC 897 , A 1937 All 36; *Sheikh Nuroo* v. *Seth Meghraj*, 174 IC 790, A 1937 Nag 139). It should not require the tenant to vacate the premises before or after the last date of the tenancy. In U.P. 30 days' notice is necessary in a case of monthly tenant but it need not expire with the month of tenancy (U.P. Act 24 of 1954).

the said house at the close of October 24, 1994, yet the defendant has not vacated the house.

Where A agreed to let a godown to B for three years from 1st June but a lease was not actually executed and the tenant remained a month to month tenant, the tenancy terminated on the last date of the month and not on the 1st June as it would have terminated under section 110 if the lease had been executed. Now section 106 and not 110 would apply (*Calcutta Landing and Shipping Co.* v. *Victor Oil Co.*, A 1944 Cal 84). Notice to vacate "on or before" the end of tenancy, has been held to be good (*Ismail* v. *Bai Zulaikhabai*, A 1944 Bom 181). Notice to quit asking the tenant to vacate within the month of October 1962, otherwise he should be treated as trespasser with effect from November 1, 1962 was held valid (*Bhagwan Das Aggarwal* v. *Bhagwan Das Kanu*, A 1977 SC 1120).

Many suits are dismissed for some defect in the form of the notice. The law should, therefore, be clearly understood before drafting a notice, and before drafting a plaint, the pleader should satisfy himself of the correctness and sufficiency of the notice given. A mere demand for possession is not a notice to quit (*Narayana* v. *Kunbhan Mannudiar*, A 1949 Mad 127, 1942 MLJ 559, 1947 MWN 775). In view of the rent control laws and the concept of statutory tenancy evolved in respect of urban building it is now not generally necessary to determine tenancy by a notice to quit before claiming ejectment on grounds admissible under such laws (*Dhanpal* v. *Yashodai*, A 1979 SC 1745).

The facts that the tenancy was a tenancy at will, the "purpose for which it was created, and the exact notice given should be set out in the plaint". The date of the expiry of the month or year of tenancy and the exact date on which the tenancy was determined by notice (where required) should also be stated. It is not necessary to allege the plaintiff's title, as the defendant cannot delay it, even after the expiry of the term of the lease so long as he does not hand over possession to the lessor (*Bilaskaur* v. *Desaraj*, 37 A 557 (PC); *Kumar Raj Krishan* v. *Barabani Coal*, 62 Cal 346, A 1935 Cal 368; See also Chap VIII ante for decree on basis of title where tenancy is not proved).

Court-fee : A suit for ejectment can be brought on a court-fee calculated on a year's rent. The same will be its valuation for the purpose of jurisdiction (*Narayanswamy* v. *Vennavai*, 39 M 873, 31 IC 104).

Procedure : All the co-sharers must join as plaintiffs in a suit for ejectment of a tenant (*Gholam* v. *Mt. Khairan*, 31C 786), but a tenant continuing in occupation after the expiry of the period of lease is a tenant on sufferance whose position is akin to that of a trespasser hence he can be sued by one of the co-sharers (*Ahmad Sabib* v. *Magnesite Syndicate Ltd.*, 29 IC 60, 39 M 501, 17 MLT 387, 28 MLJ 598; *Maganlal* v. *Budhar*, 101 IC 35, 29 BLR 230; *Yeswant* v. *Keshav*, 41 BLR 1213, A 1940 Bom 13, 186 IC 92; *Vinode Sagor* v. *Vishunbai*, A 1947 Lah 388). One co-sharer can eject a trespasser without impleading other co-sharer in the suit (*Mahabir Singh* v. *Shyam Nandan Prasad*, A 1972 Pat 304) [See also Chap. XII, ante].

3. The defendant has not paid the rent from June 25, 1994, or any part thereof.

4. The defendant has (*here mention the facts entitling the plaintiff to sue for ejectment under the local Control of Rent and Eviction Act, if any*) and is thus liable for ejectment under section ____ of the said Act.

A claim for rent may be joined with a claim for ejectment, and in that case **the rent agreed upon and the period for which it is in arrears should be given in the plaint.** But as after the period fixed in the notice, the defendant's possession becomes wrongful, damages for use and occupation and not rent should be claimed for the period, which may be more than the rent (*Suresh Chandra* v. *Kanti Chandra*, 110 IC 715, A 1928 Cal 436, 47 CLJ 530 DB; *Ubdur Rahman* v. *Darbari*, A 1933 Lah 509, 146 IC 845). Sometimes, in the notice to quit the lessor also warns the lessee that if he remains in possession after the expiry of notice damages will be charged at a particular rate. This may be penal, and the court is not bound to award damages at that rate (*Ramaswamiengor* v. *Ramamurthi*, 8 Mys LJ 130). But the Allahabad High Court has held in one case that such enhanced rent can be recovered on the ground of contract implied by defendant's remaining in possession (*Madan Mohan* v. *Bobra Ramlal*, A 1934 All 115, 1934 ALJ 921). The maximum that can be claimed as damages is the rent payable under Rent Control Act (*Dwarika Pd.* v. *Central Talkies*, A 1956 All 187). But in *Chiranjilal* v. *Kunwar Pd.*, A 1963 All 249, it was held that the amount to be awarded should be assessed according to the reasonable market value of the accommodation. The Nagpur High Court has held that enhanced rent may be allowed if it was not penal or improbable, if the tenant refuses to quit; but if he requires a little time for winding up his business he can occupy for such time on the original rent (*Parekh* v. *Anant*, A 1940 Nag 140, 189 IC 895). The court has to investigate if the enhanced rent claimed by landlord is otherwise equitably justified and has the power to fix fair and equitable rent (*Union of India* v. *Andhra Bank Ltd.*, A 1976 Mad 387).

Limitation : Twelve years from the determination of the tenancy (Article 67 of the Act of 1963).

Defence : Any flaw in the notice is a complete defence to such a suit. A suit for eviction is liable to be dismissed for want of proper notice to quit (*Manujendra Dutt* v. *Purnedu Prasad Roy Chowdhury*, A 1967 SC 1419). But plea of absence of proper notice to quit will have to be raised by defendant at an appropriate stage (*Magan Lal Chhotabhai Desai* v. *Chandrakant Motilal*, A 1969 SC 37) because absence of notice does not make the proceedings before court a nullity, as if lacking inherent jurisdiction (*S.A. Henry* v. *J.V.K. Rao*, A 1972 Mad 64). If such a plea has not been taken it will be deemed that the objection as to the lack of notice was waived (*Bosta Ram* v. *Balmukund*, (1971) 73 Punj LR (D) 217; *Batoo Mal* v. *Rameshwar Nath*, A 1971 Delhi 98; *P.Kochukrishna Pillai* v. *Achi Ammalu Ammal*, A 1972 Ker 257; *Ram Pratap* v. *Birla Cotton Spinning & Weaving Mills Ltd.*, A 1973 Delhi 124). Even if the defendant pleads that the land belongs to a third

The plaintiff claims :

(1) Possession of the said house.

(2) Rs.1,200 on account of rent from June 25 to October 24, 1994.

(3) Rs. 2,000 on account of damages for use and occupation at Rs.500 per mensem being the letting value of the house, from October 25, 1994 to the date of suit, and further damages upto the date of delivery of possession at the same rate.

No. 65—Suit for Ejectment on Expiry of Term *(v)*

1. The plaintiff let the house described below to the defendant, by a deed of lease, dated February 1, 1987, for a term of eight years.

---

person, the latter need not be impleaded (*Subramanya* v. *Ananth*, 139 IC 679, A 1932 Mad 688).

(v) No notice is required in this case. But if the lease by which term was fixed is not a valid lease, e.g., if it is not registered though it is required by law to be registered, or there is no lease but a mere *kabuliyat or kirayanama*, which cannot amount to a lease as it is not a bilateral document as required by section 107, Transfer of Property Act, no tenancy for the fixed period could legally be created, but the tenancy may be treated as one from month to month or from year to year as the case may be, and a notice will be required to determine it . If there is holding over, i.e. if after expiry of the term, the tenant is still treated by the landlord as his tenant, a tenancy is created and is determinable by notice (section 116, Transfer of Property Act). **Rent for the period after the expiry of the term should be claimed not as rent but as damages for use and occupation.** If the tenant is not treated as tenant after expiry of the term of lease, but he remains in possession, his possession is that of tenant by sufferance, which is akin to that of trespasser (*Jagarnath* v. *Janki*, 66 IC 337, A 1922 PC 142, 49 IA 81, 43 MLJ 55, 26 CWN 833) and in such cases even one of the several landlords can sue for ejectment (*Yeshwant* v. *Kesav*, 41 BLR 1213, A 1940 Bom 13). In such a case if suit is not brought within 12 years, the landlord's right to eject was held to be barred by Article 139 (*Laifqut Ali* v. *Muhammad Baksh*, 102 IC 231 All). Now Article 139 has been substituted in the Act of 1963 by Article 67. In the case of tenant by sufferance, no notice is necessary (*Gordhan* v. *AliBux*, A 1981 Raj 206).

Defence : The defendant may plead that the lease was invalid, or that he was re-admitted to the tenancy by an express contract, or by conduct, such as acceptance of rent by the plaintiff for a period after the expiry of the term. Acceptance of rent after the expiry of term, for a prior period, does not amount to the renewal of the tenancy. He cannot plead that he is entitled to a renewal of the lease under the terms of his lease, for he can enforce such terms only by a separate suit for specific performance (*Sewakram* v. Municipal *Board, Meerut* 169 IC 145, A 1937 All 328.). He cannot plead title of third person (*Pusram* v. *Deorao*, A 1947 Nag 188).

Description of the House

* * * *

2. The said term expired on January 31, 1995, but the defendant has not delivered possession and is still in possession.

3. The defendant has *(here mention the facts entitling the plaintiff to sue ejectment under the local Control of Rent and Eviction Act, if any)* and is thus liable for ejectment under section __of the said Act.

The plaintiff claims :

(1) Possession of the said house.

(2) Rs.1,200 on account of damages for use and occupation at Rs.400 per mensem being the letting value of house, from February 1, 1995 up to date of suit, with future damages for use and occupation up to the delivery of possession at the same rate.

No. 66—Suit for Ejectment on Ground of Forfeiture *(w)*
(For Breach of a Covenant)

1. By a deed of lease, dated September 9, 1992, the plaintiff let his house situate in Rani Bazar in the town of Saharanpur and bounded as follows to the defendant (*or*, defendant No.1) for three years at a monthly rent of Rs.30.

(w) A forfeiture of lease occurs: (1) when the lessee breaks an express covenant of the lease, on breach of which the lease becomes void, or a right of re-entry is reserved to the lessor, or (2) when the lessee denies the lessor's title by setting up title in himself or in a third person, but a lease for fixed term cannot be forfeited on this ground (*Maharaja of Jaipore* v. *Rukemini*, 42 M 589, 17 ALJ 552 PC).

But in either case, the lease is not determined unless the lessor or his transferee gives notice in writing to the lessee of his intention to determine it. The notice need not be in any specified form and need not give any specified time (section 111 (g), Transfer of Property Act). If the lease was entered into before Transfer of Property Act was extended to that area , notice in witting to the lessee of his intention to determine the lease is not necessary as the rule in section 111 (g) is not a rule of justice, equity and good conscience (*Rattan Lal* v. Vardesh *Chander*, A 1976 SC 588, (1976) 2 SCC 103).

The specific condition of the lease and its breach, or a definite and unequivocal denial of title, must be alleged in the plaint. The giving of notice under section 111(g) should also be alleged *(vide* Chap III under "Condition Precedent") When a lease is not alleged in the plaint and the allegations do not amount to more

Boundaries of the House

* * *

2. By the said deed, the defendant agreed to pay rent regularly every month, and further agreed that in case of default in payment of rent for any two months the plaintiff should be entitled to resume possession (*or*, the said defendant No. 1 agreed not to sublet the house to any other person and, further, that if he did so, the plaintiff should be entitled to terminate the lease).

3. The defendant took possession under the said lease, and is still in possession thereof. He paid rent to the plaintiff upto September 9, 1994, but has not paid the rent which accrued due on October 9, November 9 and December 9, 1994, (*or*, by a verbal agreement on September 15, 1994 the defendant No. 1 sublet the said house to defendant No. 2 and has put the said defendant No.2 in possession).

4. On December 17, 1994, the plaintiff sent by registered post a notice to the defendant (*or*, defendant No.1) putting an end to the tenancy

---

than this that the defendant was a licensee who paid rent, section 111 (g) cannot be applicable (*Kanhaya Lal* v. *Abdullah*, 160 IC 866, A 1936 All 385). The denial of title must be express, and not merely casual, must have been made to the knowledge of the plaintiff (*Komalukutti* v. *Pulikalakath*, 41 M 629), must have been specific and unequivocal (*Sardar Singh* v. *Man Singh* 100 IC 646 All), and must have been made before the suit and not in the pleading in the suit itself (*Mir Haider* v. *Jakiram*, 122 IC 271, *Balkaran* v. *Gangadin*, 36 A 370; *Quadir* v. *Prag*, 35 A 145, 9 ALJ 794; *Naurang* v. *Janardan*, 45 C 469; *Indar* v. *Achhru*, 110 IC 45 Lah; *Darbar* v. Barelal, 162 IC 797, A 1936 Pat 275). It must be noted that the landlord should in such cases take legal proceedings to determine the tenancy, and breach of condition cannot *ipso facto* amount to a cancellation of the lease. The landlord cannot, therefore, give a new lease to another person entitling the latter to sue the old tenant as a trespasser (*Ambika* v. *Beni Madho*, 118 IC 841, A 1929 Oudh 529).

Forfeiture can be made of the entire tenancy and not of part only (*Soorayya* v. *Sooranna*, A 1936 Mad 252). But in a case of forfeiture for unauthorised assignment, where the lease was in favour of several persons and then shares were separately specified it was held that forfeiture of the whole tenancy of all the tenants should not be made but only in respect of the share of the tenant in fault (*Pancham Singh* v. *Promotha Nath*, 164 IC 358, A 1936 Pat 450).

The landlord may in the alternative sue for injunction restraining breach by the tenant in future.

Defence: The defendant may plead that the denial of title was not clear and that he never meant to deny the title of the plaintiff, that the plaintiff did not give the

on the ground of the aforesaid breach of covenant in the lease and the said notice was delivered to the defendant (*or*, the defendant No.1) on December 18, 1994.

The plaintiff claims:

(1) Possession of the said house.

(2) Rs._____, on account of arrears up to December 17, 1994.

(3) Rs._____, on account of damages for use and occupation from December 18, 1994 upto the date of suit, with future damages upto the date of delivery of possession.

No. 67—Ditto (For Denial of Title)

1. The plaintiff let the house described below to the defendant, by a verbal agreement, on December 14, 1994, and the defendant entered into possession on that date and has been in possession ever since.

---

required notice, or that the plaintiff has done an act (e.g., acceptance of rent or levying a distress) which amounts to a waiver of the forfeiture (section 112). Or, where the condition broken is that of payment of rent, the defendant may admit and pray for relief against forfeiture under section 114 by paying the rent with interest and full costs or by giving security to pay the same within 15 days. The defendant may show that the title of the plaintiff had determined after the lease and before he denied it (*Vendu* v. *Nilkanth*, 22 B 228). Where the condition broken was against alienation, defendant cannot plead that the implication was that the consent to alienation would not be unreasonably withheld when he never asked for the landlord's consent at all (*Thakur Dayal* v. *Rai Promotha Nath*, 164 IC 811(2), A 1936 Pat 493). He may plead waiver of the forfeiture by any subsequent act or conduct of the landord, but waiver of one breach will not bar the right of forfeiture of a subsequent breach (*Muhammad Hassan* v. *Baidya Nath*, 184 IC 605, 12 RP 253, A 1940 Pat 140). Acceptance of rent falling due after breach amounts to waiver but not the acceptance after institution of suit (*Motilal* v. *Pure Jambar Colliery*, 44 CWN 1109; *Chotu Mian* v. *Mt Sundari*, A 1945 Pat 260), but to establish waiver by acceptance of rent, tenant must show landlord's knowledge of his right to enforce forfeiture and acceptance of rent with conscious abandonment of that right (*Fatehlal* v. *Dayal*, A 1949 Nag 218; *Sen & Co.* v. *Mani Bala*, A 1980 Cal 155). Long acquiescence by the landlord in the change of purpose of user by the tenant may disentitle him from claiming injunction (*Ram Gopal Banarasi Das* v. *Satish Kumar*, A 1986 P & H 52, FB).

In all suits for ejectment from house or other accommodation to which any Control of Rent and Eviction Act is applicable, the tenant may also rely on the protection against eviction afforded by the relevant Act, denying the facts on the basis of which the landlord seeks to deprive him of the protection.

Description of the House

* * * *

2. In a written statement which the defendant filed in this court on April 14, 1995, in suit No.22 of 1995, which the plaintiff had brought for arrears of rent against him, the defendant stated that he was the owner of the house and the plaintiff had no title to it.

3. On July 8, 1995, the plaintiff sent a notice to the defendant by registered post putting an end to the defendant's lease by reason of the defendant's aforesaid denial of the plaintiff's title. The said notice was delivered to the defendant on July 10, 1995.

The plaintiff claims (*same as in Precedent No. 66.*)

No. 68—Suit by Gaon Sabha for Recovery of Possession of House on *Abadi* Site after Abandonment or Escheat *(x)*

1. That the house described in the schedule stands on a site in the *abadi* of village Arjunpur, Gaon Sabha Circle Arjunpur, Tehsil and district Meerut.

2. That on the coming into force of the U.P. Zamindari Abolition and Land Reforms Act, (Act 1 of 1951), the building and the site of the house mentioned above stood settled with Sri Rameshwar Singh, who was in possession thereof on the date of enforcement, i.e. 1st July, 1952.

3. That the said Rameshwar Singh left the village and abandoned the house and site mentioned above on the 8th September, 1962 and has not come back thereafter (*or*, that Rameshwar Singh died on 8th September, 1962, without leaving any heirs entitled to succeed him and the site and house escheated to the State).

(x) With the coming into force of U.P. Act No.1 of 1951, namely U.P. Zamindari Abolition and Land Reforms Act, all the interests of the intermediaries, namely, the zamindars have vested in the State of Uttar Pradesh. This includes wells, trees in *abadi* and buildings. Section 9 of the said Act provides that all buildings shall be deemed to be settled with the person in the possession thereof, by the State Government on such terms and conditions as may be prescribed. Rule 26 of the rules framed under the said Act provides that the building in *abadi* along with the area appurtenant thereto shall be deemed to be settled with the owner of the building on the following terms and conditions: (1) he shall have heritable and transferable

4. That the right of the State in the said *abadi* site and house vest in the plaintiff under notification No. H-560/2 dated 15th July 1952.

5. That after the abandonment by (*or*, death of) Rameshwar Singh, the defendant has entered into possession of the house and site on 15th December 1962, without any right.

6. That the plaintiff claims possession of the said site and house.

No. 69—Suit for Damages for Wrongful Disturbance by the Landlord or by his Subsequent Lessee

1. By a deed of lease dated November 24, 1994, the defendant (*or*, defendant No.1) let to the plaintiff an open space of land lying to the west of the Municipal hall in the town of Budaun, for the purpose of erecting a theatrical stage for a period of four months, at a monthly rent of Rs.1,000.

2. The plaintiff took possession of the said land on November 24, 1994 under the said lease, and was in possession up to November 30, 1994.

3. On November 30, 1994, the defendant took wrongful possession of the said land, and broke and removed the bamboos which the plaintiff had erected thereon for the purpose of making a stage pandal (*or*, on November 29, 1994, the defendant No.1 let the said land to the defendant No.2 who took the lease with notice of the plaintiff's lease. The said defendant No.2, on November 30, 1994, took wrongful possession of the said land and broke, etc.)

4. In consequence of the aforesaid acts, the plaintiff had to take other land from Ram Chandra on a rent of Rs.3,300 a month and has suffered damages.

Particulars :

Cost of bamboos Rs.1,000

---

interest in the site; (2) he shall not be liable to ejectment on any ground whatsoever; (3) he shall have the right to use the site for any purpose whatsoever subject to the existing right of easement; (4) succession will be governed by personal law; (5) if the building is abandoned or if the owner dies without any heir entitled to succeed, the site shall escheat to the State; and (6) he shall pay to the Gaon Samaj rent for the site equal to the amount of rent payable therefor on the date immediately preceding the date of vesting, if any such rent was payable then. The rule further provides that a building in a holding or a grove shall be deemed to be settled with the tenure

Difference between the rent agreed to be paid to the defendant (*or*, defendant No.1) and the rent agreed to be paid to Ram Chandra for the other land, for three months and 24 days (the unexpired portion of the plaintiff's lease), at Rs.2,300 per month was Rs.8,740.

The plaintiff claims Rs.9,740, with interest from the date of suit to that of payment.

No. 70—Suit by Tenant Against Landlord, with Special Damage

(Form No. 19, Appendix A, C.P.C.)

1. On the ___ day of _____ 19__, the defendant, by a registered instrument, let to the plaintiff [the house No. ___, _____ Street] for the term of _____ years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. *All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. On the ___ day of _____ 19__, during the said term, EF, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend.....rupees in moving, and lost the custom of GH and JF by such removal].

The plaintiff claims _____ rupees, with interest at _____ percent from the ___ day of _____ 19__.

*[*This allegation is not really necessary, vide O.6, R.6, but is reproduced here as the form itself is set out in the Appendix A to C.P.C.*].

---

holder on the same tenure as the holding or the grove in which it is situate. Under section 117 of said act all *abadi* sites shall vest in the Gaon Sabha established for the circle. In view of these provisions of law, a *ryot* cannot be ejected now from the *abadi* site on any grounds whatsoever except where he abandons it or dies without any heir.

LICENCE (y)

No. 71—Suit for Ejecting a Licencee and for Injunction

1. By a verbal agreement, on January 4, 1995, the plaintiff granted a licence to the defendant to occupy the house described below, and to take water from the well situate to the west of the said house, for a period of one month.

2. The defendant entered into possession of the said house under the said licence, on January 4, 1995, and has, since that date, been taking water from the said well.

3. The term of the licence expired on February 4, 1995, but the defendant is still in possession of the house and is still taking water from the well.

The plaintiff claims :

(1) possession of the said house.

(y) A licence is permission to do any act on the immovable property of the licensor, when such permission does not amount to the creation of an easement or transfer of an interest in the property. For distinction between a lease and a licence see, *Lal* v. *Dunlop Rubber Co.*, A 1968 SC 175; *Biswanath Panda* v. *Gadadhar Panda*, A 1971 Ori 115; *Sorab* v. *Viswanatha Menon*, A 1975 Ker 990; *Khaja Moinuddin Hasan* v. *Municipal Corporation of Hyderabad*, (1977) 1 An WR 329; *Govindbhai* v. *New Shorrock Mills*, A 1984 Guj 182.

A licence is revocable at the pleasure of the licensor, except in cases mentioned in section 60, Easements Act. A licence is revocable unless (1) it is coupled with a grant or interest, *or*, (2) the licensee acting on the licence has constructed work of permanent nature (*Ratha Behera* v. *Ram Ratan Goenka*, (1974)(1) CWR 216). It is also impliedly revoked in cases mentioned in section 62. No notice is necessary to revoke a licence (*Gobinda* v. Nandulal, 45 IC 317, 27 CLJ 523), and therefore, a suit for the ejectment of a licensee or for an injunction restraining the licensee from doing the acts for which licence was granted may be instituted without a previous notice. But a plaintiff may be deprived of his cost, if the licensee's plea be that he was prepared to leave the land or to desist from continuing to do the act and would have done so, had the licensor expressed a desire to revoke the licence. If however, the licence is revoked by expiry of the period for which it was granted, or on any of the other grounds mentioned in section 62, clauses (c), (f), (g), or (i), the licensee is not entitled to any notice and cannot even be exempted from costs of the licensor's suit. A licence is personal and in the absence of a different intention appearing it cannot be exercised by agents, servants, transferees or even heirs. On the death of

(2) A perpetual injunction restraining the defendant from taking water from the said well.

MASTER AND SERVANT *(z)*

No. 72— Suit by Servant for his Wages

1. The plaintiff was employed by the defendant as his Head Clerk and Accountant, under a verbal agreement, on August 1, 1994, at a monthly salary of Rs.3,200.

---

the licensee the position of an heir is that of a trespasser or tenant at will (*Chinnan* v. *Ranjithammal*, 59 M 554, 131 IC 175, A 1931 Mad 216, 60 MLJ 709). One co-sharer cannot revoke a licence. Either all the co-sharers jointly revoke it or authorise one co-sharer to revoke it (*Hafiz Ali Khan* v. *Mohd Ishaq*, 1977 AWC 709, A 1977 All 469).

Where licence is revocable, the licensee is entitled to reasonable notice. If, however, the licence is revoked, the remedy is by way of damages and not by way of injunction if the licence is irrevocable and its enjoyment is obstructed by the licensor, the remedy of the licensee is either by way of injunction or damages. The Calcutta High Court seems, however, to hold that even in such cases the remedy will be one by way of damages (*Mohd. Ziaul Hasan* v. *Standard Vacuum Oil Co.*, 55 Cal 232; see also, *E.P. George* v. *Thomas John*, A 1984 Ker 224 on relief to be claimed).

Defence : If the defendant admits the licence, he cannot deny the plaintiff's title to the land, though he can plead that it has been extinguished after the grant of licence. He may plead that he has, acting upon the licence, executed a work of permanent character on the land and has incurred expenses in doing so, or that the licence was coupled with transfer of property which is still in force (action 60). A person makes constructions "acting upon the licence" when licence is granted for building purposes or where constructions are made for purposes necessary for the enjoyment of the licence. Even a *kutcha* building, if regularly kept in repairs, may be a work of permanent character (*Nasirul Zaman* v. *Azimulla*, 3 ALJ 765, 28 A 741; *Thakur Prasad* v. *J. Thomkinson*, 102 IC 26 Oudh; *Tripathi* v. *Jokhu*, 113 IC 757 All) but a licence granted to build a shed has been held to be revocable (*Sorab* v. *Viswanath Menon*, A 1975 Ker 990). The work must be done on the licensor's land which cannot be bound in perpetuity on account of any work done by the licensee on his own land (*Gujarat Ginning Co.* v. *Motilal*, 40 CWN 417, 1936 ALJ 145, 160 IC 837, A 1936 PC 77). He may claim reasonable time to leave the property or to remove his goods from it (section 63).

(z) The relation between master and a servant [excepting a public servant, a servant of a statutory corporation or of a body which though not statutory is an instrumentality of the State, or a workman or other servant whose conditions of service are regulated by statutory provisions (*Sukhdev* v. *Bhagatram*, A 1975 SC

2. During the period of the plaintiff's employment, the defendant several times falsely accused the plaintiff, in the office and in the presence of the assistant clerks and menial servants, of dishonesty, and, by his general humiliating treatment made the plaintiff's position intolerable. On June 20, 1995, the defendant sent a report to the police falsely accusing the plaintiff of dishonestly appropriating defendant's money. The charge was, on investigation, found by the police to be false.

The plaintiff claims Rs. 4,800 for his pay from June 1 to July 15, 1995 with interest from the date of suit to that of payment.

No. 73—Suit for Damages for Wrongful Dismissal

1. Under an agreement in writing, dated June 20, 1994, the plaintiff was employed by the defendant to serve him as his assistant, from July 1, 1994 at a monthly salary of Rs.7.500.

2. By the terms of the said agreement it was agreed that the plaintiff should be retained by the defendant in his service until the service should

---

1331, (1975) 1 SCC 421) is regulated by the contract of service. The contract may provide any lawful terms. It is not illegal to provide that a servant would not leave the service without giving 15 days' notice (*Aryodaya* v. *Siva Virchand*, 13 BLR 19, 9 IC 348). If a man enters into any service, a contract to be bound by all the published rules of that service will be implied. In the absence of any contract to the contrary, contract of service is determinable by reasonable notice on either side. Generally a month's notice is considered sufficient (*Ralli Brothers* v. *Amulka Prasad*, 11 ALJ 104. 18 IC 699, 35 A 132), but it really depends on the circumstances of each case and nature of the service e.g., a Municipal Secretary and a school master have been held entitled to three months' notice (*Municipality of Tatta* v. *Assamal*, 29 IC 597 Sindh; *Nirod Chandra* v. *Kirtya Nanda*, A 1922 Pat 24 DB). In a case, a tutor was held entitled to six months notice (*Wittenbaker* v. *J.C. Galstaun*, 36 CLJ 256, 44 C 917, 43 IC 11), but a month's notice was considered reasonable in Burma in the case of a teacher employed by month (*Maung Thein* v. *J.P. De Souza*, 7 R 303, 119 IC 740, A 1929 Rang 167). If a servant is hired by month, fifteen days notice, is reasonable (*Ralaram* v. *Brij Nath*, 168 IC 697, 36 PLR 501). If a servant leaves without notice, he is not entitled to pay for the month preceding that in which he leaves (*Amar Singh* v. *Gopal*, A 1931 Lah 133, 132 IC 577). He is, however, justified in leaving the service if the master is guilty of any breach of contract, or any act or neglect on his part which is prejudicial to the safety, health or moral reputation of the servant (*Middleton* v. *Playfair*, A 1925 Cal 88 DB). According to English authorities, a servant, who leaves before the expiry of the fixed term of service, cannot get pay even for the period he has served. This strict rule has been followed in Bombay and Calcutta (*Aryodaya* v. *Siva Virchand*, 13

be determined by three month's notice given by the defendant to the plaintiff.

3. By a letter of June 10, 1995, the defendant, without giving the plaintiff any such notice as aforesaid, wrongfully dismissed from service.

4. At the time of such dismissal, there was due from the defendant to the plaintiff, pay for the month, of April and May, 1995.

The plaintiff claims :

(1) Rs.15,000, arrears of his pay.

(2) Rs.25,000, on account of damages.

Particulars of Damages

		Rs.
Pay from June 1 to 10	... ..	2,500
Three month's pay in lieu of notice	... ...	22,500
Total	.....	25,000

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

No. 74—Like Suit, Another Form

(Form No. 15, Appendix A, C.P.C.)

1. On the ___ day of _____ 19__, the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [*an accountant, or in the capacity of foreman or as the case may be,*] and that the defendant should employ the plaintiff, as such, for the term of [one year] and pay him for his services Rs.____(monthly).

2. On the ____ day of _____ 19__, the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

BLR 19, 9 IC 348; *Dhumee* v. *Sevenoaks*, 10 C 80), but the Madras High Court has taken a lenient, and apparently more equitable view in holding that a servant leaving without excuse can recover his pay for the period he has served, less the master's damages for the contract (*Choklingam* v. *Mahomed Shariff*, 23 MLJ 680, 17 IC 894). An industrial workman can recover his wages through the speedier and cheaper remedy of an application to the prescribed authority under the Payment of Wages Act, 1936, and a suit is not required.

If a master dismisses a servant during the fixed term of service, or when no

3. On the ____ day of _____19__, the defendant wrongfully discharged the plaintiff and refused to permit him to serve as aforesaid, or to pay him for his services.

No. 75—Suit for Breach of Contract to Serve
(Form No. 16, Appendix A, C.P.C.)

1. On the ___day of _____19__, the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of Rs.___, and that the defendant should serve the plaintiff as [an artist] for the term of [one year].

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the ___ day of _____19__, offered so to do].

---

term is fixed without a reasonable notice, he is liable for damages for wrongful dismissal. The measure of damages in such cases may be the pay for the unexpired period or for the period of a reasonable notice, or when a notice is provided in the agreement, the pay for the period of that notice (*Secretary of State* v. *Burrowes*, A 1937 Lah 549; *Gokak Municipality* v. *Raja Ram*, A 1940 Bom 386; *Tanjoi Bank* v. *G.N. Munia Swami*, A 1964 Mad 183). But the plaintiff must show that he was ready and able to render service during this period. Where a servant absented himself without leave and got an operation performed which incapacitated him for a period of over a month, and was dismissed, it was held that he could not claim damages for dismissal without notice (*Burma Oil Co.* v. *Narain Das*, 104 IC 185 Sind) A master can dismiss a servant without notice and even during the fixed period on the ground of misconduct, neglect of duty or incompetence (*Pandurang* v. *Jairamdas*, A 1925 Nag 166; *Ramsawami* v. *Madras Times*, 37 IC 655 Mad DB; *Piare Lal* v. *Sri Ram*, A 1936 Lah 581). If a dismissal is justified, pay of the broken period cannot be recovered (*Bhakta* v. *Seetal*, A 1925 All 680, 23 ALJ 282). A suit for arrears of salary by a government servant illegally dismissed lies against the Government concerned (*State of Bihar* v. *Abdul Majid*, A 1954 SC 245, 1954 SCR 786; *Om Prakash* v. *State of U.P.*, A 1955 SC 600, 1955 SRC 391).

When an apprentice is a minor living with his father and maintained by him, the father can bring a suit for his wages (*Muthuvelu* v. *Govindswami*, 117 IC 304, A 1929 Mad 781).

In a suit for damages for wrongful dismissal, facts showing that the plaintiff was entitled to remain in service, and that his dismissal was wrongful, must be alleged. In a suit for pay or wages, the contract should be alleged, and also how it terminated. If it is terminated by the plaintiff's own resignation, facts justifying the resignation must be alleged.

When a servant is not a servant of the Government or any Statutory body or Corporation or local authority and his employment is not governed by any statutory

3. The defendant (entered upon) the service of the plaintiff on the above mentioned day, but afterwards, on the __day of_____19__, he refused to serve the plaintiff as aforesaid.

---

provision, his remedy for wrongful termination of the contract of employment is a suit for damages and not reinstatement (*Bool Chand* v. *Chancellor Kurukshetra University*, A 1968 SC 42; *Hindustan Steel* v. *P.J. Verghese*, 1967 ILR 47 Pat 13; *R. Pandubhai* v. *Management, Bombay Cycle Importing Company*, A 1970 Mad 476; *Chairman of Managing Committee, Smt Dev Kunwar Norelal Bhatt Vaishnav College for Women* v. *Alegama Thomas*, (1971) 1 MLJ 76). A public servant dismissed in contravention of Article 311 of the Constitution has to be reinstated. Industrial worker dismissed from service may be ordered to be reinstated by Labour Court or Industrial Tribunal; and a servant of a statutory body created under a Statute when it has acted in breach of mandatory obligation imposed by statute is also entitled to reinstatement. These are the three exceptions which are generally recognised (*T. Kadiryelu* v. *The Secretary Madras State Khadi & Village Industries Board*, (1972) 2 MLJ 641; *Principal & Secretary Maulana Azad College* v. *Nathooram Pandey*, 1972 MPLJ 779; *Sirsi Municipality* v. *Cecilia Kom Francis Tellis*, (1973) 1 SCC 409, A 1973 SC 855; *Sanllaran* v. *Deputy Registrar Cooperative Societies*, 1975 KLT 861; *Sukhdeo Singh* v. *Bhagatram*, A 1975 SC 133; *Arya Vidya Sabha Kashi* v. *Krishna Kumar Srivastava*, A 1976 SC 1073).

Limitation : for a suit for wages is three years (Article 7 Limitation Act 1963).

Defence : In a suit by a servant for his wages, the defendant may plead that the plaintiff was dismissed for misconduct or incapacity or neglect of duties, or that he left of his own accord and without any justification, hence he is not entitled to pay for the broken part of the month. In a suit for damages for wrongful dismissal, the defendant may deny the dismissal and plead that the plaintiff voluntarily withdrew from the service, or he may justify the dismissal by pleading misconduct, or incapacity or neglect of the plaintiff. But it is no defence to a suit for dismissal within a fixed term that the defendant's business was not improving or he could get another cheaper man (*Sundaram Chettiar* v. *Chocklingham Chettiar*, 1938 MWN 653, A 1938 Mad 672, (1938) 1 MLJ 857, 47 LW 803). All that is necessary is that the existence of the reason for dismissal on the date of dismissal must be shown. It is immaterial that the defendant did not know of them and dismissed the plaintiff on other grounds (*Sassoon* v. *Dossa Kalian*, 15 IC 757, 5 SLR 192). But where the dismissal is wrongful because the person dismissing the plaintiff was not competent to dismiss him, the fact that there were good reasons for dismissal can be no justification (*Venkata* v. *Ponnuswami*, 41 M 357, 33 MLJ 660, 43 IC 205).

Full particulars of the alleged misconduct or other facts showing justification must be given in the written statement. It is a sufficient defence if the facts justify the dismissal, and the question whether the Judge would have himself dismissed a servant on that ground is an irrelevant consideration (*The Madura, etc.*, v. *Sundaram*, A 1926 Mad 57, 49 MLJ 526, 91 IC 525). Disobedience of an order which is not lawful

MONEY SUITS *(aa)*

No. 76—Suits for Money Lent

1. On June 4, 1993, the defendant borrowed Rs. 4,000 from the plaintiff and agreed to repay the loan on demand (*or*, within six months), with interest at 12 per cent per annum; [*or*, from May 20, 1992 to June 4, 1993, the defendant borrowed money from the plaintiff on several occasions and agreed to repay it on demand, with interest at 12 per cent per annum.]

Particulars of the Loans

			Rs.
May 20, 1992	...	...	500
August 4, 1992	...	...	500
October 8, 1992	...	...	500

is not misconduct, e.g., refusal of a servant to go to a place where he is in danger of life (*The Ottoman Bank* v. *Chakrian* 124 IC 881, A 1930 PC 110).

If pay for the unexpired period of service is claimed as damages the defendant may plead that the plaintiff had opportunities to obtain other service during the period and he wrongfully refused to take other employment. If pay in lieu of notice is claimed, defendant may show that plaintiff had actually obtained equally advantageous employment (*Baldeo Singh* v. Sachdev, 151 IC 613, A 1934 Rang 107).

(aa) A suit for a simple money debt, if advanced on the security of a bond or other agreement, must be brought on the basis of such bond or agreement. Otherwise, it is a simple suit for money lent and **the fact of the loan, with the terms on which it was advanced, must be alleged in the plaint.** If the suit is within three years of the loan, an express promise of repayment need not be pleaded, as the same is implied in the request for the loan (*Pramatha* v. *Dwarka*, 23 C 821). If the plaintiff has kept a memorandum of the debt or has entered it in his account books, the fact need not be alleged in the plaint, as that is only an evidence of the loan. Even if there is acknowledgment of the loan in the defendant's hand in the plaintiff's *bahi khata*, it need not be alleged in the plaint, though it would be an excellent piece of evidence at the trial. It has already been shown that if the acknowledgment is accompanied by a promise, it can be made the basis of a suit and should then be pleaded (*see* "Account stated").

Limitation : Three years from the date of loan under Articles 19 and 21. But if money is repayable at a specified time Article 113 will apply and time will run from the date fixed for payment. If an agreement provides that debtor can repay in three years and the debtor makes default, suit brought within three years of expiry of time

November 10, 1992	...	...	100
January 12, 1993	...	...	1,000
March 14, 1993	...	...	400
June 4, 1993	...	...	1,000
		Total	4,000

2. The defendant has not made any payment [*or*, the defendant has not made any payments except the following :—]

Particulars of Payment

* * *

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

Particulars of the Amount Claimed

* * *

No. 77—Like Suit, Another Form

(Form No. 1, Appendix A, C.P.C.).

1. On the __ day of _____ 19__, plaintiff lent the defendant Rs.___ repayable on the __day of _____19___ .

2. The defendant has not paid the same, except ____ rupees paid on the ___day of _____19 __.

[*If the plaintiff claims exemption from any law of limitation, say:*]

3. The plaintiff was a minor [*or*, insane] from the __ day of till the ___ day of _____19___.

The plaintiff claims ___rupees, with interest at ___ per cent from the __ day of _____ 19__.

---

granted for repayment is not barred (*Shatzadi Begum Saheba* v. *Girdharilal Sanghi*, A 1976 AP 273). If money is lent by cheque, under Article 20, three years period will run when the cheque is paid.

Defence : Defendant may show that the debt is not recoverable because it was advanced for an immoral or illegal purpose, or there might be a dispute about the terms of the loan if the loan is admitted.

MONEY PAID *(bb)*

No. 78—Suit for Money Paid for the Defendant at his request

1. At the request of the defendant made verbally on December 20, 1994, the plaintiff paid Rs.500 to one Kishan Lal on December 21, 1994.

2. The defendant had, at the time of making the request, undertaken to pay the money to the plaintiff in six months from the date of payment with interest at 12 per cent per annum.

(bb) When the plaintiff has paid any money to a third person at the request, or by the authority of the defendant, express or implied, with an undertaking, express or implied, to repay it, the plaintiff can bring a suit for its recovery. The liability is entirely personal and no charge is created on the property in respect of which money is paid (*Munni* v. *Triloki*, A 1932 All 332, 136 IC 66, 1932 ALJ 63, 54 A 140). Examples of an implied authority to pay are furnished by section 69 and 70 of the Contract Act. When the plaintiff was either compelled to pay, or was legally compellable to pay, or was interested in paying money for which the defendant was liable, the plaintiff can sue the defendant for it. For instance, if the plaintiff's property is attached in execution of a decree against the defendant and the plaintiff pays the decretal amount, he can recover it from the defendant (*Tulsa* v. *Jageshwar*, 28 A 563). Similarly, he can recover what he has to pay under O. 21, R. 89, to save his property from sale in execution of decree against the defendant (*Apparao* v. *Venkata*, A 1941 Mad 635). Similarly, a mortgagee discharging a rent decree against the mortgagor (*Jhanku* v. *Revati*, 19 ALJ 73), a mortgagee paying revenue of the mortgaged property (*Ma Mya* v. *Ma Lon*, A 1933 Rang 112, 144 IC 392), a Hindu widow incurring costs on the funeral of her husband (*Dalel* v. *Ambika*, 25 A 266), and a sub-lessee paying rent due from the lessor (*Mathoora* v. *Kitso Kumar*, 4 C 369), may recover the money so paid, even though he may be entitled to other remedies, e.g., to add the money to mortgage money. But if the plaintiff was not interested in paying the money nor was he compelled to pay it, the payment is voluntary one, then the money paid cannot be recovered. The plaintiff should have a present interest and not an expectant interest. For example, a person who expects to get possession as the result of a pending litigation cannot be said to be a man interested in the property (*Nand Kishore* v. *Paraoo*, 2 Pat LJ 676, 42 IC 839). It is, however, not necessary that a person to be interested in payment should at the same time have legal proprietary interest in the property, in respect of which payment is made (*G G Seksaria* v. *The State of Gondol*, 1950 ALJ 270 PC; *Chentilnathan Peri* v. *S P Manickam Chettiar*, A 1966 Mad 426).

The payment should have been actually made before a suit is brought and an undertaking given for the money is not enough to entitle the plaintiff to bring a suit. Even if a person is neither interested nor compelled to make a payment he can recover it if he had made it *lawfully for the defendant*, and the latter has enjoyed the

3. The defendant has not paid the money or any part thereof.

The plaintiff claims Rs.500 principal and Rs.60 interest, with interest from date of suit to that of payment.

No. 79—Suit for money payable by the Defendant, paid by the Plaintiff (Section 69, Contract Act)

1. In execution of the decree No. 545 of 1991, passed by this court against the defendant, the decree-holder, Ramlal, attached the plaintiff's house in village Barka, Pargana Moth, District Jhansi on September 20, 1995.

2. On September 30, 1995 the plaintiff paid into court to the credit of the said Ramlal, Rs.4,564, on account of the amount of the said decree due from the defendant, in order to have the plaintiff's house released.

---

benefit of the payment (section 70), for example, payment of debts made *bona fide* by minor defendant's uncles who were supervising the defendant's business (*Muthayya* v. *Narayanam*, A 1928 Mad 317, 109 IC 101 DB). The basis of a suit under section 70 being contractual, a minor cannot be made liable under that section as a liability which cannot be imposed by express contract cannot be imposed even by implied contract (*Bankey Behari* v. *Mahendra*, A 1940 Pat 324, 188 IC 772). But if the payment was not made lawfully, e.g., when it was made voluntarily without any legal obligation to pay or in spite of the protest of the person on whose behalf it was made, it cannot be recovered (*Venkata* v. *Aruna Chalam*, 51 IC 857 Mad; *Radhakrishna* v. *Secretary of State*, A 1936 Mad 930). A payment made with a view to create evidence in support of a claim hostile to the defendant cannot be said to be made lawfully for the defendant (*Jinnat Ali* v. *Fateh Ali*, 15 CWN 332, 13 CLJ 640, 9 IC 219).

If money is left with a vendee to pay to a creditor of the vendor and the vendee pays more than what was left with him, the payment cannot be said to have been made lawfully (*Suraj Bhan* v. *Hashim*, 40 A 555, 16 ALJ 581). Section 70 gives statutory recognition to the doctrine that a person who had been unjustly enriched at the expense of another must make restitution. The extent to which restitution is to be made by the person who is unjustly enriched is merely the excess of benefit received over the harm suffered by him (*De Semet India Pvt. Ltd.* v. *B.P. Industrial Corporation (P) Ltd.*, A 1980 All 253; *Mahabir Kishore* v. *State of M.P.*, A 1990 SC 313, see also *Aries Advertising Bureau* v. *C.T.Devaraj*, A 1995 SC 2251; *Union of India* v. *I.T.C. Limited*, A 1993 SC 2135). If the defendant was not bound to make the payment no suit can lie against him; for instance a trespasser cannot be sued for money paid by another on account of the Zamindar's due as the former was not bound to pay it (*Payida* v. *Barrey*, A 1926 Mad 152, 91 IC 608).

The fact that the defendant was benefited is not enough, if the circumstance be such that he had no option to accept or reject the benefit. For instance, A believing

The plaintiff claims Rs. 4,564 with interest from the date of suit to that of payment.

himself to be the reversioner of B, deposits the amount of a decree against B and has the sale set aside. It is found in suit between A and C that C and not A, is the reversioner, A cannot recover the amount paid by him on the ground that C is benefited by the release of the property, as the payment was made by A at that time, not for C, but on his own behalf (*Yogambai* v. *Naina*, 33 M 15). But where work, was done by the plaintiff under a contract which has not been validly executed and defendant had taken the benefit, he was made liable (*P.D. Khanna* v. *Secretary of State*, 38 PLR 618; *State of W.B.* v. *B.K. Mondal*, A 1962 SC 779; *New Marine Coal Co.* v. *Union of India*, A 1964 SC 152; *Mulchand* v. *State of M.P.*, A 1968 SC 1218). Where work was done under requisition by Government on suggestions by defendant, but defendant making it clear that he would not pay for the work, it was held that work was not done for the defendant (*Governor General* v. *The Municipal Council, Madura*, A 1949 PC 39, 1948 ALJ 462). Government of India supplied steel to a Company for manufacturing gas plants. Stock was subsequently transferred on the instructions of Government of India to a third person. Government of India was held to have enjoyed the benefit (*Union of India* v. *J.K. Gas Plant*, A 1980 SC 1330). A contractual liability by defendant to pay the money, which plaintiff, with a view to protect his own interest, has to pay would also entitle plaintiff to be reimbursed and it is not necessary that the liability under section 69 should be statutory (*Agne Lal* v. *Sidh Gopal*, A 1940 All 214, 1940 ALJ 20, 189 IC 60).

In any suit for money paid for the defendant, plaintiff must allege **(1) payment by him, (2) defendant's request, express or implied, to make the payment, and (3) an undertaking, express or implied, by the defendant to repay money. In cases of implied request or undertaking facts implying the same should be alleged,** e.g., those showing (1) that the plaintiff was interested in making it or was acting lawfully in doing so, and (2) that defendant was bound to make the payment or that he voluntarily enjoyed the benefit of it. It is not in every case in which a man had benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay (*Lala Manmohan Das* v. *Janki Prasad*, A 1945 PC 23 (30), 1945 ALJ 51).

Limitation : Three years from payment of money (Article 23).

Defence : The defendant may plead that the payment was voluntary, or that he was neither bound to make it nor was he benefited by it, nor had he requested for it nor did he ratify the payment. In a case under section 70, he may plead that the payment was not made *for him lawfully*, or that it was made by the plaintiff for his own benefit, and incidentally, the defendant was also benefited (*Viswanadha* v. *Orr*, 45 IC 786 Mad), or that the defendant had no option but accept the benefit and the benefit was thus forced upon him. Stamp and registration expenses advanced to a company which never commenced its business are not recoverable under section 70, Contract Act from the Company having regard to section 103(3) of the Companies Act, 1913 (*In re, Ambica Textile Ltd.*, 54 CWN 157).

MONEY RECEIVED *(cc)*

No. 80—Suit for Money when it was Paid for a Consideration which has Failed

1. On February 14, 1994 the plaintiff requested the defendant, who was proceeding to Bombay to buy for him a video cassette recorder and paid Rs.11,000 in advance to the defendant for payment of the price.

2. On February 20, 1994 the plaintiff verbally asked the defendant not to purchase the said recorder for him, and the defendant replied that he would not.

3. The defendant has not refunded the sum of Rs.11,000 or any part thereof.

The plaintiff claims refund of Rs.11,000 with interest from date of suit to that of payment.

No. 81—Like Suit, Another Form

1. On August 6, 1972, the defendant borrowed Rs.1,10,000 from the plaintiff at an interest of one percent per mensem and executed on her own behalf and on behalf of her minor nephew Hashim Ali, a mortgage-deed for the said loan hypothecating two houses situated at _____.

2. For two years after the mortgage the defendant continued to pay interest on the aforesaid loan but did not pay any interest after that nor did she pay any part of the principal amount.

3. The plaintiff thereupon instituted a suit against the defendant and her said minor nephew Hashim Ali under her guardianship and obtained a decree from this court on April 10, 1978, for the principal mortgage money, interest and costs, to be realised by sale of the said mortgaged houses.

(cc) Under this head fall claims technically known **as claim for money had and received to the use and benefit of the plaintiff**, for instance, money received by defendant on behalf of the plaintiff, money paid by mistake of fact, money paid for a consideration which has failed, money paid under coercion, or recovered by fraud, or for an illegal object which has not been fulfilled, or overcharge made by a Railway Co. (*Palghat Electric Corporation* v. *Veeraraghav*, A 1941 Mad 439) or money stolen by defendant from the plaintiff (*Gaffar Khan* v. *Syed Noor*, A 1941 Mad 391). **The plaintiff must clearly set out in the plaint fact from which it can be inferred that the defendant received the money for his use from the plaintiff.** In the case given in precedent No.82, the plaintiff can recover money on the ground that

4. The said houses were sold in execution of the decree referred to in para 3 above and were purchased at the auction sale by one Manik Chand on May 20, 1980.

5. The said Manik Chand obtained possession of the said houses, and sold them to the plaintiff by a sale deed dated July 15, 1980 and the plaintiff obtained possession of the said houses on July 20, 1980.

6. In or about April, 1982 the aforesaid Hashim Ali through his father as next friend, instituted in this court a suit (being suit No.218 of 1982) against the plaintiff to set aside the sale of the aforesaid houses and for a declaration that the mortgage of August 6, 1972 was not binding on him. The suit was dismissed by this court but was decreed on appeal by the High Court on February 19, 1983 on the ground that the defendant had no authority to mortgage the said houses or to represent the said minor in the suit on the mortgage.

7. The said Hashim Ali has, in execution of the said decree of the High Court, dispossessed the plaintiff of the said houses on April 3, 1983.

8. The plaintiff claims refund of the sum of Rs.1,10,000 advanced to the defendant with interest at 1 per cent per mensem on the ground that the consideration on which it had been advanced has failed on February 19, 1983 when the High Court set aside the mortgage and the decree obtained upon it and the sale held in execution of the said decree.

The plaintiff claims :

(1) Judgment for Rs.1,10,000 for principal and Rs. ____ for interest from August 6, 1974, when the defendant ceased to pay interest, upto July 20, 1980, when the plaintiff obtained possession of the said houses.

(2) Interest from date of suit.

No. 82—Suit for Refund of Money Obtained by Fraud

1. On September 20, 1993 the plaintiff lent to the defendant a sum of Rs.22,000 on the defendant executing a bond for the said loan

it was obtained by fraud (*Shabazad* v. *Narain*, 101 IC 257 All). Where a transfer is set aside under section 53, Transfer of Property Act, the transferee can recover the price from the transferor (*Parasharam* v. *Sadasbeo*, A 1936 Nag 268). If a contract stands frustrated the party who had received benefit under it is liable to return it to

hypothecating his rights in the following plot of land :—

* * * *

2. In order to induce the plaintiff to advance the aforesaid loan and to agree to accept the security of the aforesaid plot of land as sufficient, the defendant verbally represented to the plaintiff that he was proprietor of the said plot.

3. The plaintiff was induced to, and did, advance the aforesaid loan to the defendant on the aforesaid security, by, and on the faith of, the said representation of the defendant and without knowledge of the true facts.

4. The plaintiff has since discovered on February 20, 1994 and the fact is, that the said representation was false and that the defendant is not the proprietor of the aforesaid plot of land hypothecated by him but that he had only a licence in it.

5. The defendant made the said representation fraudulently, well knowing that it was false.

The plaintiff claims refund of Rs.22,000 with interest from date of suit to that of payment.

No. 83—Suit for Money Paid under Mistake *(dd)*

1. The plaintiff and one Ram Kishan owed Rs.500 to the defendant under a bond, dated June 15, 1994, jointly executed by them.

---

the other, vide section 65 (*I.F.C.I. v. Sehgal Papers*, A 1986 P & H 21; *State of Rajasthan v. Association of Stone Industries*, A 1985 SC 466).

Suit by auction purchaser against decree holder for recovery of money paid by him for purchase of property in auction is not maintainable as the principal of "money had and received" is not applicable (*Vishwanath Maharudra Matkari v. Jan Mohammed*, A 1982 Bom 30).

Limitation : Three years from the date when the money is received (Article 24), but when money is claimed back on the ground of failure of consideration, the time is three years from the date of failure of consideration (Article 47). The suit in precedent No. 81 was held to be governed by Article 97 of the Act of 1908 corresponding to Article 47 Limitation Act 1963 and could be brought within three years from the decree setting aside the sale in favour of the plaintiff (*Ma Hnit v. Fatma*, 101 IC 414, 52 MLJ 579 PC)

(dd) Under section 72, Contract Act payment made under mistake of fact can be recovered, when the mistake is in respect of the underlying assumption of the contract or transaction or is fundamental or basic (*Norwhich Union Fire Insurance*

2. On April 16, 1995, the said Ram Kishan paid Rs.500 to the defendant in full discharge of the aforesaid debt.

3. The plaintiff was not aware of the said payment by the said Ram Kishan, and in ignorance of the fact, paid Rs.500 to the defendant on April 20, 1995 in the belief that the said debt was still due.

4. The plaintiff came to know of the payment by Ram Kishan in the last week of May, 1995.

The plaintiff claims refund of Rs.500 with interest from the date of suit to that of payment.

No. 84—Money Overpaid

1. On January 4, 1996 the defendant verbally agreed to sell and the plaintiff agreed to buy the several gold ornaments detailed at the foot of the plaint at Rs.4,350 per 10 grams of gold contained in them.

2. The plaintiff and the defendant got the said ornaments weighed by Ram Kumar goldsmith, who declared them to contain 400 grammes of gold, and the plaintiff accordingly paid Rs.1,74,000 to the defendant.

3. On March 3, 1996, the plaintiff discovered, and the fact is, that the ornaments really contained only 340 grammes of gold and he was ignorant of this fact when he made the said payment.

4. The defendant has not repaid the sum so overpaid.

Society v. *W.H. Price*, 151 IC 548, 1934 ALJ 609, A 1934 PC 171). Tax paid to a board under the mistaken belief that property was situate within Board's jurisdiction can be recovered under this section (*Audi Narayana* v. *Panchayat*, A 1940 Mad 660).

While money paid under mistake of law is refundable, it would not be so, if a mistake of law of both parties had led to the formation of contract, and money was paid under the contract, because the contract is not voidable and it would not be possible to say that money was paid under mistake of law (*Ananyalakshmi Rice Mills* v. *The Commissioner of Civil Supplies*, A 1976 SC 2243, (1976) 3 SCR 387; also see, *Bhavnagar Salt Works* v. *Union of India*, A 1985 Guj 21 FB.).

The mistake must be as between the payer and the payee and not as to any collateral matter, e.g., if a bank cashed a cheque under the mistaken belief that it has funds, it cannot recover the amount from the payee (*Chambers* v. *Miller*, 32 LJCP 30; *China and Southern Bank* v. *Te Thoe Seng*, A 1926 Rang 14 DB). A payment made under a mistake of fact common to both parties can be recovered as money had and received to the use of the person making payment (*Tom Boeney Banett* v. *African Products Ltd.*, A 1928 PC 261).

The plaintiff claims the sum of Rs.26.100 paid to the defendant in excess of the true price, with interest from date of suit to that of payment.

No. 85—Like Suit, Another Form

(Form No. 2, Appendix, C.P.C.)

1. On the __ day of _____ 19__, the plaintiff agreed to buy and the defendant agreed to sell ____ bars of silver at ___ annas per tola of fine silver.

2. The plaintiff procured the said bars to be assayed by *EF* who was paid by the defendant for such assay, and *EF* declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant _____ rupees.

3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment.

4. The defendant has not repaid the sum so overpaid.

The plaintiff claims _____ rupees with interest at _____ per cent from ___ day of _____, 19__.

The mistake should be expressly alleged with particulars. When in a suit it was alleged that the contract price was not as entered in the contract deed but was really less, it was held that these allegations did not disclose any cause of action (*U. Shew Thang* v. *U. Kyaw*, A 1930 Rang 12).

Limitation : Three years from the date the mistake becomes known to the plaintiff (Article 113). In *Munnalal* v. *State of Punjab*, A 1986 P&H 59, the date of judgment in which the recovery was declared to be illegal was held to be the date of discovery of the mistake (relying on, *D Cawasji & Co.* v. *State of Mysore*, A 1975 SC 813). In *Bhavnagar Salt Works, supra*, Article 24 was applied to a suit for refund of tax illegally recovered as the plaintiff had paid it not under mistake but under compulsion knowing that it was not due.

Defence : It is a good defence that a long interval of time has elapsed during which the position of the defendant has been altered; and the plaintiff has, by his conduct, e.g., not informing the defendant of the mistake after detecting it, made it impossible for the parties to be restored to their original position (*Raghunath* v. *Imperial Bank*, 27 BLR 1129, 91 IC 342, A 1926 Bom 66 DB).

MORTGAGE*

No. 86—Suit by a Mortgagee for Sale or Foreclosure *(ee)*

1. The plaintiff is mortgagee of the property sought to be sold (*or*, foreclosed).

2. The following are the particulars of the mortgage :

(a) Date - March 6, 1970.

(b) Name of mortgagor- Puran Chand

Name of mortgagee- Sham Lal.

(c) Sum secured - Rs.44,000.

(d) Rate of interest - Twelve per cent per annum with annual rests.

(e) Property subject to mortgage— House No. 460, Mahatma Gandhi Marg, Ferozabad, bounded as follows: (*boundaries*).

(f) *Amount now due* :- Rs.54,479 as per account given at the foot of the plaint.

3. The said Puran Chand died in 1981, leaving three sons, Kishen Chand, defendant No.1, Gopi Chand, defendant No.2, and Fakir Chand.

---

*The law of mortgage is so vast that it is useless to make an attempt to deal with it in the small space of these foot-notes. When there is a complicated case of mortgage, the law should be carefully studied by the pleader before drafting the plaint.

(ee) A suit for sale can be brought under a simple or an English mortgage, though a mortgagee is always at liberty to sue for a simple money decree (*Chinnaswami* v. *Kanniah*, 1937 MWN 1215 (1), 46 LW 728). Even if a simple mortgagee is himself in possession under another usufructuary mortgage he can bring a suit for sale subject to his usufructuary mortgage (*Udaichan* v. *Nagina*, 50 IC 40 Pat; *Nazirum* v. *Asifa*, 100 IC 577 All; *Rangaswami* v. *Subbaraya*, 30 M 408; contra *Bhagwandas* v. *Bhagwani*, 26 A 14). A usufructuary mortgagee or a conditional mortgagee can bring a suit for sale only when there is a personal covenant to pay the money and also the property is hypothecated for the money, for a mere covenant to pay does not give a right to sue for sale but only gives right to a personal decree (*Kanhiaya Prasad* v. *Hamidan*, 176 IC 492, A 1938 All 418; *Kamal* v. *Ram Narayan*, A 1930 Pat 152, 120 IC 308; *Mohammad Abdulla* v. *Mohammad Yasin*, A 1933 Lah 151, 141 IC 377; *Ramlal* v. *Mt. Genda*, A 1942 All 236 contra. *Ramayya* v. *Gurwa*, 14 M 232; *Siva* v. *Gopala*, 17 M 131). Whether there is such a covenant or not has to be gathered from the deed itself.

Fakir Chand also died a few months later, leaving a minor son, Balram, defendant No.3.

4. After the said mortgage, Kishen Chand and Gopi Chand, defendants Nos.1 and 2 have sold a share in the property to defendant No. 4 and have mortgaged another share to defendant No.5.

5. On January 20, 1981, defendant No.6 has, in execution of a simple money decree against defendant No.3, purchased a half-share out of the one-third share of defendant No.3 in the mortgaged house.

6. Defendant No.7 is a prior mortgagee of the house in suit under a bond, dated May 4, 1968, but the plaintiff's mortgage in suit has priority even against the mortgage of defendant No.7, by reason of the fact that the money under the mortgage in suit was left with the mortgagee Shamlal for paying off a prior mortgage of one Ram Narayan, dated March 18, 1966, and the said Shamlal redeemed the said mortgage of Ram Narayan on March 18, 1970.

7. Shamlal, the mortgagee, died in 1982, leaving two sons, Ram Lal defendant No. 6 and Motilal. Moti Lal has executed a sale-deed in favour of the plaintiff on September 4, 1984, in respect of his half share in the mortgagee rights under the mortgage in suit.

The plaintiff claims :

(1) Payment of Rs.54,479 with interest from date of suit to that of payment, or in default (sale, or) foreclosure (and possession) of the property detailed in para 2 (e) above.

A prior mortgagee in not a necessary party to such a suit and, the property is always sold subject to his mortgage but the court may with his consent, sell the property free from his mortgage (O 34, R.12). If a puisne mortgagee has priority over the plaintiff's mortgage in respect of a portion of his mortgage money, the plaintiff can sell property only after payment of such portion to the puisne mortgagee. If the plaintiff admits this partial priority in the plaint, he must offer to redeem the mortgage to that extent, and he will have to pay court-fee for such redemption also. If he does not admit the priority, and the court finds that a puisne mortgagee has priority to a certain extent, the court will pass a decree directing payment of the prior charge.

In the suit for redemption, unless it is a conditional sale or anomalous mortgage so long as the sale is not confirmed, the debtor has a right to deposit the entire sale money including the sale expenses and poundage fee and the Court is under the Statutory duty to accept the payment and direct redemption of mortgage (*New Kemil Worth Hostels (P) Ltd.* v. *Ashoka Industries Ltd.*, (1995) 1 SCC 161).

(2) In case the proceeds of sale are found to be insufficient for the amount due under the decree, then, that liberty be reserved to the plaintiff to apply for a decree for the balance under O. 34, R. 6, C.P.C.

No. 87—Like Suit, Statutory Form

(Form No. 45 Appendix A, C.P.C.)

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage :

(a) (*Date*) ;

(b) (*Names of mortgagor and mortgagee*) :

In a plaint for sale, foreclosure or redemption full particulars of the mortgage must be given as shown in the forms in Appendix A, C.P.C. To these particulars should be added, in the case of a suit for redemption, the conditions, if any, laid down in the mortgage deed for redemption. But the allegations about transfers or devolution of the rights of the mortgagor or mortgagee should not be mixed in the particulars as in the C.P.C. forms. These should be separately but briefly made. It would be convenient first to state the transfers and devolutions of the rights of the mortgagor in their chronological order, and then to state those of the mortgagee in the same order. If the description of the mortgaged property had changed owing to settlement or partition, the changed description should also be given in the plaint, after the description given in the mortgage deed separating the two by such words as "At present corresponding to" or "which has, at the partition on (*or* settlement) held after the mortgage, become."

An account of the "money due" should be separately given at the foot of the plaint as particulars, mentioning any payments, or credit given for the profits if the plaintiff is in possession of the mortgaged property. In such cases, a paragraph should be added to the plaint in the following form: "The plaintiff has (*or* the plaintiff and his predecessors-in-title have) been in possession of the mortgaged property since June 20, 1981, and particulars of the profits received during the period of such possession, and credited in favour of the mortgagee, are given in the account at the foot of the plaint."

One of the several mortgagee can sue for his share of the mortgage money, but he must make the co-mortgagees defendants if they refuse to sue (*Sunitabala* v. *Dhara Sundari*, 46 IA 272, 53 IC 131). In such cases decree should direct deposit by the mortgagor realisation by sale of the whole sum due, out of which plaintiff can be paid his share. Court-fee should in such cases be paid on the whole sum due and not only on the plaintiff's share (*R. Kailasa Ayyar* v. *Payyabir*, A 1942 Mad 205). A suit by one of several co-mortgagees to recover the amount due under the mortgage by sale of the mortgaged property without impleading the other co-mortgagees is not maintainable. The defect is not cured if the other co-mortgagees are added after

(c) (*Sum secured*) ;

(d) (*Rate of interest*) ;

(e) (*Property subject to mortgage*) ;

(f) (*Amount now due*) ;

---

the expiry of the period of limitation (*Adivepa Channappa* v. *Radappa Ballappa*, A 1948 Bom 211 FB).

A usufructuary mortgagee has right to possession of the mortgaged property and has the right to receive the rents and profits accruing from it (*Narpatchand A Bhandari* v. *Shantilal Mool Shamakr Jani*, A 1993 SC 1712). A tenant inducted by the mortgagee in possession is liable to be evicted on redemption of the mortgage, the tenant is not entitled to the protection of the provisions of the Rent Control Law (*Jadavji Purshottam* v. *Narsibhai*, A 1987 SC 2146; *Om Prakash Garg* v. *Ganga Sahai*, A 1988 SC 108; *Pomal* v. *Tarajilal* A 1989 SC 436). A mortgagee in possession is landlord, he is entitled to seek recovery of possession of the leased premises from a tenant in mortgaged premises for his own bonafide requirement of use (*S.B. Abdul Azeez* v. *Maniayappa Setty*, A 1989 SC 553).

Parties :- See Chapter XII.

Limitation : Twelve years under Article 62 from the due date of payment. If payment by instalments is provided, limitation would run from the date of each default (*Gokul* v. *Sheo Prasad*, A 1939 Pat 433 (FB); 183 IC 523). If option is given to mortgagee to sue for whole on occurrence of any default, time does not run on default if option is not exercised (*Megh Nath* v. *Collector, Cawnpore*, A 1947 All 7, 1946 ALJ 315, following, *Lasa Din* v. *Gulab Kumar*, A 1932 PC 207). In a suit for redemption of usufructuary mortgage, where mortgage is acknowledged in a certain deed, limitation would start from the date of acknowledgment in the deed (*Bibijan* v. *Murlidhar*, (1995) 1 SCC 187). Acknowledgment of liability after expiration of prescribed period for filing suit does not revive period of limitation under section 18 of the Limitation Act (*Sampuran Singh* v. *Niranjan Kaur*, A 1999 SC 1047).

Court fees: In cases of foreclosure valuation for jurisdiction and court-fees is the amount of the principal mortgage money (section 7 (ix)]. In case of sale, it is the total amount of principal and interest claimed by the plaintiff.

Defence : The defendant may show that the transaction does not amount to a hypothecation of the property or that the so-called mortgage-deed is defective and does not therefore operate as such, e.g., that it was not attested by two witnesses. That the mortgage money was left by the mortgagor with a subsequent transferee for payment to the plaintiff is no defence. If a puisne mortgagee is impleaded, he may show that he has discharged some mortgage prior to that of the plaintiff and thus obtained priority to that extent. But a person impleaded as subsequent mortgagee cannot plead his paramount title, i.e., that he and not the mortgagor was the owner of the property (*Gobardhan* v. *Mannalal*, 16 ALJ 639; but see, *Bisheshwar Dayal* v. *Jafri Begum*, 1937 ALJ 536 DB); where it has been held following *Radha Kishun* v. *Khurshed Hossein*, A 1920 PC 81, 47 Cal 662 that there is nothing in O.34, R.1,

(g) (If the plaintiff's title is derivative, state shortly transfers or devolution under which he claims).

(If the plaintiff is mortgagee in possession, add—)

The plaintiff took possession of the mortgaged property on the ___ day of _____, 19__, and is ready to account as mortgagee in possession from that time.

The plaintiff claims :

(1) Payment, or in default [sale *or*] foreclosure [and possession].

(Where Order 34 Rule 6, applies)

(2) In case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for an order for the balance.

No. 88—Like Suit where Members of a Joint Hindu Family are Impleaded *(ff)*

After setting out the facts as in precedent No. 87 add :

1. The said mortgagor and defendants Nos.1 and 2 are and on the date of the mortgage were, members of a joint Hindu family, and the said

---

which prohibits the mortgagee from impleading in the mortgage suit any person who, he alleges, impugns his title as a mortgagee. To hold otherwise would in many instances lead to highly undesirable and inequitable results. There is no reason in law or equity for holding that the question of prior transferees' paramount title should not be decided in the mortgage suit. The Oudh Court has held in *Mehdi Ali* v. *Walayat*, A 1930 Oudh 97, that a mortgagee should not be allowed in his suit to raise a controversy as regards the title of third person, not connected with the mortgage and claiming a paramount title. A person having a paramount title is not a necessary party to the suit (*Nimba Ganba* v. *Narain Paikaji*, A 1948 Nag 369). If impleaded, he may apply to be discharged. If he does not so apply and an issue is framed and decided about his rights, the decision becomes binding on the parties (*Mst. Satwati* v. *Kali Shankar*, A 1955 All 4). The Calcutta High Court has held that the court has a discretion to entertain or refuse to entertain such a plea (*Asmatullah* v. *Gamir*, 33 CWN 659, A 1929 Cal 672 DB). The same view has been taken by Madras High Court (*State Waqf Board* v. *Indian Bank Limited, Madras*, (1976) 2 MLJ 314). An auction purchaser can impeach a mortgage made by the judgment-debtor whose rights he has purchased (*Jagannath* v. *Chunilal*, A 1933 All 180, 1933 ALJ 1110, 143 IC 736).

(ff) If the property mortgaged was the self-acquired property of the mortgagor, no other member of the family should be impleaded in a suit for sale or foreclosure.

mortgagor was at all material times the head and manager of that family.

2. The mortgaged property was the ancestral property of the mortgagor.

3. The mortgage was made by the said mortgagor to raise money for payment of government revenue of the family *zamindari* property in village Randewa for the years 1946 and 1947. [*Or, if defendants 1 and 2 are mortgagor's sons*, the mortgage was made in lieu of (*or*, to pay off) antecedent debts of the said mortgagor. *Particulars of the antecedent debts.*] [*Or*, (*if the mortgagor was not the father*) the mortgage was made by the said mortgagor as manager of the joint family to pay off an antecedent debt, viz. debt due on a bond, dated January 6, 1949 to one

---

If any one is impleaded, the suit is bad against him for want of a cause of action. It is only when the property is joint family property, in which other members of the family besides the mortgagor have also an interest, that such other members should be joined. In such cases, **all facts making the mortgage binding on such members should be pleaded**, viz. that the mortgagor was the manager of the family, that the mortgaged property was joint family property, the necessity for which the mortgage was made, or the benefit which family derived from it, or the antecedent debt for payment of which it was made, or that the mortgagee had made, *bonafide* inquiries into the alleged necessity of the mortgage and was satisfied that the mortgage was justified by necessity. In the last case it is immaterial that the alleged necessity did not actually exist (*Ram Krishna* v. *Ratanchand*, 1931 ALJ 458, 1931 MWN 733, 33 BLR 988, 35 CWN 841, A 1931 PC 136, 132 IC 613). If the antecedent debt was not the debt of the father, but of any other member acting as manager, the necessity of such debt should also be alleged. When the plaintiff relies on inquiries it is better to allege both the actual necessity as well as, and in the alternative, the inquiries about that necessity, so that if actual necessity is not established the plaintiff can fall back on his inquiries.

If, however, the other members were neither born nor were in their mother's womb when the mortgage was made, and the mortgagor was the only member of the family then in existence, and allegation to that effect may alone be made and it is not necessary to allege the necessity for the mortgage. So also, if the mortgage was made with the consent of the other members, then in existence. But, in the latter case, unless the consent of the other members then in existence can be easily established, it will be safer to allege the necessity also as an alternative case.

If the plaintiff is not sure whether the property is self acquired property or ancestral property of the mortgagor, he can put forward an alternative case, and may then join other members and make all the allegations of necessity, etc.

The mortgagee may, however, if he so likes, not implead other members of the family and may bring a suit against his mortgagor alone. In such cases no allegation

Ram Bilas, and taken by the said mortgagor to pay off a decree for arrears of rent which had been passed in respect of the family holdings].

4. Further, and, in the alternative, few days before the mortgage it was represented by the said mortgagor that he required the loan to pay off arrears of government revenue of village Randewa for the years 1946 and 1947, and the plaintiff (*or*, the said Sham Lal mortgagee) made inquiries from the village patwari Ram Lal and satisfied himself that the said representation was true.

Relief same as in precedent No. 87.

No. 89—Like Suit when Mortgage made by Certificated Guardian

After setting out the facts as in precedent No. 87 add :

1. The defendant was on the date of the said mortgage a minor and one Pratap Singh who had been appointed by the court of District Judge, Delhi, by order dated _____, as the guardian of his property executed

---

of necessity, etc., need be made as the mortgagor cannot plead want of authority in him to make the mortgage. In such cases the decree will be binding on the whole family, if the circumstances show that the defendant was the manager and the property involved was joint family property (*Ramnathan* v. *S.R.M.M.C.T.M. Firm*, 168 IC 731, A 1937 Mad 345). In such cases it is always better to allege that the mortgagor is sued in his capacity as manager though mere omission to do so will not make the decree less binding on the whole family (*Pirthipal* v. *Rameshwar*, 99 IC 154, 3 OWN 954). If, in such a case, any other member of the family, who is not impleaded wishes to challenge the mortgage, he must, without delay, make an application to be made a defendant. If he does not and a decree is passed against his father, he may find it difficult to have the decree set aside, for it has been held in *Gauri Shanker* v. *Jang Bahadur*, 79 IC 1008; *Nandlal* v. *Umrai*, A 1926 Oudh 321 and *Lal Singh* v. *Jagraj Singh*, 26 ALJ 229, that he will not be able to do so without proving that the mortgage was made for illegal or immoral purposes. But see observations, which are of course *obiter*, in *Sukh Lal* v. *Murari Lal*, 1 Lucknow 160, A 1926 Oudh 273 DB, that a son can have the question of legal necessity tried in a separate suit (See *"Suit by or against a joint family" in Chap* XII). See also *Kira Lal* v. *Puranchand*, A 1949 All 685 (FB), where it has been held that if the managing member of the joint undivided estate is the father, he may, by incurring debt, whether simple or mortgage debt, as long as it is not for an immoral purpose lay the estate open to be taken in execution proceedings upon a decree for payment of that debt.

Defence : The defendants may plead that they and the mortgagor were separate, or that the mortgagor was not the manager of the family. They may deny

the said mortgage on behalf of the defendant under permission of the said court granted by its order dated _____ for the purpose of discharging the debt of the defendant particularised below.

Particulars :

2. Alternatively, if the said permission be held to be ineffective or invalid, the plaintiff claims restitution of the money advanced by him on the ground that the defendant's estate has been benefited by the discharge of the debts particularised in the preceding paragraph.

Relief same as in precedent No. 87.

Add the following prayer also :

Alternatively, the plaintiff claims Rs._____ by way of restitution.

No. 90—Suit for Redemption with Allegations of Satisfaction *(gg)*

1. The plaintiff is the mortgagor of (*or*, transferee of mortgagor's rights in) the property sought to be redeemed.

(2) The following are the particulars of the mortgage :

(a) to (e) as in precedent No. 87.

(f) Nothing is now due.

(g) *Condition of Redemption*— Mortgagor may redeem at any time on payment of what is due.

3. The said mortgagor sold his rights and interest in the said mortgaged property to the plaintiff by a sale-deed, dated April 6, 1995.

3. (*or* 4). The defendant has been in possession of the mortgaged property since the date of the mortgage and it was agreed by the terms of

---

the allegations of necessity and may plead that in any case, there was no necessity for the high rate of interest stipulated in the mortgage deed. Unless a definite plea that the particular debt was incurred for immoral or illegal purposes is taken, it is needless to make general allegations of immorality of the mortgagor.

(gg) As to who is entitled to redeem, *see* section 91, Transfer of Property Act. Ordinarily the whole mortgage money should be paid. A plaintiff is not entitled to claim partial redemption on payment of a proportionate sum, unless the integrity of the mortgage has been broken by the mortgagee (*or*, all the mortgagees) acquiring a share of the mortgaged property. Under section 60 of the Transfer of Property Act, the integrity of a mortgage is broken only if the mortgagees have acquired in whole or in part the share of mortgagor (*Shiva Harakh Raj* v *Akbar Ali*, 1947 ALJ

the said mortgage that the net profits of the said property should be first applied to the payment of interest, and surplus should be applied to the liquidation of the principal.

4. (*or* 5). The plaintiff claims that the whole mortgage money has been satisfied by the profits of the property, and that there is a surplus of Rs. 4,000 in the defendant's hands, but if the court finds any sum still due to the defendant, plaintiff is ready and willing to pay it.

The plaintiff claims :

(1) Redemption of the said property without any payment, or on payment of any sum the court may, on account taken from the defendant, find to be due, and possession of the same.

(2) Rs. 4,000 or any other sum found due on account of the surplus, with interest at 16% per annum or at such rate as the court may deem reasonable.

No. 91—Suit for Sale by an Equitable Mortgagee*

1. On the ___ day _____19__, the defendant borrowed Rs.____ from the plaintiff agreeing to repay the same with interest thereon at 12% per annum within 3 years.

---

244). In such cases each mortgagor can redeem his own share only and cannot redeem the whole (*Zaibun-nissa* v. *Maharaj Prabnu Narain*, 39 A 618). In all such cases he must make the other co-mortgagors parties to the suit (*Ahmed Husain* v. *Md. Qasim Khan*, A 1926 All 46 DB, 24 ALJ 88, 90 IC 80; *Durga Prasad* v. *Chamr*, A 1940 All 528). But the fact that the mortgagee has allowed one mortgagor to redeem his share does not entitle other mortgagors to redeem their shares piecemeal but any other mortgagor must redeem the whole (*Shah Ram Chand* v. *Prabhu Dayal*, A 1942 PC 50). A single suit should be brought for redemption of the whole mortgage, and even the fact that the mortgagee rights in different portions of the property, have been transferred to different persons will not justify separate suits against such persons (*Purshotam* v. *Isub*, 104 IC 648, 29 BLR 1052).

Full particulars of the mortgage with conditions, if any, laid down in the deed for redemption must be alleged, also offer of the money due. If there has been previous tender of the mortgage money, it should be alleged in the plaint, as the mortgagee's right to interest ceases and the plaintiff becomes entitled to profits of the mortgaged property from that date. If there has been no previous tender, an offer to pay the mortgage money should be made in the plaint itself. A suit cannot be dismissed merely for want of a previous tender (*Raghunandan* v. *Raghunandan*, 19 ALJ 573 FB). If no money is due, there should be an allegation to that effect.

*No writing is required to create such a mortgage but usually a memo is

2. At the time of taking the loan defendant deposited with the plaintiff the following documents of his title to the property mentioned at the foot of the plaint with intent to create a security on the said property for the repayment of the said loan (and immediately after the completion of the transaction executed a memorandum to that effect, which is annexed to the plaint).

Particulars of the Documents

3. The defendant has not paid anything towards the said loan and Rs._____ is now due on account of principal and interest.

Prayer: (*Same as in the case of suit for sale on simple mortgage*).

No. 92—Suit for Redemption

(Form No. 46, Appendix A, C.P.C.)

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2. The following are the particulars of the mortgage :

(a) (*Date*);

(b) (*Name of mortgagor and mortgagee*);

(c) (*Sum secured*);

(d) (*Rate of interest*);

(e) (*Property subject to mortgage*);

(f) (*If the plaintiff's title is derivative, state shortly transfers or devolution under which he claims*).

---

drawn up. If the memo is intended to be the mortgage it is inadmissible without registration, and oral evidence would be inadmissible (*Hari Ram* v. *Kedarnath*, A 1939 PC 167), but if the memo is only an evidence of a completed transaction, it is admissible (*Ram Sarup* v. *Shiva Dayal*, A 1940 Lah 285).

The plaintiff may claim that the mortgage has been satisfied by the usufruct of the property and no money is due, and may in the alternative, offer to pay whatever the court might find to be due, and this is the safest course to adopt in all cases in which satisfaction is alleged. It has been held in Bombay that a redemption suit without such offer is bad and should be dismissed (*Purshotam* v. *Vanat*, A 1943 Bom 259, 45 BLR 489). Any balance left in the mortgagee's hands after satisfaction of the mortgage debt should be claimed with interest. On mortgagee's obligation to keep accounts see *Shadilal* v. *Lal Bahadur*, (1933) 1 AWR 291 PC; *Mohd Ishaq* v. *Rupnarain*, 1931 ALJ 977 FB).

(If defendant is the mortgagee in possession, add)

3. The defendant has taken possession, [*or*, has received the rents] of the mortgaged property.

The plaintiff claims to redeem the said property and to have the same reconveyed to him and have possession thereof together with mesne profits.

No. 93—Like Suit, after Tender of Mortgage Money

1. The plaintiff is the mortgagor of the property sought to be redeemed.

2. The following are the particulars of the mortgage:

(a), (b), (c) and *(e)* as in No.87.

(d) Rate of interest— Nil. Profit of mortgaged property to be taken by defendant in lieu of interest.

(f) Amount due— Rs.4,000.

(g) Condition of redemption— Mortgagor may claim redemption, in the month of *Jeth* any year, on payment of the principal sum.

3. On May 20, 1994, in the month of *Jeth* the plaintiff deposited Rs.4,000 for the defendant in court, along with an application under section 83, Transfer of Property Act.

4. The defendant was served with a notice of the said deposit on _____, in the month of *Jeth*, but he did not appear to accept the tender on the date fixed by the court, which was July 4, 1994. The money is still in deposit.

The plaintiff claims :

(1) Redemption of mortgage and possession of the mortgaged property.

If money is not paid under a preliminary decree for redemption another suit for redemption can be brought so long as a final decree extinguishing the right of redemption is not passed, the right can always be enforced (*Joti Lal* v. *Sheodhayan Pd.*, 163 IC 908, A 1936 Pat 420).

Limitation : Thirty years under Article 61(a), Limitation Act, 1963.

Court-fees : The court-fee payable is an *ad valorem* fee on the principal money secured by the mortgage but valuation for purposes of jurisdiction in case mortgagee is in possession and the plaintiff sues for possession, should be the

(2) Rs.150, on account of mesne profits of the property for one year, i.e., from July 4, 1994 upto date, as per details given below.

(3) Future mesne profits upto the date of delivery of possession at the same rate.

Details of Mesne Profits

	Rs.
Gross rental	290
Government Revenue...	140
Total ...	150

No. 94—Suit for Partial Redemption

1 and 2 as in the last precedent.

3. The defendant No.1 has by a sale-deed executed on the ____ and registered on the ____, acquired the 1/5th share of defendant No.5 in the mortgaged property, and the plaintiff, therefore, claims redemption of his 1/5th share only on payment of the proportionate mortgage money.

4. (*3 and 4 as in precedent No.93 substituting Rs.800 for Rs. 4,000*).

The plaintiff claims :

(1) Redemption of the mortgage and possession of his 1/5th share of the mortgaged property.

(2) and (3) *as in last precedent substituting 30, 58 and 28 for 150, 290 and 140 respectively*).

---

value of the land (*Ma Hla Saing* v. *Na Suwe*, 5 R 499,105 IC 412). No additional court-fee will be required even if surplus money is claimed as being due on taking account (*Chhiddu* v. *Jhanjhan Rai*, 45 A 154, 79 IC 303, A 1923 All 26 DB; *Mt. Wajidbegum* v. *Abdulgani*, 113 IC 34 , A 1929 Nag 1). A doubt was expressed about this in *Vasudeva* v. *Madhava*, 16 M 329.

Defence : The defendant, though admitting his possession as a mortgagee, may deny the specific mortgage sought to be redeemed, as the plaintiff can redeem only the specific mortgage on which he sues (*Gawri Shankar* v. *Lala*, A 1938 Oudh 16, 171 IC 437) He may deny a previous tender, as, although want of a valid previous tender is not fatal, yet it may affect the question of interest and costs, if the defendant has no other objection to the suit.

The defendant may deny his possession for the period alleged by the plaintiff, and the amount of profits received by him, if they were to go in liquidation of the principal also.

No. 95—Suit by a Mortgagee for Mortgage Money or for Possession *(hh)*

1. The defendant No.1 usufructuarily mortgaged the property detailed below to the plaintiff, by a mortgage deed, dated the 19th June, 1993, for a consideration of Rs.2,000 and put the plaintiff in possession from July 1, 1993.

Details of the Property

* * *

2. The defendant No.1 by the deed, dated June 20, 1995, mortgaged with possession the said property to defendant No.2.

3. Under colour of the said mortgage in his favour, defendant No.2 dispossessed the plaintiff of the mortgaged property on July 4, 1995.

The plaintiff claims:

(1) Possession of the property.

(2) Rs.80 on account of mesne profits for one year from defendant No. 2, as per account given below.

(hh) Every mortgagee, in whose mortgage there is a personal covenant to pay, can forego his mortgage security and sue for a personal decree for the mortgage money, provided, the claim is within limitation. Limitation in such cases used to be six years in the case of registered bond, and three years in case of an unregistered bond (*Ma Pua* v. *Ma Me Tha*, 161 IC 462, A 1936 Rang 80), but is only three years under the Act of 1963. When the mortgage is defective and cannot be enforced as mortgage, a suit for a personal decree can be brought upon it if there is a covenant to pay. Even a suit for sale can, on detection of such a defect, be amended by addition of a prayer for a simple money decree.

A suit for mortgage money will lie at the instance of the mortgagee, even when there is no personal covenant to pay, in cases referred to in clauses (b) and (c) of section 68, Transfer of Property Act. In such cases court has no power to insist on the plaintiff filing a suit for sale, even if he can do so (*Chinnasami* v. *Kannia*, A 1938 Mad 132, (1937) 2 MLJ 920, 171 IC 593). The decree will be personal in the case of a purely usufructuary mortgage, but in a case of a combined usufructuary and simple mortgage the plaintiff may claim a decree for sale (*Narsingh Partap* v. *Mohd Yaqub*, A 1929 PC 139, 116 IC 414, 56 IA 299). If a bond, however, contains a clause of hypothecation in case of dispossession or disturbance, a suit for sale may be brought on the basis of such clause and the limitation will then be twelve years.

Interest may be claimed though not provided for in the bond, under the Interest Act. In fact, when a plaintiff is kept out of possession, he must get interest

(3) In the alternative, Rs.2,000 principal and Rs.160 interest from July 4, 1995 up to date, at the rate of 1 per cent per mensem with further interest from date of suit to that of payment, from defendant No.1.

NECESSARIES OF LIFE *(ii)*

No. 96—Suit for Necessaries of Life Supplied to Wife

1. Defendant No.1 is the wife of the defendant No.2.

---

on his money (*Sitanath* v. *Thakurdas*, 46 C 448; see also, precedents and notes under (r) ante). Where a usufructuary mortgagee granted lease of the property to the mortgagor at an annual rent equal to interest, non-payment of rent was held to be equivalent to non-payment of interest so as to give the mortgagee a right to sue for principal and interest due on the mortgage, and the defence that the mortgagee should sue for rent under the lease was over-ruled (*Chaitan Prakash* v. *Mumtaz Ahmad*, 1937 ALJ 1171, 172 IC 63, A 1937 All 762).

In a suit under clause (a) of section 68, Transfer of Property Act, the plaintiff has simply to allege that the defendant covenanted to repay the mortgage money. In a claim under clause (b), he should allege (1) the fact of his having been deprived of the security, and (2) the wrongful act or default of the mortgagor which resulted in such deprivation. In a claim under clause (c) the plaintiff must allege (1) that he was entitled to possession and (2) either, that the mortgagor failed to deliver it, or that his possession was disturbed by the mortgagor or any other person, and (3) if it was disturbed by any other person how was the mortgagor responsible for such disturbance as a dispossession by a mere trespasser does not make the mortgagor liable (*Nakchedi* v. *Ram Charitar*, 19 A 191).

To a suit for mortgage money may be added an alternative prayer for possession, and *vice versa*. If in a suit for possession against the mortgagor, the plaintiff omits to claim recovery of mortgage money he cannot bring a suit for that afterwards (*Ram Autar* v. *Shanker Dayal*, 90 IC 622, A 1926 Pat 87). If the plaintiff has been dispossessed by a third person, even though at the instance of the mortgagor, and he wants to sue for possession only and not for money he should sue the trespasser alone and the mortgagor is not a necessary party.

Court-fee in a suit for possession is calculated on the principal amount of the mortgage money. If interest is also claimed, an additional fee is payable on its amount. In an alternative suit such as in precedent No. 95, fee on the higher relief, viz., on the amount claimed as principal and interest, is payable.

Defence: In a suit under clause (a), the defence which are available in a suit on a simple money bond may be raised. In other suits, the legality of the mortgage may be attacked, or it may be pleaded that the plaintiff did not himself take possession, or gave up possession or intentionally procured his dispossession by colluding with a third person.

(ii) A suit for recovery of the price of necessaries of life supplied to a person

2. Defendant No.1 is living with defendant No.2 and her children and is managing the family affairs and has been doing so at all material times.

3. Between Sept. 20, 1992 and August 25, 1994 defendant No.1 purchased certain goods from the plaintiff. Particulars of the goods purchased with the prices are given at the foot of the plaint.

4. The said goods were articles of food necessary for defendants and their family and suitable to the position of the family.

The plaintiff claims Rs.____being the price of the said goods with interest from the date of suit.

No. 97—Suit for Necessaries Supplied to Wife Living Separately

1. Defendant No.1 is the wife of defendant No.2 and was until the 2nd October 1993 living with him.

2. On the 2nd October 1993 defendant No.2 without any cause or justification, expelled her from his house (*or*, defendant No.1 by reason of the cruelty of defendant No. 2 was compelled to leave the house of defendant No. 2) (*Particulars of Cruelty*).

3. Since the 2nd October 1993 defendant No.1 has been living apart from defendant No.2 and defendant No.2 has refused to provide her maintenance.

4. After the said date defendant No.1 ordered from the plaintiff and the plaintiff has sold and delivered to her, goods on credit, particulars of which are given at the foot of the plaint.

5. The said goods were necessary for the maintenance of defendant No.1 according to her position in life.

---

who cannot contract, such as a minor or a person of unsound mind, is recognised by section 68, Contract Act and lies against the minor's property. Similarly, a suit will in some cases lie against a husband for necessaries supplied to a wife on account of the legal duty of the husband to maintain his wife and the consequent implied agency of the wife to pledge the credit of her husband for such purposes (*E.T. Robinson* v. *R.V. Rigg*, A 1936 All 393, 160 IC 874, 1936 ALJ 50), though unlike the case in England, he is not ordinarily liable for her debts. If she lives apart from the husband without any justification the husband will not be liable even for necessaries supplied to the wife but if her separate living is justified, e.g., by husband's cruelty, husband would be liable. It is safe to implead the wife and claim

The plaintiff claims Rs._____on account of the price of the said goods with interest from date of suit, from defendant No.2 and in the alternative from defendant No.1.

NEGOTIABLE INSTRUMENTS *(jj)*

No. 98 —Suit on a Bill of Exchange by Endorsee against Acceptor

1. On September 20, 1995, at Agra, one Sham Lal, by his bill of exchange directed to the defendant, required the said defendant to pay to one Ram Lal Rs. 4,000 on demand.

2. On September 30, 1995, the defendant accepted the said bill of exchange.

3. The said Ram Lal endorsed the same to one Sri Lal and the said Sri Lal endorsed it to the plaintiff.

4. The defendant has not paid the same.

The plaintiff claims:

Principal	... ...	4,000
Interest	... ...	260
	Total	4,260

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

---

a decree against her in the alternative.

Defence Husband may plead that he has been supplying necessaries himself and the wife did not need anything or that she has no justification for living separately from him or that he had warned the tradesman that he would not be responsible.

(jj) This term includes a promissory note, bill of exchange, or cheque payable to order or bearer. Even if such a note or cheque is payable to a particular person, it is presumed to be payable to his order unless it contains words expressly or impliedly showing an intention that it shall not be transferable (section 13, Negotiable Instrument Act). A document not containing an unconditional promise to pay, or not specifying person to whom money is payable, is not a pronote (*Narbada Prasad* v. *Mt. Sunki*, A 1938 Nag 464, 177 IC 889; *Brij Kishore Rai* v. *Lakhan Tewari*, A 1978 All 44).

It is only a person who comes into possession of a negotiable instrument having paid consideration for it and being a *bona fide* transferee that can be a holder in due course within the meaning of section 9. Section 9 implies and

No. 99—Suit by Payee Against Drawer for Non-Acceptance

1. On September, 20, 1995, at Agra, the defendant by his bill of exchange directed to Ram Lal, required the said Ram Lal to pay to the plaintiff Rs. 4,000, twenty-one days after sight.

2. On September 30,1995, the same was duly presented to the said Ram Lal for acceptance and was dishonoured.

3. On October 22,1995, the plaintiff by a letter of the same date gave notice of the said dishonour to the defendant, but the defendant has not paid the amount of the said bill.

Prayer as in previous precedent.

No. 100—Suit by an Endorsee against his Endorser for Non-Payment

1. The defendant endorsed to the plaintiff a bill of exchange now overdue purporting to have been made by one Sham Lal on September 20, 1995, at Agra requiring one Ram Lal to pay to the order of the defendant Rs.4,000, twenty-one days after sight, and accepted by the said Ram Lal on September 30, 1995.

2. On October 21, 1995, the same was presented to the said Ram Lal and was dishonoured.

3. *As in previous precedent.*

Prayer as in precedent No. 98.

---

contemplates that there must be a negotiation or transfer to the holder in due course by some one who had the authority to transfer or negotiate the negotiable instrument. The transfer and the negotiation must be of a negotiable instrument, and not of an inchoate document which is not negotiable instrument under the Act (*Tara Chand Kewal Ram* v. *Sikri Brothers*, 55 BLR 231). The person signing the hand note is the person actually liable, and no evidence is admissible to prove that it was executed on behalf of an undisclosed principal (*Promod Kumar Pati* v. *Damodar Sahu*, A 1953 Ori 179).

In a suit on a promissory note it is not necessary to aver consideration or to prove it. The court places the burden upon the defendant to prove want of consideration. But in a case where the plaintiff does not rely upon the promissory note *per se* but pleads certain facts in his plaint which militate against the presumption naturally arising from the document, the presumption will be displaced by the act of the plaintiff himself. Where, therefore, the plaintiff has himself shown that the date and sum which the promissory note bore were not the date on which it was executed

No. 101—Suit by an Endorsee against Drawer, Acceptor and Endorser

1. On September 20, 1995, at Agra, Ram Lal, defendant No.1, by his bill of exchange now overdue directed to Sham Lal, defendant No.2, required the said Sham Lal to pay to the order of Sri Lal, defendant No.3, Rs.4,000, twenty-one days after sight.

2. On September 30, 1995, the said Sham Lal, defendant No.2, accepted the same.

3. The said Sri Lal, defendant No.3, endorsed the same to the plaintiff.

4. On October 21, 1995, the same was presented to the said Sham Lal, defendant No.2, for payment and was dishonoured.

---

and the sum which was actually handed over, it is not possible to take recourse to the presumption contained in section 118 (a) and (b), Negotiable Instruments Act as the plaintiff has deprived himself of the presumption by pleading facts contrary to what would be presumed (*Ful Chand* v. *Laxmi Narain*, A 1952 Nag 308 DB). The presumption is rebuttable. It can be rebutted by direct evidence or even by circumstantial evidence and once it is rebutted the burden of proof shifts back to the plaintiff (*Beni Madhab Nath* v. *Juvandra Nath Narman*, A 1979 Gau 46). The presumption is not available when the negotiable instrument is obtained by fraud or by commission of offence (*Alopi Prasad* v. *Harish Chandra*, A 1973 All 368).

A cheque is a negotiable instrument. Its negotiability can be destroyed only if it is marked as "not negotiable" on its face (*Durga Shah Mohan Lal* v. *Governor General- in - Council*, 1951 ALJ). A promissory note payable on demand can be endorsed (*Doongar Mal Kissan Lal* v. *Shambhu Charan*, A 1951 Cal 55).

A promissory note or bill of exchange, payable on demand, is payable at once, while one payable on a specified date becomes due on the third day after that day, and if the later day is a public holiday under the Negotiable Instruments Act, the instrument falls due on the next preceding business day (section 25), and no action can lie on such an instrument before the day on which it falls due.

A bill of exchange and a pronote must be presented for acceptance in cases in which it is so required by section 61 and 62, and must be presented for payment as required by section 64. A promissory note payable on demand and not payable at a specified place need not be presented for payment. But a *Hundi* not payable at a specified period after date or sight but made payable on the same day is not governed by section 66 and should be presented within a reasonable time (*Firm Harnam Singh* v. *Firm Nikha Ram*, A 1938 Lah 183). Want of presentment exempts the endorser (*Benaras Bank* v. *Piryа Das*, A 1930 All 160).

The plaint in suit on a negotiable instrument must show its date, amount

5. On October 22, 1995, the plaintiff by letters of the same date, gave notice of dishonour to each of the defendants, but none of the defendants has paid the amount of bill.

Prayer as in precedent No.98.

No. 102—Suit by Endorsee of Cheque against Endorser

1. On September 20,1995, one Sham Lal drew a cheque for Rs.4,000 on the State Bank of India, Lucknow Branch, payable to one Ram Lal or order.

2. The said Ram Lal endorsed the said cheque to one Sri Lal, and the said Sri Lal endorsed it to the defendant and the defendant endorsed it to the plaintiff.

3. On October 20, 1995, the plaintiff presented the said cheque for payment at the State Bank of India, Lucknow Branch, but the same was dishonoured.

4. On October 21, 1995, the plaintiff, by a letter of the said date, gave notice of the said dishonour to the defendant but, the defendant has not paid the amount of the said cheque to the plaintiff.

Prayer same as in precedent No. 98.

No.103—Suit by Bearer or Endorsee of a Crossed Cheque against Drawer

1. On September 20,1995, the defendant drew a cheque upon Grindlays Bank, Calcutta, for Rs.4,000 payable to Sham Lal or bearer (*or*, order)

---

and parties thereto. It must allege whether the defendant is the maker, or the acceptor or the endorser of the instrument. If the defendant in a suit on a bill or a cheque is the drawer or the endorser **the fact that a notice of dishonour was sent or facts relied on as excusing the giving of such notice must be alleged in the plaint** (*Frubauf* v. *Grosvernor and* Co., 61 LJQB 717), for the giving of this notice is not a mere condition precedent but is a necessary element in the plaintiff's cause of action, as no party can be made liable unless such notice was sent to him, except when such notice is unnecessary under section 98. Notice may be oral or written, and may be in any form but it must be given within a reasonable time. In cases of foreign bills and when an acceptor for honour is to be charged, notice of protest should be sent instead of a notice of dishonour (section 102), and the fact should be alleged in the plaint. In other cases, even if the dishonour has been noted and

2. The said cheque before presentment for payment was crossed generally under the provisions of the Negotiable Instruments Act, 1881.

3. The plaintiff became the bearer of the said cheque (*or*, the said cheque was endorsed by the said Sham Lal to the plaintiff).

4. On October 5,1995, the said cheque was duly presented for payment by the State Bank of India, Calcutta, at the said Grindlays Bank and was dishonoured.

Para 5 (as para 4 of the previous precedent).

Prayer as in precedent No.98.

No. 104—Suit on a *Hundi* (by a Payee)

1. The defendant drew a *hundi* on January 10,1994, in favour of the plaintiff on the firm Lachmi Narian Panna Lal of Kanpur, for Rs.1,000 payable 21 days after date.

2. The plaintiff presented the said *hundi* to the said firm Lachmi Narain Panna Lal at their place of business at Kanpur, after maturity, but the said firm refused to honour or accept it.

3. A notice of dishonour was sent by the plaintiff to the defendant by post on February 5,1994.

The plaintiff claims Rs.1,000 principal and Rs.40 interest at the usual rate of 6 per cent per annum, with further interest from date of suit to that of payment.

---

notice of protest sent, the facts need not be alleged.

The fact of the presentment or dishonour must also be alleged, where presentment is required, as in such cases presentment gives the cause of action. In cases mentioned in section 76 no presentment is necessary and none need be alleged. In a suit against the drawer presentment need not to be alleged (*Phul Chand* v. *Ganga Ghulam*, 21 A 450). If the drawer and the drawee are one person, presentation is not necessary (*Pachkaurilal* v. *Mulchand*, 44 A 554, 20 ALJ 437, A 1922 All 279 DB, 66 IC 503; *Shankardas* v. *Dittumal*, 99 IC 875, 8 LLJ 604).

The plaintiff may claim interest at the contractual rate from the date of suit to that of realisation (section 79). When no interest is mentioned in the instrument, the plaintiff is entitled to charge interest, not under the Interest Act, 1839 (now Act of 1978) but under section 80, Negotiable Instruments Act, at 6 per cent (now 18 per cent) per annum (*Pala Ram Gupta* v. *Harish Chander Jain*, (1974) 76 PLR 235).

In the case of promissory note payable on demand, no demand is necessary to charge the maker and none need be alleged in the plaint as the money under such

No. 105—Suit on a *Hundi* (by an Endorsee)

1. The defendant No.1 drew a hundi on January 10, 1996 addressed to the firm Lachmi Narain Panna Lal of Kanpur for Rs.1,000, payable to defendant No.2 or order, 21 days after date.

2. Defendant No.2 endorsed the said hundi to the plaintiff.

3. *As in para 2 of the last precedent.*

---

a promissory note is immediately payable (*Meghraj* v. *Johnson*, 11 NLR 189; *Sk. Jamu* v. *Muhammad Ibrahim*, A 1926 Nag 194; *Framroz* v. *Mohamed Essa*, A 1926 Bom 241, 28 BLR 41 DB), but in the case of one payable at specified time, demand must be alleged.

Parties: Any holder can sue all the prior parties in his own name. The suit may be brought by an agent, or by a principal on pronote executed in the name of the agent (*Devichand* v. *Col. Sir Raja Jaichand*, 90 IC 1047), or by an assignee, for the fact that a pronote is transferable by endorsement does not prevent its transfer by assignment (*Surath* v. *Narayan*, 150 IC 925, 61 C 425, A 1934 Cal 549, 28 CWN 465; *Motilal* v. *Punjaji*, A 1933 Nag 160, 144 IC 411; contra, *B.S. Bhagwan Singh* v. *Backeshi Ram*, A 1933 Lah 494; *Jailal* v. *Jagmohan*, A 1937 Oudh 405, 168 IC 922). A payee of a cheque has no cause of action against the banker on whom the cheque is drawn (*Punjab National Bank* v. *Bank of Baroda*, A 1941 Cal 372; *U.P. Union Bank* v. *Dina Nath Raja Ram*, A 1953 All 637). A member of joint Hindu family can sue on an instrument endorsed in his name without joining other members. If a pronote is in favour of a joint family firm, individual members composing the family at the time of the execution can sue (*Madhubai* v. *Vadi Lal*, 181 IC 808, A 1939 Bom 147), or even the adult members at the time of suit who are capable of giving a valid discharge on behalf of the family (*Damel* v. *Man Mohan Das*, A 1940 Bom 164, 188 IC 618). A reversioner cannot be sued on an instrument executed by a Hindu widow (*Ramaswami* v. *Sellatami Lal*, 4 M 375; *Dhiraj* v. *Manga Ram*, 19 A 300), but the Bombay and Calcutta High Courts hold contrary view (*Rameshwar* v. *Provaboti*, 20 CLJ 23; *Sankrabhai* v. *Magan Lal*, 26 B 206), nor can a master be sued on a pronote executed by the servant (*Lallu Ram* v. *The Deputy Commissioner, Kheri*, 165 IC 578 (2), A 1937 Oudh 65). An agent signing a pronote on behalf of principal can, by appropriate words, exclude his personal liability (section 28); but a trustee cannot do so (*P. Bala Venkatram* v. *Marutha Mulhu*, A 1943 Mad 247).

As provisions of Sec. 4 of the Indian Negotiable Instrument Act indicates, in order that a document may fall within the definition of "promissory note", it must confirm to the following conditions viz. (1) it should be in writing, (2) it must contain an unconditional undertaking by the maker of the document, (3) such unconditional undertaking must be to pay certain sum of money only, (4) that such undertaking to pay certain sum of money must be to a certain person or to the order of that person or to the bearer of the instrument.

4. A notice of dishonour was sent by the plaintiff to the defendants by post on February 5, 1996 (*or,* the defendant No.1 had, before the maturity of the said hundi, countermanded payment, and was not therefore entitled to notice of dishonour. Such a notice was sent by post to the defendant No.2 on February 5,1996).

Prayer as in the previous precedent.

Every prior party is liable to a holder in due course until the instrument is satisfied. The maker and the acceptor are respectively liable as principal debtors and other parties as sureties. A subsequent surety can be impleaded in the same suit (*C.T.A.C.T. Firm* v. *Maung Aye*, A 1937 Rang 197, 171 IC 527). All must be joined in one suit. Members of a joint Hindu family cannot be impleaded in a suit on a promissory note executed by the *karta*, even for family necessity. The plaintiff can join them only if he brings a suit on the original consideration (*Ram Gopal* v. *Dhirendra*, 31 CWN 357, 54 C 380, A 1927 Cal 376; *Thakur Pd* v. *Ayodhya Pd*, 180 IC 365; A 1939 Pat 490. *Ramanathan* v. *Muthuraman*, (1941) 2 MLJ 816; *Mahadeb Ram* v. *Jagannath Pd*, A 1942 Pat 337), but even then their liability is not personal (*Jiwandas* v. *People's Bank*, A 1937 Lah 926), and even the joint family property will not be liable unless it is proved that the debt was binding on the family, e.g., that it was taken for a legal necessity or for the benefit of the family (*Srikant Lal* v. *Sidheshwari Prasad*, 170 IC 357, A 1937 Pat 455). In this last case the question of authority of the manager to contract loans on pronote for the benefit of the family has been fully discussed. The Nagpur and Calcutta High Courts have, however, held that a suit can be brought against a joint family on a pronote executed by the *karta*, but the liability of other members will have to be established (*Sagarmal* v. *Bhikusa*, A 1936 Nag 252; *Gendulal* v. *Janglal*, A 1948 Nag 131; *Lilavati* v. *Guru Prasad*, A 1947 Cal 259, 274 IC 586).

Similarly, other partners can be made liable on a pronote executed by one partner for the partnership, provided *an independent contract* (apart from the mere execution of the pronote) is alleged, and in such cases evidence of such independent contract can be given (*Venkatachala* v. *Ramakrishnayya*, A 1930 Mad 168). Where a partner signed a pronote as "X managing partner of XY" it was held that X was acting on behalf of the firm and the firm can be made liable on the original consideration (*Chandan Mal* v. *Mt. Krishna Kumari*, A 1944 Oudh 273). If pronote is proved to be executed on behalf of the firm, the other partner can be made liable thereon (*Pandit Lal Mani* v. *Lala Gopal Sah*, A 1945 All 221; *Ghisulal* v. *Haji Mohd.*, A 1981 Raj 58). Suit cannot be brought by a person to whose share the pronote is allotted in a partition with the payee without an endorsement by the payee (*Virappa* v. *Mahadevappa*, 36 BLR 807, A 1934 Bom 356). Where a joint Hindu family was partitioned by means of a written arbitration award and promissory notes standing in the name of one member were allotted to the share of another, the latter could maintain a suit on the promissory notes so allotted (*Rat Ram Kishore* v.

No. 106—Suit on a Promissory Note

1. The defendant executed a promissory note on December 6, 1993, for Rs.1,000 payable to the plaintiff on demand, with interest at 1 per cent per mensem.

Ram Prasad, A 1952 All 245; also see, *Muthaveeraw Chetty* v. *Govinda Chetty*, (1961) 2 MLJ 470 FB).

A promissory note can be transferred as an actionable claim by means of an instrument in writing, e.g., a sale deed, and the transferee shall acquire the rights of the transferor. He shall be able to maintain an action on the promissory note, though he will not be a holder in due course (*Venkatarama* v. *Krishna Swarup*, A 1933 Mad 153 (1); *Subbarayndu* v. *Subbarayndu*, A 1935 Mad 473; *Surat Chandra* v. *Kripanath*, A 1934 Cal 549; *Ghanshyam Das* v. *Ragho Sahu*, A 1937 Pat 100; *Vaddadi* v. *Hanwara*, A 1956 AP 9).

Alternative claims: In suit between immediate parties, it is advisable, if there is any doubt as to the validity of the bill or the note or as to the right of recovering upon it as such, to base the claim, in the alternative, on the original consideration. For example, when the stamp on a promissory note is not properly cancelled, or there are some material alterations in the note which might make it void under section 87, or when sons of a Hindu executant are impleaded. But this alternative suit is permissible only when the promissory note was executed as sort of conditional payment of the loan, or when it was executed as security for the loan (*Bhushanchandra* v. *Kandi Lal*, 170 IC 758, A 1937 Cal 241; *Ramasamy* v. *Murugiah*, 161 IC 273, A 1936 Mad 179). Where, however, the contract is considered as contained wholly in the promissory note, section 91, Evidence Act will bar the proof of the loan independently of the promissory note (*Jacob and Co.* v. *A P. Vicumsey*, 102 IC 138, 29 BLR 432; *Perumal* v. *Kanakshi*, A 1938 Mad. 785, 177 IC 236, 1938 MWN 722; see contra *Chinayya* v. *Srinivasa*, 160 IC 1069, 43 LW 48), nor can the note be looked into to fix interest which can be awarded only under the Interest Act. (*Anupal Mehta* v. *Mahesh Jha*, 172 IC 744, A 1937 Pat 65, *Babulal* v. *Durga Prasad*, A 1940 Oudh 308, 188 IC 184).

The Oudh Chief Court has, however, allowed interest as compensation for deprivation of the use of money (*Ambika Singh* v. *Jagdeo*, 168 IC 927, A 1937 Oudh 387). Therefore, if an alternative claim on the loan is brought, care should be taken to draft the plaint so as to keep clear of section 91(b) Evidence Act, though the courts are indulgent in the matter of allowing plaintiff to fall back on the original consideration and generally allow him to do so as far as possible (*Sarab Dial* v. *Nanda Mal*, A 1936 Pesh 143). When a promissory note is not taken in discharge of an oral contract of loan but is taken by way of collateral security as it will be presumed to have been so taken, section 91 has no application (*Lakshmi Devi* v. *Mst. Aparna Devi*, 1951 ALJ 222). In a suit on the original consideration it is not necessary to mention in the plaint the fact of the execution of the pronote and of its being inadmissible for want of stamp (*Onkar Ballabh* v. *Girwar Lal*, 1936 AMLJ 37).

2. The said note or any part of it has not been paid (*or*, the defendant has paid Rs.200 on July 7, 1995, and has not paid any other sum towards the said note).

The Calcutta High Court has granted a decree on the original consideration even when the suit was on a pronote which was found to be inadmissible and held that it is not necessary to prove an independent promise to pay as the fact of loan implies a promise to repay it (*Mohatabuddin* v. *Mahomed*, 40 CWN 473; *Indra Chandra* v. *Hiralal*, 40 CWN 696, A 1936 Cal 127). The Allahabad High Court in *Lakshmi Narain* v. *Mst. Aparna Devi* A 1953 All 535, following its earlier decisions in *Nazir Khah* v. *Ram Mohan*, A 1931 All 183 FB; *Sheonath* v. *Sarjoo Lonia*, A 1943 All 220 FB; and *Major Mistri* v. *Binda Devi*, A 1946 All 126 FB, held that in case of a pronote and a simultaneous transaction of loan, if the pronote is inadmissible for some reason, suit will lie on the original loan, and the loan can be proved by oral evidence. Section 91 of the Evidence Act will not apply in such a case. The Oudh Chief Court has held that if the fact of taking loan is mentioned in the plaint even without clearly raising an alternative claim, an alternative claim on the original consideration should be held to be made out (*Chandamal* v. *Mt. Krishna Kumari*, A 1944 Oudh 273).

Where in a suit for the recovery of money on the basis of promissory note and not on original consideration or on transaction anterior to or independent of execution of promissory note, the promissory note is found inadmissible, no decree can be given in favour of the plaintiff on the basis of the original consideration (*T. Chandari* v. *Kambrath Kanarakutty*, A 1990 Ker 122; *Bharpura* v. *Diwan Chand*, A 1940 Lah 329, 190 IC 846)

An assignee to whom a pronote and not the debt has been assigned by endorsement cannot claim on the original consideration (*Ramanathan* v. *Muthuraman*, 1941 MLJ 816; *Maung Pho Mya* v. *A H. Dawood*, 11 LBR 137, 66 IC 584), and cannot therefore make others, e.g., sons etc., liable (*Viragavlum* v. *Chinna*, A 1939 Mad 856) nor is such an alternative claim possible where a pronote was executed in lieu of a previous pronote which is now barred by limitation (*Bhagwan* v. *Parag*, 9 OWN 961).(As to amendment of a claim on pronote so as to base it on original consideration see Chapter X).

A suit on the original consideration independently of the pronote or *Hundi* is permissible provided there are no circumstances which keep intact the liability of the maker under the note (*Krishna Jana* v. *Seeta Nath*, A 1937 Cal 753, 174 IC 340); and provided the plaintiff has not lost his right to enforce the Hundi (*Wallibhoy* v. *Jagjiwandas*, A 1936 Nag 260). But if the pronote is found to be forged, a claim on the original consideration cannot be permitted (*Ladhuram* v. *Bansidhar*, 171 IC 881, A 1937 Pat 572). It is not permissible for a beneficiary of a Hundi to sue on the original consideration without impleading the *benamidar* holder (*Keshab Kumar* v. *Singai Moti Lal Kastur Chand*, A 1949 Nag 21).

Renewal of a negotiable instrument: When cause of action for money on a bill is once complete and the debtor then gives another bill to the creditor, the

The plaintiff claims:

(1) Rs. ____as per account given below.

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

---

creditor, if the bill is not paid at maturity, must always sue on the original bill provided that he has not endorsed, or lost, or parted with the second bill under circumstances making the debtor liable under it to a third person. The effect of giving a new instrument is not to discharge the old one (*Punjab National Bank* v. *Tajammul*, 100 IC 341, 25 ALJ 102; *Sheikh Akbar* v. *Sheikh Khan*, 7 C 256; see also, *Kshetra* v. *Harasukdas*, 102 IC 871, 45 CLJ 233, A 1927 Cal 538 DB).

Limitation: Three years from different dates in different cases (vide Articles 21 and 41).

Defence: Besides any defect in the bill or note, want of due presentment or of notice of dishonour may be pleaded. It may be pleaded that the suit has been brought before maturity but the maker of a promissory note cannot deny its validity as originally made, and cannot, in a suit by a holder in due course, plead the incapacity of the payee to endorse the instrument. The acceptor cannot deny the payee's capacity or the authority of the drawer to draw or endorse the bill, though he may plead that it was not drawn by the person by whom it purports to have been drawn. An endorsee cannot in a suit, by a holder, deny the signature or the capacity of any prior party. The defence of want of consideration is admissible only as between parties who stand in immediate relationship with each other. In a suit by holder for consideration or his assignee the maker or the drawer cannot deny consideration of the note or bill (section 43). But the fact that the consideration was of a different nature from that mentioned in the instrument is no defence (*Barhamdeo* v. *Karising*, 165 IC 809, A 1936 Pat 498; *Lakshmanaswami* v. *Narasimha*, 1936 MWN 437). The Allahabad High Court has held that the protection of section 43 is not open to an assignee under assignment made by a separate sale-deed and not by endorsement (*Jangbahadur* v. *Chanderbali*, 181 IC 897, A 1939 All 279; see contra, 1962 Ker LJ 251). The defence of payment to endorser is not open to a maker in a suit by an endorsee who had no knowledge of the alleged payment (*Anamalai* v. *Maung Saing*, 103 IC 139, 5 Bur LJ 241; *Gopalan* v. *Lakshminarasamma*, 191 IC 40, A 1940 Mad 631), nor can the maker of a pronote, when sued by an assignee of the note plead payment to the promisee, his remedy being against the promisee (*Alapati* v. *Vemuri*, A 1948 Mad 171, 1947 MWN 502, (1947) 2 MLJ 196). He is liable for negligence in not requiring the pronote for cancellation (*Sriniwas* v. *Karan Goverder*, A 1966 Mad 176). The defendant in a suit on a promissory note may show that it was given merely as a security for the plaintiff's share of the capital advanced towards a partnership and that the note can be enforced only when such capital becomes payable (*Sheo Prasad* v. *Govind Prasad*, 100 IC 352, 49 A 464). He cannot plead that there are accounts to be settled and that the amount would be given credit for in the final settlement of accounts between the parties (*Ghanshiam Das* v. *Mithan Lal*, 124 IC 763). He cannot plead that the plaintiff (payee) was a *benamidar*

No. 107—Suit on a Promissory Note and, in the alternative, on Original Consideration

1. On January 12,1994, the defendant borrowed Rs.500 from the plaintiff agreeing to repay it on demand with interest at 1 per cent per mensem. (*Or*, on January 12,1995, the defendant made an account of the previous mutual dealings between the parties and found a balance of Rs.500 due from him. The said accounts were stated by the defendant in writing and the balance was struck and signed by the said defendant in the plaintiff's *khata bahi* at page 8).

2. As a security for the aforesaid loan (*or*, balance on account stated), the defendant executed a promissory note on the aforesaid date, payable to the plaintiff on demand, with interest at 1 per cent per mensem.

---

for another (*Raghubir* v. *Ramashray*, 183 IC 60, A 1939 Pat 347; *Ghanshyam* v. *Raghu*, A 1937 Pat 100; *Reoti* v. *Manna*, 44 All 290; *Subha* v. *Ramaswami*, 30 Mad 88; *Bapu Kalingarayar* v. *Rajam alias Rajalakshmi*, 1978 1 MLJ 67).

It has been held in Rangoon and Madras that a defendant cannot prove that the promissory note was given in repayment of an advance made by the plaintiff to a partnership capital and that the money due could not be claimed without going into the general accounts of partnership (*Maung Kyan* v. *Aruna Challam*, 5 R 520; *Vallamkonnuy Mahupeddi*, 31 M 342; *Kaluram* v. *Bhojraj*, 1938 MLJ 1). The defendant (maker) cannot plead that the pronote was not executed really in plaintiff's favour and that he has made payments to the person in whose favour he really meant to execute it (*Subba Narain* v. *Ramaswami*, 33 M 88, 15 MLJ 508; *Madari Lal* v. *Lal Chand*, 100 IC 703 All). Where defendant executed a pronote for Rs. 500 and it was understood between the parties that if a prior payment of Rs. 500 said to have been made by defendant could be traced in plaintiff's books, the defendant would be exonerated of his liability under the pronote, the defendant was allowed to plead in suit on the pronote that Rs. 500 had been subsequently traced. (*Chunni Lal* v. *Hira Lal*, 26 ALJ 183). In a suit by an alleged owner for consideration, the defendant can plead that he is not bound to pay until the plaintiff obtains a discharge from the holder of the pronote (*Sree Kristo* v. *Seetanath*, 41 CWN 1283, A 1937 Cal 753, 174 IC 340, 66 CLJ 54 DB).

The defendant may plead that some material alterations have been made in the negotiable instrument and therefore no suit can be brought upon it (section 87) (*Sundar* v. *Mahadeo*, 23 ALJ 253). The alteration must be in the body of the instrument and a forged endorsement of payment is not a material alteration (*Chandukti* v. *Kunbi*, 163 IC 803, A 1936 Mad 616; *Saripalli Subbarao* v. *Gumnan Ramarao*, (1979) 1 APLJ 169). In order that the alteration may be material, it must make a change as regards the rights and liabilities of the parties or their legal position (*Nathu Lal* v. *Mt. Gomti Kuar*, A 1940 PC 160; *Surendra* v. *Krishna*, 182 IC

3. Rs.580 is now due to the plaintiff.

Particulars

	Rs.
Principal	500
Interest from January 12, 1994 to September 12, 1995	80
Total ...	580

The plaintiff claims:

(1) Rs.580, on the basis of the pronote.

(2) Alternatively, the like sum, as money lent (*or*, on account stated).

(3) Interest from date of suit to that of payment at 1 per cent per mensem.

PARTNERSHIP *(kk)*

No. 108—Suit for Dissolution and Account

1. On June 20, 1990, the plaintiff and the defendant entered into partnership in the business of commission agents and verbally agreed that the business should be run at Shamli under the name and style of Sada

615, A 1939 Cal 181; *Janardan* v. *Prandhan*, 5 CLT 45). If a stamp on promissory note is cancelled by drawing two parallel lines on it, there is no material alteration (*K.A. Lona* v. *Dada Haji Ibrahim Hilari & Co.*, A 1981 Ker 86). It must be by a party to the instrument or his representative and not by a stranger (*Krishna Charan* v. *Gaurochandro*, A 1940 Mad 61). It is not necessary that the alteration should be prejudicial to the person pleading it, e.g., when 3 persons are sued and one pleads that his signature is a forgery, the other can also take advantage of the plea and the suit should be dismissed even against latter (*Rangayya* v. *Sundara Murty*, A 1943 Mad 511). If he is a minor he may plead that the instrument drawn by him is invalid. This plea will not be barred by section 120, as section 120 is subject to section 26 (*Chengalaroya* v. *Nainappa*, 117 IC 133 Mad).

(kk) A partnership contract is governed by the agreement on which it is entered into, and in the absence of any such agreement, by the provisions of the Partnership Act (on what constitutes partnership see *Raghunath* v. *Trinath*, A 1985 Ori 8). The Act requires that all firms should be registered, and if a firm is not registered it cannot sue a third person nor can a partner sue the firm on the basis of any contract (section 69). Subsequent registration of the firm does not cure the defect (*Annapoorna F.&.G. Stores* v. *Arunodaya F.& G. Stores*, A 1994 AP 197

Sukh Ram Lal, that the plaintiff should do the selling and purchasing work and the defendant should do the account and correspondence work and should be incharge of the funds belonging to the partnership and that both should contribute equally to the capital of the partnership and should share equally the profits and losses thereof.

(DB)). But a suit for dissolution and accounts can be brought by a partner [section 69 (3) (a); *Shibba Mal* v. *Gulab Rai*, 1939 ALJ 964, A 1939 All 735; *D.C. Upreti* v. *B.D. Karnatak*, A 1986 All 32]. A plaint in the name of an unregistered firm is legally *non est* for all purposes, but a plaint or a proceeding instituted in the trade or business name of a sole owner is not similarly deemed to be void when erroneous description was made without any fraudulent and malafide motive.

After dissolution of the firm, however, any partner to whose share a debt has been allotted can sue to realise it (*Sanka* v. *Batter*, A 1948 Mad 441, (1948) 1 MLJ 394, 1948 MWN 343). But though a decree "for accounts" by which a receiver could be appointed to take accounts can be granted, a decree "calling upon the defendant to render accounts" is not permissible (*Magan* v. *Ram Pratap*, 184 IC 160, A 1939 All 535). A firm shall be deemed to be registered on the date when the Registrar of Firms enters the statement in the register of firms and so a suit brought before such date though after the date of application for registration is moved, is not maintainable (*Popular Fils* v. *Nalini Saigal*, 84 CWN 707). Registration after institution of the suit cannot save the suit (*Firm Dnamal Purshotam* v. *Firm Babulal Chotelal*, A 1936 All 3; *Prithvi Singh* v. *Hassan Ali*, A 1951 Bom 6; *Govind Lal* v. *Kunj Behari*, A 1954 Bom 364; *Union of India* v. *Durga Dutt*, A 1961 Ass 2; *Kapur Chand* v. *Laxman*, A 1952 Nag 57). A suit dismissed on account of non-registration of the firm cannot be validated in appeal if the firm has been registered in the interval (*Jakiuddin* v. *Vithoba*, A 1939 Nag 301, 186 IC 670). Where the firm could not sue, a transferee from that firm also could not (*Kaniram* v. *Parmananda*, 191 IC 39, A 1940 Cal 528). But if an unregistered firm is sued and decree is passed it can appeal against that decree (*A.V. Sundaram* v. *T.O. Ithamthu*, A 1945 Mad 209).

A partnership may be dissolved by the parties themselves, or by the court. A partnership at will may be dissolved by any partner by notice to the others (section 43); but if the assistance of the court is required for dissolution a suit can be brought after the notice (*Tajammul Husain* v. *Ahmad Ali*, 13 Lucknow 219, A 1937 Oudh 438, 167 IC 83). A suit for dissolution of partnership can be brought on any of the grounds mentioned in section 44. Even a partnership entered into for a fixed term can be dissolved if the partners have lost confidence in each other (*Tulsi Ram* v. *Dina Nath*, A 1926 Lah 145, 89 IC 333). But neglect of one partner alone to further the partnership business is no ground for dissolution (*Chunni Lal* v. *Sheocharan*, A 1925 All 787 DB). **The grounds should be specifically stated in the plaint, as also the terms of the partnership, if profits are claimed.** Accounts may be demanded, and if necessary, a prayer for appointment of a receiver may be made. If the partnership has been dissolved by the parties themselves, a suit for

2. The said partnership business has been carried on, on the said terms since the said date, but for some time past it has become impossible to carry on the business of the partnership except at loss. (*Or*, the defendant has been guilty of gross misconduct in the affairs of the partnership.

account only may be brought and the mere fact that account books are in possession of the plaintiff himself does not debar him from bringing a suit (*Dogar Singh* v. *Mst. Parbati*, 161 IC 669, A 1936 Lah 146). A plaintiff may pray for winding up the partnership on an allegation of dissolution, or for dissolution by court, in the alternative. **The shares of the partners must be alleged in all suits in which an account is claimed. It is not necessary to allege any other terms of the partnership except those on which the suit is based.** e.g., if dissolution is claimed on the breach of any term by the defendant, the term must be alleged. A suit for account by one partner against another without a prayer for dissolution does not lie unless it seeks the discharge of an obligation undertaken by the defendant under the partnership contract, e.g., to render accounts annually (*Binjraj* v. *Kison Lal*, A 1933 Nag 127, 141 IC 277). When it is necessary to go into the accounts before giving the plaintiff an effective relief, the court may pass a preliminary decree before passing a final decree (O.20, R. 15). If after preliminary decree no action is taken by the court, the plaintiff may at any time apply for further action and for passing a final decree. Such an application is not governed by any rule of limitation (*Ramanatha* v. *Alagappa*, 53 M 378). As the forms of preliminary and final decrees given in the C.P.C. (forms No.21,22, Appendix D) would show, a court is bound to give all necessary instructions for the winding of the partnership, and to adjust all accounts between the parties, and to make any of them liable to pay to another any sum found due. It is not, therefore, necessary to claim any specific sum from any of the defendants. If there are no outstanding debts to be realised or no partnership property to be turned into money, the appointment of a receiver need not be asked for. **If dissolution prior to suit is alleged, its date and as to how it came about must be alleged.** If accounts have also been settled, then the plaintiff may sue for the amount for which the defendant has made himself liable to the plaintiff under the settled account. **In that case the settlement of account must be specifically alleged with particulars.** The recital in the deed of dissolution of partnership that the property at the time of dissolution was a partnership property is admissible in evidence (*Gangadhar Madhavarao Bidwai* v. *Hanmantarao Vyankatrao Murgali*, (1995) 3 SCC 205).

All the partners should be made parties to a suit for dissolution (*V.P.R. Prabhu* v. *Surendranath*, A 1985 Ker 265), and, if a partner is dead, all his heirs must be impleaded. A suit for account by some of the heirs of a partner without impleading the other heirs is bad and the defect cannot be cured after limitation (*Syyad Abdul Hawk* v. *Tumuluri*, 100 IC 616, 52 MLJ 318, A 1927 Mad 491). In an Allahabad case, however, it was held, that other partners could be added as *proforma* defendants even after limitation (*Jamna Kuer* v. *Kunj Behari*, A 1937 All 502, 170 IC 743, 1937 AWR 527). If the manager alone of a joint family is a partner, it is not necessary to implead the junior

Particulars: The defendant, having the control of the partnership funds, has given loan of Rs.2,000 out of them to his nephew Sada Ram, on March 20, 1994 at an interest of 6 per cent per annum, and in order to carry on the business of partnership, has borrowed, on March 20, 1994, Rs.1,500 from the Allahabad Bank at 9 per cent per annum).

The plaintiff claims:

(1) Dissolution of the partnership;

(2) that accounts be taken; and

(3) that a receiver be appointed.

No. 109—Suit for Dissolution of Partnership
(Form No. 49, Appendix A, C.P.C.)

AB, the above named plaintiff states as follows:

1. He and CD, the defendant, have been for _____ years (*or*, months) past carrying on business together under articles of partnership in writing, (*or*, under a deed, *or* under a verbal agreement).

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners, whereby it has become impossible to carry on the business in partnership with advantage to the partners.

---

members (*Manohar* v. *Ram Richpal*, 125 IC 628 Lah), nor can a junior member sue for dissolution but if on dissolution the manager makes an arrangement which is prejudicial to the interest of the family he can sue to recover the manager's share in the assets (*Venkataraman* v. *Vardhalu*, 50 LW 681, 1939 MWN 1028). A Hindu joint family cannot as such enter into partnership, though its manager and other members may. If the manager enters into partnership in a representative capacity that capacity will govern his relations with other members of the family but *qua* the other partners he acts in his personal capacity (*V.P.R. Prabhu*, supra, following *I.T.C.* v. *Bagyalakshmi & Co.*, A 1965 SC 1708). A suit for account or balance due cannot be brought when all partners of the plaintiff firm are also members of the defendant firm; in such a case the proper remedy is a suit for partnership account of the defendant firm (*Pokhar Das* v. *Sewa Ram*, 125 IC 801, A 1929 Sindh 192). Individual partners cannot sue for their shares of any separate part of the partnership assets until the accounts are completely settled (*Sonunram Mukhi* v. *Sewaram*, 178 IC 53, A 1938 Lah 259).

The question as to who used to keep the accounts or the funds of the partnership, and in whose custody the account-books are, should be considered after the passing of a preliminary decree. The procedure which should be followed for the settlement of accounts is described in *Thirukumaresan* v. *Subbaraya*, 20 M

(*Or*, the defendant has committed the following breaches of the partnership articles:

(1)

(2)

(3)

No. 110—Suit for Winding up a Partnership

Para 1 as in precedent No. 108.

2. The said partnership was, by mutual verbal agreement, dissolved on November 5, 1994.

The plaintiff claims:

(1) That an account of the partnership be taken.

(2) That a receiver be appointed.

---

313. Accounts should be taken from the beginning unless it is shown that there was settlement at a later stage (*Shawal* v. *Tansukhdas*, 125 IC 721, 33 CWN 1101, A 1930 Cal 154). Ordinarily the suit should be for general accounts, and in the absence of special circumstances, a claim for partial accounts will not be entertained (*Lachmichand* v. *Jagoolal*, 166 IC 953, A 1937 Pat 55).

Before a dissolution takes place, or unless a dissolution is also claimed, no partner has a right to call for accounts from another partner (*Seth Kassamal* v. *Gopi*, 9 A 120), nor can a partner discharging a partnership debts sue for contribution (*Shidlingappa* v. *Shankarappa*, 28 B 176). But in respect of any matter which can be determined without going into partnership accounts, a suit may be brought in the ordinary way, e.g., for defendant's share of capital or for an injunction to restrain waste of partnership property.

A plaintiff suing for dissolution of a partnership which, under the terms of the agreement of the partners, is for fixed term, which has not yet expired, must make out a very strong case for dissolution before any relief could be granted in violation of the terms of the agreement (*Mani Lal Bechar Lal* v. *Khesabji*, 6 DLR Pat 140). The consent of the partners for dissolution of a firm may be express or implied. Where the partners close a firm and starts new firm, give up their share in the old firm, there is dissolution of old firm (*Pandurang N. Vanarase* v. *Janardhan Narayan, Varanase*, 1995 AIHC 1863 Bom). A suit for money due to partnership by one of the partners alone, in his name, is not maintainable (*Chhotey Lal Ratan* v. *Rajmal*, A 1951 Nag 448).

An agreement of partnership need not be express and can arise out of mutual understanding evidenced by a consistent course of conduct and by express admission of the partners (*Chotey Lal Ratan* v. *Rajmal*, A 1951 Nag 448).

No. 111—Suit for Winding up on the Allegation of Dissolution or, in the Alternative, for Dissolution

Paras 1 and 2, as in the last precedent.

3. It has become impossible to carry on the partnership business except at a loss.

The plaintiff claims:

(1) A declaration that the partnership was dissolved on November 5,1994; or,

(2) In the alternative, that the partnership be dissolved by decree of the court.

(3) and (4) as (1) and (2) in the previous precedent.

PLEDGE *(ll)*

No. 112—Suit by a Pawnee for Money and Sale of Pledged Property

1. On January 20,1994 the defendant borrowed Rs.1,500 from the

---

Court-fee is calculated on the amount at which the plaintiff values his suit

Limitation. A suit for dissolution was under the Act of 1908 governed by Article 120 and not by Article 106 which applied to a suit for account *after* dissolution (*Khorasany* v. *C.Acha*, 6 R 198, 110 IC 349, A 1928 Rang 160 DB; *Srinivasalu* v. *Rama Krishna*, 1933 MWN 689, A 1933 Mad 353, 142 IC 573). Under the Act of 1963, Article 113 and not Article 5 will apply.

A suit by an expelled partner for accounts or for dissolution and a share in profits was governed by Article 120 and not Article 106 (*Din Mohomed* v. *Kashi Ram*, 120 IC 613 Lah), so also a suit for account based on an agreement to render accounts and distribute property annually (*Binjraj* v. *Kishanlal*, A 1933 Nag 127, 141 IC 277).

Defence. To a suit for dissolution of a partnership at will, the defendant can hardly have any defence; but if dissolution is claimed on any other ground, e.g., misconduct of the defendant or breach of any term of partnership, the same may be denied. He may plead that the partnership, has already been dissolved by mutual agreement. The shares alleged by the plaintiff may be disputed. If a suit is brought for winding up the partnership, the defendant may plead that it has not yet been dissolved, or he may admit the dissolution and plead that accounts were also settled and squared up at the time of such dissolution. It is premature to set up, before the passing of a preliminary decree, any objection about the accounts, e.g., that the plaintiff has realised all the assets.

(ll) The three essential features of a pledge are (i) there must be bailment, *i.e.*

plaintiff, and in consideration of the said loan executed a pronote payable on demand and carrying interest at 9 per cent per annum. As a collateral security for the said loan, the defendant pledged the goods detailed at the foot of the plaint with the plaintiff.

2. The defendant has not repaid the said loan or any part thereof.

The plaintiff prays (1) that a decree for Rs.1,500 principal and Rs. 450 interest, with further interest after the date of suit be passed; and,

(2) that the said goods be ordered to be sold and the proceeds be applied to the satisfaction of the decree.

[*Or*. The plaintiff prays (1) that the said goods be ordered to be sold and the plaintiff's claim for Rs.1,500 principal and Rs. 450 interest with further interest after the date of suit be satisfied out of the sale proceeds].

---

delivery of goods; (ii) the bailment or delivery must be by way of security; (iii) the security must be for payment of a debt or performance of a promise (*Shaizadi Begum* v. *Girdhari Lal*, A 1976 AP 273). Under section 176, Contract Act a pawnee can either himself sell the goods pledged and sue for any balance remaining due to him, or he can sue upon the debt, retaining the goods as collateral security. But this does not, it is submitted, mean that he can bring a suit for money withiout making any mention of the pledge, for, if he were allowed to do so, he could execute the decree against the person or other property of the debtor, retaining the pledged goods and this would be very hard on the debtor. It has even been held that a pawnee cannot maintain the suit for his debt unless he is in a position to produce the goods pawned on payment or to account for the same (*Trustees* v. *Dixon Johnson*, 1926 AC 489; *Rahmat Ali* v. *Lallan Prasad*, 1962 ALJ 324 DB; also see, *Lallan Pd.* v. *Rahmat Ali*, A 1967 SC 1322; *Prestolite of India Ltd.* v. *Union Bank of India*, A 1986 P & H 64). The court will generally give a direction for satisfaction of the decree by sale of the goods pledged and for execution against other property only for the balance. The general practice is to bring suit for sale in the form adopted in the precedent No.112. The same forms appear to have been adopted in the cases (*Madan Mohan* v. *Kanai*, 17 A 284, and *Mahalinga* v. *Ganpathi*, 27 M 528 (though the relief may as well be worded as within brackets).

If the pawnee wants to exercise the option of private sale, he must give reasonable notice of his intention to the debtor though it is not necessary that date and time of sale should be communicated by the notice (*Kunj Behari* v. *Bhargava Commercial Bank*, 45 IC 462, 40 A 522, 16 ALJ 390). Such notice cannot be dispensed with even by contract (*Co-operative Hindustan Bank* v. *Surendra*, A 1932 Cal 524, 138 IC 852, 59 C 667). If no notice is given pledger can bring a suit for redemption against vendee even if he is an innocent purchaser without notice of pledge (*Official Assignee* v. *Madholal*, A 1947 Bom 217). No notice of adjourned date of sale is necessary (*ibid*). A pledger cannot compel the pawnee to exercise the power of sale

(3) that should the sale proceeds prove insufficient to satisfy the plaintiff's said claim, the plaintiff be given a personal decree against the defendant for the balance.

No. 113—Another Suit after Private Sale of the Property

1. *Same as in the previous precedent.*

2. On March 4, 1996, the plaintiff sent notice to the defendant by registered post demanding the money due to him within 15 days and intimating that, in case of default of payment, the plaintiff would sell the pledged property.

3. The defendant did not pay the amount due to the plaintiff or any part thereof.

---

as a means of satisfying the decree which the latter has obtained (*Ramaswamy* v. *Palaniappa*, 30 LW 898). The pawnee is not put to exercise his judgment at his peril as to when is the proper and reasonable time for him to sell, as considerations applicable to an unpaid seller and buyer are not applicable in his case (*Mannargudi* v. *Ramaswami*, 1929 MWN 167). **In such a case, he should allege a demand for the amount due, unless the same was payable at a fixed time, a default by the pledger, a notice of sale, an actual sale and the fact that the sale proceeds were insufficient to satisfy the claim** (*Alliance Bank* v. *Ghammandi Lal*, 101 IC 725, 8 Lah 373). Where no time is fixed for payment reasonable notice of demand should be given and right of sale will accrue when the demand is not complied with (*Motilal* v. *Lakshmi Chand*, A 1943 Nag 162; *Ram Dalay* v. *Sayyad*, A 1944 Pat 135). The right of pledgee to realise money out of the sale proceeds of the pledged goods gets priority over other creditors who can only realise their dues after the debt of the pledgee is satisfied (*Central Bank of India* v. *State of Bihar*, ILR (1979) 58 Pat 68).

Limitation : for a suit to recover the debt is three years provided by Article 19. The collateral security of pledge does not make any difference. But limitation for a sale was six years as provided by Article 120 of the Act of 1908 but will now be 3 years under Act 113 of the Act of 1963. If a creditor exercises his right of private sale, his suit for recovery of balance is to be brought within the original three years provided by Article 19 and no new cause of action arise from the sale. The position was same under Article 57 of the old Act (*Yellappa* v. *Desayappa*, 30 B 218, 7 BLR 739; *Saiyid Ali* v. *Debi Pd*., 24 A 251). Even if the agreement is that pawner should sell the goods pledged, and the pawnee should realise his debt out of the sale proceeds, the pawnee's suit for recovery of the debt or any balance should, it was held, be brought within three years provided by Article 57 (now Article 19) and the right to recover the debt cannot be held to be suspended till the goods are sold (*Debi Din* v. *Gaya Pd*, 109 IC 64). The right of creditor against the pledged goods continues even after suit becomes time-barred (*T.S. Kotagi* v.

4. The plaintiff sold pledged property through Ram Lal, on March 20, 1996, and realised Rs.1,050 from the sale, Rs.752 is still due as per account given below.

The plaintiff claims Rs.752 with interest from date of suit to that of payment.

RAILWAYS AND CARRIERS *(mm)*

No. 114—Suit against a Carrier, not being a Common Carrier, for Injury to Goods

1. By a verbal agreement entered into between the plaintiff and the defendant on March 15, 1995, the defendant undertook to carry carefully by a motor lorry the plaintiff's goods detailed at the foot of the plaint from Saharanpur to Dehradun and there deliver the said goods to the order of the plaintiff.

2. On March 16, 1995, the defendant received the said goods for the purpose and on the terms aforesaid, but did not carefully carry the goods.

3. The said goods were broken and damaged, whilst being carried upon the said journey, by the negligence and want of care of the defendant.

Particulars of Negligence and Want of Care

* * *

Particulars of Damage

* * *

The plaintiff claims Rs.4,000, with interest from date of suit to that of payment.

Tahsildar, A 1985 Karn 265; referred to *Balkrishna* v. *Swadesi Polytex*, A 1985 SC 520).

(mm) **Carrier** is a person who undertakes to transport the goods of another person from one place to another. The term "**common carrier**" denotes a person, other than the government, engaged in business of transporting for hire, property from place to place, by land or inland navigation, for all persons indiscriminately (section 2 Carriers Act III of 1865). But a motor bus service intended for transport of passengers and their luggage only, cannot be deemed to be a common carrier for parcels (*Maddappa* v. *Firm of Ramiah*, 17 Mys LJ 284). A Motor Transport Co. and Steam Navigation Co. are examples of common carriers but a carrier by sea is not a common carrier. Whereas a porter or cart-man is governed by contract, the liabilities

No. 115—Suit against Common Carrier for Damages for Delay in Delivery of Goods

1. The defendants are common carrier of goods by steamer from Ghazipur to Bhagalpur.

2. On June 4, 1995, the plaintiff delivered to the defendants one parcel of butter to be conveyed by them as such common carriers from Ghazipur to Bhagalpur and there delivered to the plaintiff within a reasonable time.

3. The defendant failed to deliver the said parcel within a reasonable time, but delivered the same two days after the time when it ought to have been delivered, and when butter had become stale and worthless.

Particulars of Damage

20 Kgs. of butter at Rs.100 per kg. - Rs.2,000.

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

No. 116—Suit against a Common Carrier for Loss of and Injury to Goods

1. The defendants are common carriers of goods from Chandigarh to Srinagar.

2. On May 4, 1995, the plaintiff delivered to the defendant four cases containing crockery to be conveyed by them as such common carriers from Chandigarh to Srinagar and delivered to the plaintiff.

---

of a common carrier are governed by English common law as modified by the provisions of Act III of 1865 (see, *Uma Rani* v. *S.K. Datta*, A 1984 Cal 230). The Railways Act (IX of 1890) now The Railways Act, 1989 generally governs the liabilities of all railways, whether owned by the State or by private companies. See also, Carriage of Goods by Sea Act, 1925 and Carriage by Air Act, 1972 for cases not covered by the Carriers Act and the Railways Act. On carriage by air see *Rajasthan Handicrafts Emporium* v. *Pan Am*, 1984 Del 396.

In a suit against an ordinary carrier, the contract, with all its terms, has to be alleged in the plaint which is framed like a plaint in a suit against a person for breach of any other contract. In a suit for damage resulting from the carrier's negligence, the onus of proving negligence, will be upon the plaintiff, if the carrier has taken care of the goods as required by section 151, Contract Act. **In a suit against a common carrier, facts showing that the defendant is liable under the Carriers Act should be alleged in the plaint,** and the suit should be brought

3. The defendants delivered only three cases of crockery to the plaintiff at Srinagar, and one of the said three cases was delivered in a broken and totally worthless condition.

Particulars of Damages

Value of one case of crockery not delivered by the defendant, as per details given below— Rs.18,000.

Value of the crockery broken as per details given below Rs.6,000.

The plaintiff claims Rs.24,000 and interest from date of suit to that of payment.

---

subject to that Act as to notice, etc. In a suit for loss, damage or non-delivery of goods entrusted to a common carrier, it is not for the plaintiff to prove negligence of defendant (section 9, Carriers Act), therefore the same need not be alleged in the plaint. It will be for the defendant to show diligence and explain the loss, etc. A common carrier can limit his common law liability by special contract (section 6) but liability for negligence being a criminal act cannot be curtailed (section 8) (*Murlidhar Mohanlal* v. *River Steam Navigation Co.*, A 1967 Assam 74). The liability of the common carrier is that of an insurer. The burden is on the carrier to prove that the loss, damage or non-delivery is not due to the negligence or criminal act of the carrier or his servants or agents (*Milap Carriers* v. *National Insurance Co. Ltd. Hyderabad*, A 1994 AP 24).

Where the carrier delivers the goods to the holder of the original way bill, he is not liable even if that holder acquired possession of bill unauthorisedly (*Amin & Co.* v. *S. Roadways*, A 1985 Mad 287, distinguished, *Easwara Iyer & Sons* v. *M. B Transport Co.*, A 1964 Mad 516, a case in which the person taking the delivery had not produced the original way bill). Where goods are consigned to a place beyond the scope of a carrier's business so that from that point he must forward them by another carrier, the carrier is responsible for the goods for the *whole* journey, unless he limits his liability by a specific agreement (*India General Navigation Co.* v. *Girdharilal*, 100 IC 903, 31 CWN 359, A 1927 Cal 394 DB).

No claim in respect of certain specified classes of goods can be made, if the value of the goods is worth over Rs.100 unless the value and description thereof has been declared before hand (section 3). A notice under section 10, Carrier's Act has to be given (*National Insurance Co.* v. *Om Prakash Poddar*, A 1993 Cal 26), but it may be served on any local representative of carrier, there being no special rule on whom it should be served (*India General Navigation* v. *Girdharilal*, A 1927 Cal 394, 100 IC 903, 31 CWN 359 DB), but it is not necessary to plead the giving of this notice in the plaint (*U. Ba Tin* v. *U. Tun On*, A 1938 Rang 437).

If consignment note has been endorsed by the consignor in favour of a bank for value received, then the bank can also file a suit jointly against consignor, guarantor and carrier (*Deccan Queen Motor Service* v. *I.D. Bank*, A 1985 Ker 1297; *Lal Chand Madhav Das* v. *Union of India*, A 1986 Del 29).

No.117—Claim against Railway for Shortage in Delivery

(Form I, Appendix XXVII, of Railway Claims Tribunal (Procedure) Rules 1989)

1. Particulars of the applicant—

Name and Address : Km. Manju Rani Agarwal,
D/o. Rajendra Kumar Agarwal
Sole Proprietor of the firm

The responsibility of all Railways (whether owned by the State or by a company), as carriers, for loss, destruction or deterioration of goods or animals is governed, not by the Carriers Act, but by sections 93 to 106 of chapter XI of the Railways Act, 1989 which should be carefully studied before drafting a plaint against a railway administration. **Facts showing the liability under the provisions of that chapter should be alleged in the plaint. If goods are consigned under any special agreement, facts should be alleged showing the liability of the Railways under the terms of that agreement.**

Now claims against the railway administration are to be filed before the Railway Claims Tribunal, and the jurisdiction of the Civil Courts is barred by section 15 of Railway Claims Tribunal Act, 1987. Claim Tribunals have been established for inquiring into and determining claims against railway administration for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to it to be carried or for refund of fares or freight or for compensation for death or injury to passengers occuring as a result of railway accident (section 13).

Section 18(1) provides that the Claims Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure but shall be guided by the principles of natural justice, and subject to the other provisions of the Act, and of any rules, the Claims Tribunal shall have powers to regulate its own procedure.

An application to the Tribunal shall be presented in Form I or Form II or Form III [Appendix XXVII of Railway Claims Tribunal (Procedure) Rule 1989] to the Registrar of the Bench concerned.

An application for compensation in respect of loss, destruction, damage, deterioration or non-delivery of animals or goods or in respect of refund of fare or freight shall be accompanied by the following documents, namely-

(a) copy of the railway receipt/parcel way bill/luggage ticket;

(b) original sale invoice (*bijak*), if any;

(c) copy of order or letter, if any, of the railway administration deciding the claim of the party;

(d) copy of the original certificate issued by the railway administration regarding loss, deterioration or damage to the goods, at the time of granting open delivery or assessment delivery;

Luxman Prasad Karuna Nidhi,
Koocha Nazir Chhakka Lal,
Barabanki.

2. Particulars of the Respondent/ Respondents : 1. Union of India;
2. General Manager Northern Railway, New Delhi;
3. General Manager, Southern Railway, Madras.

3. Value of claim and details of application fee-
   (1) Value of claim : Rs.2250
   (2) Details of application fee : Rs.152

4. (i) Name and address of the Bank on which the draft is drawn: Punjab National Bank R.C.C., Lucknow
   (ii) Demand Draft No. and the Branch at which payable QFF 011846 Punjab National Bank R.C.C., Lucknow

Or

   (i) Number of Indian Postal order(s) No.OT/A/98 9073 46
   (ii) Name of issuing Hazaratganj, Branch, Lucknow

(e) copy of the notice under section 106 of the Indian Railways Act, 1989.

(f) copies of any other relevant document in possession of the applicant (Rule 7).

An application for compensation in accident claims may be filed before the Bench having territorial jurisdiction over the place where the accident occurred (Rule 8), and application for compensation for loss, damage, destruction, deterioration or non-delivery of goods or animals, may be filed before the Bench having territorial jurisdiction over the place where—

Post Office

(iii) Date of issue of postal order(s) 23.4.96 Rs.152/-

(iv) Post Office at which payable :

5. Full Booking particulars of the consignment —

Date of Booking	Railway Receipt or parcel-way-bill No.	Station From	Station To	Description of consignment
1	2	3		4
22.10.1995	927444	Barabanki	Mysore	One bale containing hand printed Art Silk Sarees

Value of Consignment	Any other particulars
5	6
Rs.2250.00	25 Sarees of the value of Rs.2250.00 were delivered short.

6. Date on which notice served on the Railway Administration under section 106 of Indian Railways Act, 1989 (*Attach proof*) : 8.2.1996

7. (i) Facts of the case :-

(*Give here a concise statement of facts in a chronological order,*

(a) the goods or animals were delivered for carriage; or

(b) where the destination station lies; or

(c) the loss, destruction, damage or deterioration of goods or animals occurred (Rule 9).

An application in respect of a claim for refund of fare or freight may be filed before the Bench having territorial jurisdiction over the place at which such fare or freight was paid or the place where the destination station lies (Rule 10).

each paragraph containing as nearly as possible, a separate issue, fact or otherwise)

(a) One bale containing hand printed Art Silk Sarees was despatched by the applicant from Barabanki under parcel-way-bill No.927444 dated 22.10.1995 for being carried to and delivered at Mysore.

(b) When the applicant, owner of the goods consigned approached the Railway authorities at the destination to take delivery of the aforesaid consignment, it was found in tampered and loose condition and restitched and short in weight. Consequently, open delivery was demanded and the same was given. Only 55 sarees were delivered to the applicant as against 80 sarees consigned i.e. 25 sarees were found short. Price of 25 sarees found short was Rs. 2,250 only.

(ii) *(a) Nature of the relief sought :*

Decree for recovery of Rs.2,250 together with costs of the case and *pendent lite* and future interest at the rate of Rs. 2% per month be passed in favour of the applicant against the Respondent.

(b) Grounds of relief :

That aforesaid shortage is the outcome of gross negligence and misconduct of the Railway employees concerned and the applicant has suffered loss of Rs. 2,250.

8. Matters not previously filed or pending with any other court. (State whether the applicant had previously filed any claim, writ petition or suit regarding the matter in respect of which the present application has been filed). In case the applicant had previously : Not filed.

Where a petition has been dismissed for default, restoration application may be moved within a period of thirty days from the date of dismissal and on sufficient cause being shown the petition may be restored (Rule 18). Substitution shall be made within thirty days, on failure the application for compensation shall abate (Rule 26).

filed any claim, application, writ petition of suit, indicate the stage at which it is pending, and if decided, attach a certified copy of the order.

9. Jurisdiction of the Bench (indicate the facts on the basis of which the Bench to which application is made, has the jurisdiction. : Barabanki District lies within the jurisdiction of Lucknow Bench of the Railway Claims Tribunal, hence this Hon'ble Bench has jurisdiction to entertain the application.

10. *List of enclosures :-*

1. Application
2. Copy of Notice
3. Copy of Invoice
4. Copy of open delivery
5.
6.

Verification

No. 118—Claim Petition against Railways for Delay in Delivery of Goods

Paras 1 to 6 as in precedent No.117.

7(i) Facts of the case :

(*Give here concise statement of facts in chronological order, each paragraph containing as nearly as possible, a separate issue, fact or otherwise*)—

In regard to matters other than matters covered by section 13(1) of the Railway Claims Tribunal Act, 1987, the jurisdiction of the Civil Court is not barred. A passanger fell out of bogie of the train and died on being caught between the platform and the running train (*Ratnakar Taubaji Itankar* v. *Union of India*, A 1994 Bom 132 DB).

(a) On July 18, 1995 the plaintiff's agent at Calcutta delivered 250 bags containing 250 quintals of sugar to the servants of the defendant at Howrah for despatch by goods train to Jamuna Bridge Station for delivery to the plaintiff, on receiving the freight, and obtained R.R. No. 2341. The goods were booked at railway risk rates.

(b) The usual and reasonable period of transit by goods train from Howrah to Jamuna Bridge is eight days.

(c) The defendant negligently delayed the consignment in transit, and actually delivered it to the plaintiff on September 25, 1995.

(d) In consequence of negligence of the defendant the goods lost in value by a fall in the market price, and thus damage was caused to the plaintiff.

(ii) (a) Decree for recovery of Rs.5,000/- together with the costs of the case and *pendente lite* and future interest at the rate of 2 per cent per month be passed in favour of the applicant against the respondent as per details given below-

Particulars of damages :

Difference between the price in the last week of June (i.e. Rs.1,360 per quintal and on September 25, (i.e. Rs.1,340 per quintal) at Rs.20 per quintal, Rs.5,000.

(b) The aforesaid loss in value by fall in the market price is the outcome of the gross negligence and misconduct of Railway Employees concerned and the applicant has suffered loss of Rs.5,000/-.

Paragraphs 8, 9 and 10 as of the previous precedent No.117

No.119—Claim against Railways for Damage to Goods

Paras 1 to 6 as in precedent No.117

7(i) Facts of the case :

(*Give here a concise statement of facts in chronological order, each paragraph containing as nearly as possible, a separate issue, fact or otherwise*).

Section 17(1)(c) of the Limitation Act would apply only to a suit instituted or an application made in that behalf in the civil suit. The Railway Claims Tribunal is the creature of the statute, therefore, it is not a civil court. The Limitation Act has no

(a) On July 10, 1995, the plaintiff handed over 200 bags of sugar each containing one quintal to the servants of the defendants at Bareilly, for despatch to Muzaffarnagar and for delivery there to the plaintiff or his order.

(b) The servants of defendants accepted the consignment for the aforesaid purpose on the plaintiff executing a forwarding note and paying the Railway freight, and granted Railway Receipt No.789 to the plaintiff. The goods were booked at owner's risk rates.

(c) When the consignment was delivered to the plaintiff's agent at Muzaffarnagar, all the bags were found in a drenched condition and the sugar considerably damaged by water and the plaintiff has suffered damage thereby, amounting to Rs.15,000.

---

application and the limitation under section 78 B of the old Act of 1890, is not saved by operation of section 17(1)(c) (*Birla Cement Works* v. *G.M. Western Railway*, JT 1995(2) SC 59, A 1995 SC 1111).

Whether the goods or animals were booked at railway risk or owner's risk must be clearly alleged in the pleadings. The railway is responsible only if the negligence or misconduct of its administration or of its servants is proved, allegations of negligence and misconduct must be made and particulars thereof given. Where however, it is for the railway to escape liability on the ground that there was no negligence or misconduct, their pleas need not be anticipated. The stage at which loss, etc., occurred and if compensation can be recovered only in special circumstances, those circumstances must be alleged.

Who can sue : A suit against a Carrier or Railway for the loss of goods, or for any breach of duty or of contract is, as a general rule, to be brought by the person in whom vests the property in the goods (*Dani Chand* v. *Bhawalka Bros.*, A 1955 SC 182). A Railway Receipt is a document of title (*Commissioner of I.T.* v. *Bhopal Textile Ltd.*, A 1961 SC 426). As between seller and purchaser, the property passes to latter on the seller's delivery to the carrier, who carries the goods as bailee for the purchaser, and the seller in employing the carrier is to be regarded as agent for the purchaser. In such cases, consignee should bring the suit. When, however, property does not pass to the consignee, as in case of goods sent on approval, the consignor alone can bring the suit and also where the consignor has to carry or procure at his own expense the carriage of the goods. When the seller, books the consignment "to self" the property does not pass to the buyer and the buyer cannot sue, but if the railway receipt is handed over to the buyer *on taking the price*, this operates as transfer of the right (*G.G. in Council* v. *Joy Narain*, A 1948 Pat 36).

A consignee who is not the owner of the goods but to whom goods are consigned for sale on commission basis can sue for loss caused to the goods in transit (*Dominion of India* v. *Gaya Pershad*, A 1956 All 338; also see, *Chaganmal*

(d) The servants of defendants employed at Bareilly station loaded the goods during the rainy season in a wagon, the roof of which was damaged and was in the knowledge of the said servants. During the course of journey, the rain water came into the wagon and drenched all the bags of sugar. The servants of the defendants at the junction stations at Moradabad and Hapur saw this but did not arrange have the goods transferred to another wagon.

(e) The said damage to the goods was caused by misconduct of the servants of the defendants.

(ii)(a) A decree for the recovery of Rs.15,000 together with the costs of the case and *pendents lite* and future interest at the rate of 2 per cent per mensem be passed in favour of the applicant against the defendants as per details given below—

Particulars of damages :

Difference between the market value of sugar of the quality of the plaintiff's sugar at Muzaffarnagar on the date of delivery (Rs.1,305 per quintal) and the value which the damaged sugar fetched (Rs.1,230 per quintal) at Rs.75 per quintal on 200 quintals, Rs.15,000.

(b) The aforesaid loss in value by fall in the market price is the outcome of the gross-negligence and misconduct of Railway employees concerned and the applicant has suffered loss of Rs.15,000.

Para 8, 9 and 10 as in precedent No.117.

Harpal Das v. *Dominion of India*, A 1957 Bom 276; *Union of India* v. *West Punjab Factory Ltd.*, A 1966 SC 395). In such a case the consignor does not lose his right to sue (*B.B. & C.I. Railway* v. *Siyaji Mills*, 101 IC 689; see also, *Union of India* v. *W. Punjab Factories*, A 1966 SC 395). Where the goods were not given to the consignor's agent in whose favour Railway receipt had been endorsed, were kept by the railway administration in jetty and not in godown, and the goods caught fire, the railway administration was held responsible for the damages caused to the goods (*Union of India* v. *Hafiz Bashir Ahmad*, 1987 (Supp). SCC 174). In case of short delivery of goods, a consignee can file suit, the fact that he became owner of the goods after the detection of shortage of delivery is immaterial (*Utkal Farm and Road Machinery* v. *Union of India*, A 1995 Mad 185).

The opinion is not uniform on the right of an endorsee of Railway receipt to sue. It has been held in some cases that endorsee can sue and even a blank and unsigned endorsement is sufficient (*Jalan & Sons* v. *Governor-General*, A 1949 East Punjab 190; *State of Bihar* v. *Union of India*, A 1959 Pat 438, *Samrath Lal* v.

No. 120—Claim for Refund of an Overcharge made by the Railway

Paras 1 to 6 as in the precedent No.117.

7(i) Facts of the case (*Give here a concise statement of facts in a chronological order each paragraph containing as nearly as possible, a separate issue, fact or otherwise.*)

(a) On June 20, 1995, the defendants through their servants at Basti station accepted from the plaintiff's agent 50 sleepers for transport by goods train to Bhagalpur, and charged Rs.1,220 from the said agent and granted Railway Receipt No.1262.

(b) The correct charge for the said sleepers according to the schedule laid down in the goods tariff issued and published by the defendants should have been Rs.930.

[*Or*, (b) The defendant's servants at Bhagalpur station said to the plaintiff that charge should have been made not by weight as made at Basti but by measurement and therefore they wrongfully refused to deliver the said sleepers to the plaintiff until the plaintiff paid them an alleged undercharge of Rs. 290, and the plaintiff had therefore to pay, and he did pay on July 1, 1995 Rs. 290 to the defendant's servants at Bhagalpur.

(c) Under the rules laid down in the defendant's goods tariff, the charge was correctly made at Basti].

(ii) Nature of the relief sought:

(a) The plaintiff claims refund of Rs.290 with interest at 1 per cent per mensem by way of damages from the date of overcharge up to date, with further interest upto the date of payment.

Union of India, A 1959 MP 309; *Union of India* v. *Tahar Ali*, A 1952 Ori 126). The Calcutta High Court was of the view that an endorsee cannot sue unless property in the goods had passed to him (*Commissioner Port of Calcutta* v. *General Trading Corporation*, A 1964 Cal 290). The Assam High Court in the case of *Shree Shyam Stores* v. *Union of India*, A 1971 Assam 59, discussed the entire law and held that a mere endorsement of Railway Receipt does not vest the right of suit. The endorsee must prove that the property in goods has also passed to him (*Union of India* v. *Ram Pd Mool Chand*, A 1971 Bom 52). The Supreme Court has, however, held that while an endorsement may pass property in the goods, it does not transfer the contract contained in the receipt on the statutory contract under section 74 F of the old Railways Act. Further that a Railway Receipt cannot be accorded the benefit

(b) Grounds of Relief:

The aforesaid overcharge has been made on account of the negligence on the part of the Railway employees concerned.

Paras 8, 9 and 10 *as in precedent No.117.*

Verification

No. 121—Claim for Loss of Luggage

Paras 1 to 6 as in precedent No.117. The facts may be modified according to the facts of the present case.

---

which flow from negotiability so as to entitle the endorsee to sue the carrier. But the plaintiff may prove that he is an assignee of the contract of carriage and may sue as such (*Movi Mercantile Bank Ltd.* v. *Union of India*, A 1965 SC 1954). Where the insurer has paid the amount of the damages sustained to the consignor and the latter has authorised the former to recover the amount from the railways, the insurer can recover the amount from the Railways (*New India Assurance Co. Ltd.* v. *Union of India*, (1995) 2 SCC 417).

Contract or tort: The liability of the carrier may be based on contract or on negligence, sometime it can be based on both. It is sufficient to allege the material facts. Whenever a breach of duty is alleged the facts from which the duty arises must be stated. If the contract is one, the facts of which must be pleaded, in order to establish the duty of which the defendant is alleged to have committed breach, the suit is one on contract. If the facts are such that the plaintiff can show a duty without relying on the contract, the plaintiff may sue in tort in spite of the existence of a contract. For presumption of negligence of Railway *see*, *Union of India* v. *Khalilul Rahman*, A 1971 Cal 347. A man who is no party to a contract may sue for the negligent performance of that contract provided it was entered into with express reference to himself; thus an infant or a servant may recover damages for injuries received in a Railway accident, although his parents or master took his ticket for him. A servant may sue for loss of his own luggage though his master took the ticket. A claim for shortage in weight of goods carried under risk-note is a suit on contract, and when it is so brought it is not competent for court to pass a decree as if the suit was one in tort for damages for delay (*M.& S.M. Railway* v. *Gopal Rai*, 94 IC 510, A 1926 Pat 273).

Luggage: Under section 100 of Railways Act of 1989, the Railway Administration is not responsible for the loss, damage, destruction, deterioration or non-delivery of any luggage belonging to a passenger unless a railway servant has booked the luggage and given a receipt therefor. In case the luggage is carried by the passenger in his own charge, it must be proved in addition that the loss, etc., was due to negligence or misconduct of the railway administration or any of its servants. If compensation for luggage is claimed these facts must be alleged in the application.

7(i) Fact of the case (*Give here a concise statement of facts in chronological order, each paragraph containing as nearly as possible, a separate issue, fact or otherwise*).

(a) On June 6, 1995 the plaintiff purchased a ticket at Lucknow station for journey from Lucknow to Simla by the Railway owned by the defendants.

Personal injury : Suits for personal injury by negligence of Railways are suits based on tort. The liability of the railways in respect of death or injuries caused to bona fide passengers by accidents to trains carrying passengers is governed by section 124 of Railways Act 1989, and that in respect of accidents at sea by section 111 of the Act. If the deceased passenger was travelling without ticket he was not a *bona fide* passenger and his dependants cannot recover compensation (*Sundari* v. *Union of India*, 1984 UPLBEC 612 (All) FB). The accident must be to the train and not mere to the passenger for invoking section 124 (*Union of India* v. *Sunil Kumar*, (1985) 1 CCC 202, SC).

Damages : Plaintiff should try to minimize his damage. If goods have deteriorated he should take delivery and claim loss. If he does not take delivery he cannot claim damages (*Secretary of State* v. *Devi Ditta*, 148 IC 489; *Laduram* v. *Secretary of State*, 59 CLJ 467, A 1934 Cal 834). The measure of damages ordinarily is the value of the goods at the time they should have reached the consignee, and loss of profits is not the ordinary consequence of non-delivery unless special circumstances were brought to defendant's notice (*G.A. Jolli* v. *Dominion of India*, A 1949 Cal 380; *Union of India* v. *Jogendra Chandra*, A 1976 Pat 24). When there is no evidence before the court to prove the value of consignment at destination, the freight paid and the cost price of the consignment is the measure of the value of the consignment (*New Swadeshi Mills* v. *Union of India*, A 1981 All 268). Where the consignor declared the value of the goods, he cannot claim damages exceeding that amount (*Union of India* v. *Sri Rama Silk Factory*, A 1980 AP 47).

Notice : Many suits are lost for want of a proper notice. No suit can be brought against the Railways for refund of an over-charge in respect of goods or animals, or for compensation for the loss, damage, destruction, deterioration or non-delivery of animals or goods delivered to be carried, unless the claim has been preferred in writing to the Railway administration within six months from the date of delivery of the animals or goods for carriage by the Railway (section 106). It is not necessary that the claim should be in the form of a notice. It may be in the form of application or in any other form, such as a letter (*Bala Prasad* v. *B.N.W. Railway Co.*, 106 IC 311, A 1927 Oudh 478 DB). Such notice may be served, in the case of State Railways on the Chief Commercial Manager (*Shamsul Haq* v. *Secretary of State*, A 1930 Cal 332); or General Manager or General Traffic Manager (*Shamji* v. *N.W. Railway*, A 1947 Bom 169, 48 BLR 698) and a notice sent to any subordinate official of the Railway will be of no avail (*Cawnpore Cotton Mills* v. *G.I.P. Railways*, 21 ALJ 223, *Ram Sahai* v. *E.I. Railway*, 20 ALJ 644; *Sahebdin* v. *E.I. Railway*, 13

(b) The luggage of the plaintiff was booked by the defendant's servants at Lucknow for being carried to Simla in the luggage van, and a receipt No. 243 was given to the plaintiff for the same. (*Or, if the luggage was in the charge of the plaintiff* "was being carried in the charge of the plaintiff in the carriage in which he was travelling").

(c) The defendant's servants did not carry the said luggage to Simla but by negligence and misconduct lost it upon the said journey or have retained it, whereby the plaintiff has suffered damage. (*Or*, by the negligence of the defendant's servants the carriage caught fire and the goods were destroyed).

(ii) A decree for the recovery of Rs.5,000 together with costs of the case with *pendente lite* and future interest at the rate of 2 percent per month be passed in favour of the applicant against the defendants.

(b) The aforesaid loss of luggage is outcome of the gross negligence and misconduct of the Railway employees concerned.

Paras 8, 9 and 10 as in precedent No.117.

Verification

No. 122—Application for Compensation for Death, Injury in Train Accident

(*Form II, Appendix XXVII, Railway Claims Tribunal (Procedure) Rules 1989*)

I, ...son/daughter/wife/widow of .....

residing at .....having been injured in

OLJ 15, 3 OWN 156, 93 IC 22). A joint notice to the Superintendent-General and Agent was held sufficient (*Bhayyalal* v. *Agent B.N. Railway*, A 1944 Nag 262).

A notice under section 80, C.P.C. is further necessary if government has to be sued as in case of State Railways (*Ali Asmat* v. *G.I.P. Railways*, 124 IC 711; *A. Jamal Noor Md.* v. *G.G. in Council*, A 1947 Cal 26) and notice under section 106 (formerly 78-B) Railways Act only is not sufficient (*Secretary of State* v. *Fazluddin*, 1932 ALJ 1033; *N.W. Railway* v. *Dwarka*, A 1931 Pat 393; *Balak Ram* v. *Secretary of State*, 1935 ALJ 908). Notice under section 80 should be served as required by that section and service on Manager of the Railway or on Collector is not sufficient, nor on Secretary Railway Board (*Kumar Bros.* v. *Governor-General*, A 1949 Lah 165). It is open to a party to give a combined notice satisfying the requirements of both sections 80, C.P.C. and section 106, Railways Act (*The G.I.P. Railway* v. *Mageti*, 109 IC 406, A 1928 Mad 599, 1928 MWN 218).

railway accident hereby apply for the grant of compensation for the injury sustained.

Or,

I, ..., son/daughter/wife/widow of ..... residing at .....hereby apply as dependent for the grant of compensation on account of the death/injury sustained by Shri/Kumari/ Shrimati .....son/daughter/ wife/widow of Shri/ Shrimati..... son/daughter/wife/widow/widow of Shri/ Shrimati ..... who died/was injured in the railway accident referred to hereunder.

Necessary particulars in respect of the deceased/injured in the accident are given below :

1. Name and father's name of the person injured/dead (husband's name in the case of married woman or widow).
2. Full address of the person injured/dead.
3. Age of the person injured/dead.
4. Occupation of the person injured/dead.
5. Name and address of the employer of the deceased, if any-
6. Brief particulars of the accident indicating the date and place of accident and the name of the train involved :-
7. Class of travel, and ticket/pass number, to the extent known.....
8. Nature of injuries sustained along with medical certificate.
9. Name and address of the Medical Officer/Practitioner, of any,

---

A claim under section 106 is not necessary in cases not covered by that section. Although in a claim for refund of overcharge, a notice is necessary, the Allahabad High Court took an equitable view in a case where such notice was physically impossible and held that suit could be maintained without such notice. In that case overcharge was made at the time of the delivery at destination which took place more than 6 months after delivery to railway by the consignor (*Sheo Dayal* v. *G.I.P. Railway*, 97 IC 474, A 1926 All 698, 25 ALJ 89 DB). Under the old section 77, it was held that a notice was not necessary in cases of detention or conversion, e.g., where railway admittedly in possession of goods fails to hand them over to the owner (*Haryana Cotton Mills* v. *B.B. & C.I. Railway*, 102 IC 149, 8 Lah 555; *Shamshul Haq* v. *Secretary of State*, A 1930 Cal 332), or in other cases of tort (*Sundarji* v. *Secretary of State*, 152 IC 995, A 1934 Pat 507).

who attended on the injured/dead and period of treatment .....

10. Disability for work, if any, caused.
11. Details of the loss of any luggage on account of the accident.....
12. Has any claim been lodged with any other authority? If so, particulars thereof.....
13. Name and permanent address of the applicant.....
14. Local address of the applicant, if any.....
15. Relationship with the deceased/injured.....
16. Amount of compensation claimed.....
17. Where the application is not made within one year of the occurrence of the accident, the grounds thereof .....
18. Any other information or documentary evidence that may be necessary or helpful in the disposal of the claim.....
19. Mention the documents, if any, filed along with application.

I,.....solemnly declare that.....

(a) the particulars given above are true and correct to the best of my knowledge and

(b) I have not claimed or obtained any compensation in relation to the injury/death which is the subject matter of this application.

Signature or left thumb-impression of the applicant.

Date.....

Place.....

Name of witness and his address in case left thumb impression is put by applicant.

The words "loss of goods" used in section 106 mean loss or destruction or deterioration of the goods and consequent loss to the owner thereof (*G.G. in Council* v. *Musaddilal*, A 1961 SC 725).

Section 96 of the new Railways Act 1989 (sections 76D and 76E of the old Railways Act, 1890) govern the responsibility if goods are carried on two or more

No. 123—Application for Refund of Fares or Freight

(Form III, Appendix XXVII, Railway Claims Tribunal (Procedure) Rule 1989)

Paras 1 to 4 as in Precedent No. 117

5. Full particulars of payment of fare/freight.

(1) Claim for refund of freight.

Date of Booking	Railway Receipt or Parcel Way Bill	Station From	To	Description of consignment
1	2	3		4
Freight paid	Amount Refund of Claims		Money Receipt/Credit Note or other payment particulars	
5	6		7	

(2) Claims for refund of fare

Date of journey	Train No.	Class of Travel	Class actually travelled
1	2	3	4
Ticket or Ticket Deposit Receipt/ Excess Fare Ticket, etc., Guards or Conductors, Certificate		Fair Paid Rs.	Refund Claimed Rs.
5		6	7

6. Date on which notice served in Railway Administration under section 106 Railways Act, 1989 (in respect of claims for refund of freight)—attach proof.

railway administrations or other transport systems and over railways in India and foreign countries. It is, open to the plaintiff to sue all the administrations or systems concerned or only such of them as he holds responsible for the compensation he is claiming. But the non-booking administrations can be made liable only if loss occurred on their railway and the new section does not enhance the liability which is still governed by section 80 Railways Act (*Union of India v. Brij Lal*, A 1969 SC 817 para 10).

7. *(i)* Facts of the case:

(Give here a concise statement of facts in a chronological order, each paragraph containing as nearly as possible, a separate issue, fact or otherwise.)

(ii) (a) Name of relief sought; and

(b) Grounds of relief.

8. Matters not previously filed or pending with any other Court.

(State whether the applicant had previously filed any claim, writ petition or suit regarding the matter in respect of which the present application has been made).

Place of Suing : Section 109 of the Railways Act, 1989 (section 80 of the old Act, of 1890) is a self-contained provision with regard to the choice of forum for such suits. There is implied repeal of the provisions of section 20 CPC and section 18 of the Presidency Small Cause Courts Act. The words "may be instituted" in section 109 are equivalent to "shall be instituted" (*Ratan Lal Adukia* v. *Union of India*, A 1990 SC 104; *Union of India* v. *Ratan Lal Adhukia*, A 1987 Cal 311 (FB) affirmed; *Hindustan Machine Tools Ltd.* v. *Union of India*, A 1985 Mad 130; and *Assam Cold Storage* v. *Union of India*, A 1971 Assam 69 overruled).

Limitation period is of three years for suits for compensation for loss or non delivery of goods. It runs in the case of a suit for compensation for losing or injuring goods, from the time when the loss or injury occurs, and in a suit for non-delivery of or delay in delivering goods, from the time when the goods ought to have been delivered (Articles 10 and 11).

The limitation period for filing claim petitions against Railways is now governed by section 17 of Railway Claims Tribunal Act, 1987. For compensation for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to railway administration for carriage by railway, the limitation period is three years from the date on which the goods in question were entrusted to the railway administration. The claims for refund of fares and freight is three years from the date of payment. Claim can be filed only after the expiration of three months next after the notice required under Sec. 106 of the Railways Act, has been served.

For compensation for death or injuries as result of railway accident, and for compensation payable under sections 124 and 124 A of the Railway Act, 1989, the limitation period is one year from the date of the occurence of the accident.The delay may be condoned by the tribunal on sufficient cause being shown.

Defence : The Railway may plead that the loss, etc., was due to one of the causes mentioned in section 93 and that they had used reasonable foresight and care. They may also plead any special agreement as exempting them from liability. They may plead omission of claim under section 106. They may plead that the parcel or package contained articles of the class mentioned in the 2nd Schedule of

In case the applicant had previously filed any claims application, writ petition or suit, indicate the stage at which it is pending, and if decided, attach a certified copy of the Order.

9. Jurisdiction of the Bench (indicate the facts on the basis of which the Bench to which application is made, has the jurisdiction).

10. List of enclosures :

Verification

RECTIFICATION *(nn)*

No. 124—Suit for Rectification of a Sale-Deed

1. The plaintiff is owner of the houses No. 325 and 325-A in Ramnagar, Tahsil Rampur, District Ambala.

2. On December 14, 1994, the plaintiff agreed to sell and the defendant agreed to purchase, for consideration, a one-third share in the said house No. 325 only.

3. On December 15, 1994 a sale-deed was drawn up under the direction of the defendant, and was signed by the plaintiff and registered the same day.

---

the Railways Act and were of value exceeding Rs.100 but were not insured. The railway may also plead (section 93) that the subject-matter of bailment was seized by some authority of law, exercised through regular and valid proceedings (*Jugilal Kamlapat Oil Mills* v. *Union of India*, A 1976 SC 227). Where the delivery of the goods is not taken within seven days after the expiry of free time allowed for the removal of the goods under Sec. 99 and thereafter the consignment of goods is delivered to a wrong person, the Railways can claim protection under Sec. 99(2) and are not liable for damages (*St. Joseph Textiles* v. *Union of India*, A 1993 SC 1692).

(*nn*) An instrument can be rectified by court at the instance of a party to it, if, by reason of a mutual mistake or fraud, it does not express the real intention of the parties (section 26, Specific Relief Act).

If the instrument is a decree, it has been held in some cases (*Bala Prasad* v. *Kannu*, 14 IC 41; *Bepin* v. *Jageshwar*, 66 IC 345, 26 CWN 36, 34 CLJ 256; *Upadrashta* v. *Gudapartu*, 103 IC 384 Mad; *Moorudin* v. *Md. Omar*, A 1940 Bom 321), that rectification can be by suit. In *Azizullah Khan* v. *Court of Wards*, A 1932 All 587, however, it was held that the decree could be amended under section 152 C.P.C. The section was, however, held to be inapplicable in *Umashankar* v. *Ram Agyab*, A 1939 All 231 and *Shujat Mand Khan* v. *Govind Behari*, A 1934 All 100, but it was not decided in these cases as to whether a suit would lie. A suit of rectification of decree was held to be maintainable in *Kistoormull* v. *Sattar Md.*, A 1958 Raj 276. It

4. In the said sale-deed, the property is described as a "one-third share in house No. 325 and 325-A and the defendant has thereby become owner of more property than the plaintiff had contracted to sell.

5. The aforesaid wrong description of the property sold was procured in the sale-deed by the defendant fraudulently.

Particulars of the Fraud : The defendant falsely and fraudulently represented to Duni Chand, the scribe of the sale-deed, that the plaintiff had agreed to sell a one-third share in the both houses, aforesaid and induced the said Duni Chand by the said representation to enter the said wrong description of property sold in the sale deed. After the deed had been drawn up, the defendant fraudulently represented to the plaintiff that it correctly described the terms of the agreement of the parties and, by this representation, which was false and which the defendant knew to be false, he induced the plaintiff to affix his signatures to the deed. (*Or*, the defendant entered into an unlawful conspiracy with Duni Chand, the scribe, with a view to cause injury to the plaintiff and, in pursuance of that conspiracy, the said Duni Chand entered the aforesaid wrong description of the property in the sale-deed, and the defendant represented falsely and fraudulently to the plaintiff that the deed contained fully and correctly the terms of the contract between the parties. Further, when the said Duni Chand read out the contents of the sale-deed to the plaintiff, he read out the description of the property according to the agreement between the parties and contrary to what he had written in the sale deed).

6. In the alternative, the plaintiff says that the description of the said property was wrongly written in the sale deed by reason of mutual mistake of the parties, and both the parties remained under the impression that it was correctly entered according to the agreement.

---

is not absolutely necessary that an instrument should be rectified by a suit. If a suit is brought upon it, the defendant may plead facts entitling him to rectification and the court will then pass a decree upon it according to its true intention, or the party aggrieved may sue for a declaration of his title under the instrument as it should be pleading facts which will entitle him to rectification (*Palani* v. *Nechappa*, 53 IC 379 Mad; *Sabaji* v. *Nawal Singh*, 104 IC 736 Nag). If inspite of wrong description of property sold, right property has actually been transferred to the vendee's possession, the latter's title is good and though he may not have brought a suit for rectification of sale deed he can always show by oral evidence that the property in his possession was really intended to be transferred (*Kesho Singh* v. *Roopan*

The plaintiff claims that the said sale-deed be rectified by substitution of the words and figures "house No.325" for the words and figures "house No. 325 and 325-A" in the description of the property sold as given in the said sale deed.

RESCISSION OF CONTRACT *(oo)*

No. 125—Suit for Rescission on the Ground of Misrepresentation

1. On December 22, 1994, the defendant represented that he was the exclusive owner of the house detailed at the food of the plaint and that he had no sons or any other member of a joint family having any interest in the property.

Singh, 100 IC 568 All; *Raja Ram* v. *Manik*, A 1952 Nag 90). A transfer in excess of the legal rights of a transferor does not entitle a transferee to have the instrument of transfer rectified (*Ratneswar Goswami* v. *Mangoli Chutiani*, A 1951 Assam 70). **The plaintiff should allege in the plaint what the intention of the parties to the instrument was, and the fact that it was not correctly expressed in the instrument, showing exactly the variance between the intention and its expression. He must next allege the fraud (with particulars) or the mistake which caused the discrepancy. In case of mistake it must be alleged that it was mutual, for a unilateral mistake is no ground for rectification** (*Bepin* v. *Jogeshwar*, 34 CLJ 256). The claim may be based alternatively on fraud and on mutual mistake. **The plaintiff must show substantial injury to him,** as the relief, being discretionary, will not be granted if the error is not substantial.

Court fee : should be paid on the value of the subject-matter of the suit *i.e.*, according to the value of the benefit which the plaintiff will derive from the rectification.

Limitation : is three years under Article 113 from the time when the cause of action accrues.

Defence : The defendant may deny the alleged fraud or may show that there is no error in the instrument. If he is a transferee from the original party, he may plead that he is a *bona fide* transferee for value, and rectification cannot be granted so as to prejudice his rights.

(*oo*) A contract can be rescinded under section 27, Specific Relief Act, 1963, if it is voidable or terminable by the plaintiff, or when it is unlawful for any cause apparent on the face of it and the defendant is more to blame than the plaintiff. When the defendant purchaser had obtained a decree for specific performance and he makes default in payment of the purchase money or other sums, the plaintiff must apply to have the contract rescinded (section 28), though if the decree is properly framed and the defendant's suit is dismissed on such default, it would hardly be necessary for the plaintiff to have the contract rescinded. A separate suit

2. The plaintiff was thereby induced to purchase the same in the belief that the said representation was true, and he signed an agreement on the said December 22, 1994, and paid Rs.2,000, as earnest money, but the property has not yet been transferred to him.

3. On March 4, 1995 the plaintiff came to know that the defendant has got two minor sons who are the members of a joint Hindu family with him, and have got an interest in the aforesaid property.

The plaintiff claims :

(1) Rescission of the contract.

(2) Cancellation of the agreement of December 22, 1994.

(3) Refund of Rs.2,000, with interest from the date of suit to that of payment.

Details of the House

* * * * * *

No. 126—Suit for Rescission on the Ground of Fraud

1. By an agreement in writing, dated January 4, 1996, the plaintiff agreed to purchase from the defendant, the house detailed at the foot of the plaint, for a consideration of Rs.3,20,000 and the plaintiff paid Rs.25,000 to the defendant as earnest money.

2. In order to induce the plaintiff to make the said contract and to execute the said agreement and to pay the said money, the defendant

---

for rescission of contract will not lie in view of sub-section (4) of section 28. **The plaint in a suit for rescission must contain allegations (1) of the contract, and (2) of the grounds on which it is sought to be rescinded.** If fraud, undue influence, etc., are alleged as the ground, particulars of the same should be given. An allegation that the contract is unlawful is not sufficient. It must be shown that the unlawfulness is apparent on the face of the contract and that the parties are not in *pari delicto*.

Limitation : Three years from the date when the facts entitling the plaintiff to the relief became known to him (Article 59). **The date of such knowledge** should also be alleged in the plaint.

Court-fee : must be paid on the value of the relief, as in the case of "Cancellation".

Defence : Besides denying the existence of the grounds on which rescission is claimed, a defendant may pray for restoration of the benefit which the plaintiff has received under the contract (section 30, Specific Relief Act, 1963). In a suit for rescission on the ground of mistake, the defendant may plead that his position has

represented to the plaintiff that the monthly rent of the said house was Rs.2,000.

3. The plaintiff was induced to, and he did make the said contract and execute the said agreement, and did pay the said money, on the faith of said representation.

4. The plaintiff has since discovered, on March 15, 1996, and the fact is, that the said representation was false and that, as a matter of fact, the monthly rent of the said house was, and is only Rs.500.

5. The defendant made the said representation fraudulently, knowing well that it was false.

The plaintiff claims :

1. Rescission of the contract.

2. That the said agreement may be delivered up and cancelled.

3. Refund of Rs.25000 with Rs. _____ on account of interest by way of damages, and further interest from the date of suit to that of payment.

Details of the House

* * * *

No. 127—Suit for Rescission of a Contract on the Ground of Mistake

(Form No.34, Appendix A, C.P.C.)

1. On the ___ day of _____19___, the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant situated at _____, contained [ten *bighas*].

2. The plaintiff was thereby induced to purchase the same at the price of Rs._____in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

---

been so substantially changed by the contract that he cannot be restored to his original position if the contract is rescinded. When the ground is unlawfulness of the contract, he may plead that the plaintiff was equally, if not more, to blame. He may plead that the contract is void *ab initio*, hence there is no necessity for its rescission. If rescission is claimed on the ground of misrepresentation, he may plead that the plaintiff had means of discovering the truth with due diligence or that the contract was not caused by such misrepresentation and the plaintiff knew the

3. On the ___ day of _____ 19__, the plaintiff paid the defendant Rs._____ as part of the purchase money.

4. That the said piece of ground contained in fact only [five *bighas*].

The plaintiff claims :

(1) Rs.___ with interest from the___ day of _____ 19___;

(2) that the said agreement be delivered up and cancelled.

SALE OF GOODS

No. 128—Suit for Price of Goods Sold at Fixed Price and Delivered

(Form No.3, Appendix A, C.P.C.)

1. On the__ day of _____ 19__, *EF* sold and delivered to the defendant (one hundred barrels of flour, *or*, the goods mentioned in schedule hereto annexed, *or*, sundry goods).

2. The defendant promised to pay Rs._____ for the said goods on delivery (*or*, on the ___ day of _____ 19__ , *some day before the plaint was filed*).

3. He has not paid the same.

4. *EF* died on the ___ day of _____ 19__. By his last will he appointed his brother, the plaintiff, his executor.

The plaintiff as executor of *EF* claims (*relief claimed*).

No. 129—Suit for Price of Goods Sold and Delivered when no Price was Fixed *(pp)*

1. On January 4, 1994, it was verbally agreed between the plaintiff and the defendant that the plaintiff should sell, and deliver to the defendant at Hapur, any grain and sugar ordered by the latter, that the defendant should pay the price on delivery and that if the price was not so paid, the defendant should pay interest at 9 per cent per annum.

---

true facts (section 19, Contract Act). The defendant may claim the benefit of section 64, Contract Act. (*Muralidhar* v. *International Film Co.*, A 1943 PC 34).

(pp) **The contract of sale must be alleged, as also the agreement to pay the price.** If price was not settled, a reasonable price can be claimed under section 9, Sale of Goods Act, 1930 and, in such a case, the plaintiff must allege in the plaint what he claims to be the reasonable price. **It should be distinctly alleged when the price was agreed to be paid, whether before the goods were received from the**

2. From January 4, 1994 to October 14, 1995, the plaintiff sold and delivered to the defendant under the latter's instructions contained in letters received by the plaintiff, wheat and sugar from time to time, particulars of which are stated in the account given below.

3. No price was fixed between the parties, but according to the market rates prevailing at the time of the said sales, the price and other costs of the goods sold came to Rs.54,337. The defendant made payment of Rs.22,000 only in total. Particulars of the amount due from the defendant, of the payments made by him, and of the interest due to the plaintiff, are given in the account at the foot of the plaint. Under the said account, Rs.32,524 is now due from the defendant to the plaintiff.

The plaintiff claims Rs.32,524 with interest from the date of suit to that of payment.

No. 130—Suit for Price of Goods Sold at a Reasonable Price and Delivered when no Price was Fixed

(Form No.4, Appendix A, C.P.C.)

1. On the ___ day of _____ 19__, plaintiff sold and delivered to the defendant (sundry articles of house-furniture), but no express agreement was made as to the price.

---

plaintiff's premises, or on their reaching the defendant or after a specified time, for no suit can be brought until the price becomes payable. The delivery of goods should further be alleged. If it was not made personally to the defendant, it should be specified how it was made. Delivery to a carrier would be sufficient only if the defendant has been placed in a position to claim delivery threreby from the carrier or if the carrier was a nominee of the defendant (*Narain Singh* v. *Tulsiram*, 174 IC 932, A 1937 Lah 785). If the suit relates to a series of sales, all made under one agreement, the agreement may be alleged in the beginning and then sales may be alleged either each specifically or, if the number is large, they may be detailed in particulars appended to the plaint. Expenses and costs can be claimed only when contracted for, or when they were necessary for the fulfilment of the contract. Cost of notice of demand, or of sending a man to the defendant to realise the balance due cannot be claimed from the defendant unless there was an express agreement for its payment (*Majety* v. *Cuppalla*, 109 IC 649, A 1928 Mad 476). In the absence of an agreement, price of goods is presumed to be payable where the seller resides (*Firm of Hardial* v. *Bathal Das*, 118 IC 898 Lah). No person can be fastened with liability for the price of goods solely on the basis of entries in the books of accounts even where such books of accounts are kept in the regular course of business. There

2. The goods were reasonably worth _____ rupees.

3. The defendant has not paid the money.

No. 131—Suit for Damages for not Accepting Goods Purchased *(qq)*

1. The defendant, by a letter of January 14, 1995, asked the plaintiff to sell to him 100 qtls. of sugar, at the market rate, and send it to an agent at Patna for delivery to the defendant on receipt of the price.

2. On January 20, 1995, the plaintiff sent 100 qtls. of sugar to the firm of Rajalal Ram Gopal at Patna, and instructed them to deliver the same to the defendant on receipt of the price and cost of transport.

3. The said firm duly tendered the said goods to the defendant, who on February 5, 1995, refused to accept delivery of the said sugar or any part thereof, or to pay the price to the said Rajalal Ram Gopal. The plaintiff has thereby suffered damage.

Particulars

Difference between the price at the market rate on January 20, 1995, at Hapur (Rs.1320 per qtl.) and that at the market rate on

---

must be further evidence to prove the receipt of goods by the person who is sought to be made liable for payment (*Hada Steel Products Ltd.* v. *Emjay Engineering Enterprises*, A 1995 P&H 327).

Limitation : Three years under Articles 14, 15, 16 or 17 as the case may be.

Defence : The defendant may plead that goods sent were not according to order or were short of what are entered in the invoice. He may question the rate claimed if none was agreed upon. He may question his liability to pay other incidental expenses. When a number of goods which are indentical are agreed to be sold, it can be pleaded that specific goods were not sold (*Provincial Automobile Co. Ltd.* v. *State of M.P.*, 1952 NLJ 149).

If the goods were sold with a warranty, breach of the warranty is no defence, though the vendee may claim compensation for the breach by way of equitable set-off. A breach of an express or implied warranty does not give the buyer a right to rescind the contract or to treat it as repudiated (*Kisen Chand* v. *Ram Pratap*, 44 CWN 505; *Ghulam Md.* v. *Granver*, 42 PLR 172). But if they were sold with a condition, the breach of it gives rise to a right to treat the contract as repudiated, *see* section 12, Sale of Goods Act, 1930.

(qq) It should first be determined whether the property in goods has or has not passed to the purchaser (See sections 19 to 24, Sale of Goods Act; *Prem Singh* v. *Deb Singh*, A 1948 PC 20; *Hoe Kim Singh* v. *Maung*, 62 IA 242; *Controller of*

February 5, 1995, at Patna (viz, Rs.1300 per qtl.) at Rs.20 per qtl. on 100 qtls. ... ... Rs. 2,000

Cost of transport from Hapur to Patna ... Rs. 1,500

Total Rs. 3,500

The plaintiff claims Rs.3,500, with interest, from date of suit to that of payment.

No. 132—Suit for Deficiency upon a Re-sale (Goods Sold at Auction)

(Form No.6, Appendix A, C.P.C.)

1. On the ___ day of _____19__, the plaintiff put up to auction sundry [*goods*], subject to the condition that all goods not paid for and removed by the purchaser within [*ten days*] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.

2. The defendant purchased [*one crate of crockery*] at the auction at the price of ____ rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [*ten days*] after.

4. The defendant did not take away the goods purchased by him, nor pay for them within [*ten days*] after the sale nor afterwards.

5. On the ___ day of _____19__, the plaintiff resold the [*crate of crockery*], on account of the defendant by public auction, for ____ rupees.

6. The expenses attendant upon such resale amounted to __ rupees.

7. The defendant has not paid the deficiency thus arising, amounting to____rupees.

Customs v. *Pednekar & Co.*, A 1976 SC 1408). If the property has passed even though the goods may still be in possession of the seller, the seller should sue for recovery of the contracted price [section 55(1)] or he may, under section 54(2) if property in the goods has passed to the buyer subject to lien of the unpaid seller, resell the goods after giving a reasonable notice to the buyer and sue the buyer for any loss sustained by such re-sale, but re-sale must be made within a reasonable time (*Nikkumal* v. *Guru Prasad*, 134 IC 777, A 1931 Lah 714; *Chidambara Nadar* v. *Vadivel*, 159 IC 1031, A 1936 Mad 47). If sale is held without notice and results in loss no damages can be claimed (*Kalka Pershad* v. *Harish Chandra*, A 1957 All 25). In such cases he cannot sue for the unpaid price (*Chidambara Nadar* v.

No. 133—Suit for Price of Goods Purchased but not Accepted by the Defendant

1. By a verbal agreement, on April 20, 1995, the defendant purchased 40 bags containing 40 quintals of sugar from the plaintiff at Rs.1318 per quintal and it was agreed that the plaintiff should weigh the sugar and put it into bags and keep them ready for being delivered to the defendant's order.

2. On May 7, 1995, the plaintiff filled and set apart in his godown 40 bags of sugar appropriating them to the said agreement, and verbally informed the defendant at his shop the same day of the said appropriation, and the defendant promised to take delivery of the said bags within one week.

3. The defendant has not yet taken delivery of the said bags nor has he paid their price or any part thereof.

The plaintiff claim Rs.52,720, with interest from date of suit to that of payment.

No. 134—Suit for not Accepting Delivery of Part and for Price of Part Accepted

1. On August 15, 1980, at Delhi the defendant, placed an indent No.169, signed by the defendant, for 18 cases of coloured glazed paper, each case containing 50 reams, at Rs.120 per ream, to be delivered at Delhi in three lots of six cases each in October, November and December, 1980. The plaintiff accepted the said indent by letter of acceptance, dated August 20, 1980.

2. The plaintiff, accordingly, delivered two lots each of six such cases of the said paper in October and November, 1980, to the defendant who accepted the same.

3. The plaintiff was ready and willing to deliver the remaining six cases in December according to the contract referred to in paragraph 1 above but the defendant, by his letter dated December 14 and received

---

Vadivel, A 1936 Mad 47, 159 IC 1031). Where re-sale is made after undue delay, it cannot afford a basis for assessment of damages, which, in such a case, should be calculated on the difference between the market rates (*Jasratmal* v. *M L. Jain & Co*., 39 PLR 945; *Mohan* v. *Khuda*, 184 IC 43, A 1939 Lah 260).

by the plaintiff on December 18, 1980, wrongfully refused to accept or pay for the same, whereby the plaintiff lost the benefit of the said contract.

4. The defendant has not paid the price of 12 cases actually delivered.

Particulars : Price of 12 cases (600 reams)
delivered, at Rs.120 per ream Rs.72,000
Difference between the contract price and
market on December 18, 1980 of 6 cases (300 reams)
at Rs.2 per ream ... ... Rs. 600

The plaintiff claims Rs.72,600 with interest from date of suit to that of payment.

No. 135—Suit for Damages for not Accepting Goods and, in the Alternative, for Loss on Re-sale

1. By an agreement in writing, dated March 14, 1980, executed by the parties at Delhi, the plaintiff agreed to sell, and the defendant agreed to buy, 25, cases of white shirtings, D1, each case containing 50 pieces, at Rs.50 per piece, delivery to be in one lot in May, 1980. The defendant agreed by the said agreement to take delivery of the goods, and to pay for them, on delivery at Delhi.

2. The said 25 cases arrived at Delhi on May 14, 1980, and the defendant accepted delivery of, and paid for, 10 of such cases.

3. At the request of the defendant the plaintiff, from time to time agreed to postpone delivery of, and store for the defendant for a reasonable time, the remaining 15 cases upon the defendant's undertaking to pay all cartage, housing and warehousing charges and interest upon the price of the said 15 cases.

Particulars

The said requisites are contained in, or to be implied from, various letters exchanged between the parties from May 16, 1980, to May 30,

---

If the property in the goods has not yet passed to the purchaser, the seller can only sue for damages for breach of contract to purchase and, in such cases, the sum which is recoverable is usually the difference between the contract price and the market price on the date on which the breach of contract has taken place (*Ishwar Das* v. *Dhanpat Rai*, 106 IC 57, 8 Lah 514, A 1927 Lah 687 DB; *Sital Prasad* v. *Ranjit Singh*, 1931 ALJ 390, A 1931 All 583). The seller has no right of resale in

1980, and the said undertakings and each of them are to be implied from the said requests and the previous dealings and courses of business between the parties.

4. By a registered letter dated August 20, 1980 the plaintiff by their agents gave to the defendant notice of their intention to sell the said goods and the defendant did not within reasonable time, or at all, tender the price, and on September 4, 1980, the plaintiff re-sold the said goods through Messrs. Chandra Kishore and Sons, Public Auctioneers, Delhi, realising thereby the sum of Rs.____

The plaintiff claims :

(1) Rs.____, as the loss on re-sale of the said 15 cases.

(2) Rs.____, on account of the expenses of carting and warehousing the said 15 cases.

Particulars of expenses _____.

Alternatively,

Rs._____ as damages for not accepting the said 15 cases purchased by the defendants.

Particulars : Difference between the contract price and market price on May 14, 1980, of the 15 cases containing 750 pieces at Rs. ___ per piece Rs._____

---

such cases (*Ambalrana Chettiar* v. *Express News Papers Ltd.*, A 1968 SC 741). The Contract Act applies to sale of goods also (*B. Muriswami* v. *B. Muriswami*, A 1944 Mad 418). On sections 73 and 74, Contract Act, see discussion of case law in *H.P. State Forest Corpn.* v. *Harichand*, A 1984 HP 51. If the seller has re-sold the goods, he cannot recover the loss sustained by such re-sale (*Firm of Ganga Ram* v. *Kadoomal*, 88 IC 571, A 1925 Sindh 222 DB), unless the re-sale was authorised by the contract. Section 62 does not bar such a contract (*Sheonarain* v. *New Sevan Sugar Refining Co.*, A 1938 All 272, 175 IC 552, 1938 ALJ 227). But where the price is payable on a fixed day irrespective of delivery, the seller can sue for the price although the property has not yet passed to buyer and the goods have not been appropriated to the contract, section 55(2). As to when the property in goods sold passes to the buyer, *see* sections 18 to 25, Sales of Goods Act. There is no objection to a suit being brought alternatively for price of goods and for damages for not accepting the goods, or for loss sustained on re-sale on the allegation that property in the goods has passed to the buyer and for damages for not accepting goods. When it is doubtful whether the property has or has not passed, or when there is a suspicion that the defendant may deny the facts which are alleged by the plaintiff

And, in either case :

Interest on the amount decreed from the date of suit to that of payment.

No. 136—Suit for Balance Due on Account of Mutual Sales and Purchases of Shares

1. The defendant purchased from the plaintiff :

(*i*) On July 2, 1995, 100 ordinary shares of the Presidency Jute Mills Co. Ltd., at Rs.16.40 per share; and

(*ii*) On July 18, 1995, 1000 ordinary shares of the Madan Theatres Ltd., at Rs.13.40 per share.

2. On August 10, 1995, the defendant sold to the plaintiff 150 ordinary shares of the National Co. Ltd., at Rs.27.80 per share, 100 ordinary shares of Clive Mills Co. Ltd., at Rs.35.40 per share, and 50 ordinary shares of Lansdowne Jute Co. Ltd., at Rs.275 per share.

3. The defendant did not give or take delivery of the shares sold or purchased by him as aforesaid, at the time of such sales or purchases, but asked the plaintiff to wait, and the plaintiff agreed to wait, for the defendant to perform his obligations.

4. It was verbally agreed between the parties on July 2, 1995, that in respect of the shares purchased by the defendant from the plaintiff the defendant would pay interest at 9 per cent per annum on the price of the shares as from due dates mentioned in the contracts and on all sums due by the defendant to the plaintiff for the time being. The defendant further agreed to keep the plaintiff indemnified and protected in respect of any loss that the plaintiff might suffer by reason of his entering into transactions for shares with the defendant or at the request of the defendant.

---

as showing the passing of ownership in the goods, it is always advisable to bring the suit in the alternative form.

The plaintiff must allege the contract for sale, with necessary terms. In an ordinary case of refusal to accept the goods and to pay for them, the plaintiff must allege his tender and defendant's refusal. In a claim for price the plaintiff must allege facts showing that the property or ownership in the goods has passed to the defendant or allege that the price was agreed to be paid on a fixed day irrespective of delivery. If the claim is for loss on re-sale notice to the defendant must be alleged.

5. On October 4, 1995, the defendant sold back 50 ordinary shares of Presidency Jute Mill Co. Ltd., at Rs.16.20 per share. The remaining 50 shares were sold back by the defendant before November, 1995, and all dues in respect of the said 50 shares were paid. The interest on the price of shares due by the defendant to the plaintiff amounted to Rs._____ and, after deducting Rs._____ due to the defendant on account of difference in the price of 50 shares, the defendant remained liable to pay to the plaintiff Rs._____.

6. On September 5, 1995, the defendant purchased back from the plaintiff the aforesaid 150 ordinary shares of the National Co. Ltd., as follows : 75 shares at Rs.26.10 and 75 shares at Rs.28.20 per share. The difference in price amounted to Rs._____. due by the plaintiff to the defendant. After setting off the transaction and deducting Rs._____. on account of interest, the defendant became entitled to get Rs._____.. from the plaintiff.

7. The defendant put off from time to time the delivery of the 100 shares of the Clive Mills and the 50 shares of the Lansdowne Jute Mills sold by him to the plaintiff and taking the delivery against payment of the 1000 shares of the Madan Theatres Ltd., sold by the plaintiff to the defendant.

8. On or about February 5, 1996, after pre-emptory demand by the plaintiff that the defendant should perform his obligations, the defendant took time till February 8, 1996, for the purpose, but even on that date the defendant failed and neglected either to give delivery of the shares sold by him or to take delivery of those purchased by him although the plaintiff was all along ready and willing to carry out his obligations.

9. On such default as aforesaid and after notice to the defendant, the plaintiff, on or about February 19, 1996, purchased 50 shares of the Lansdowne Jute Mills, at Rs._____ per share, and 100 shares of the Clive

---

Limitation : Three years under Article 55 as this is a case of breach of contract.

Defence : In such cases defence usually is that the plaintiff was not ready and willing to deliver the goods or that the plaintiff was not ready and willing to deliver the same within stipulated time, when time was of the essence of the contract, or within a reasonable time, or that the goods offered were not according to sample or of the quality contracted for, or they were sent with other goods which were not

Mills Co. Ltd., at Rs._____ per share and the defendant thus became liable to pay the loss amounting to Rs._____ and Rs._____, respectively to the plaintiff.

10. The aforesaid sums of Rs____ and Rs____ also represent the difference between the contract price and market price of the shares of the Lansdowne Jute Mills and the Clive Mills when the defendant should have given delivery and the plaintiff alternatively claims these amounts as damages for breach of contract to sell the shares.

11. On February 18, 1996, after notice to the defendant, the plaintiff sold the 1000 shares of the Madan Theatres Ltd., on account of the defendant at Rs._____ per share. The defendant thus suffered a loss of Rs._____. Adding to this Rs._____ on account of interest on the amount of price due to the plaintiff and deducting the sum of Rs._____ on account of dividend credited in favour of the defendant, the defendant's liability to the plaintiff on account of the said shares comes to Rs.....

12. The aforesaid sum of Rs._____ also represents the difference between the contract price and the market price on 1000 shares of Madan Theatres Ltd., when the defendant should have taken delivery, and the plaintiff claims the amount alternatively as damages for breach of contract to purchase the shares.

13. On taking account of the sums mentioned in paras 5, 6, 9 and 11 above Rs._____ is due by the defendant to the plaintiff with Rs._____.on account of interest at the agreed rate of 9 per cent per annum from February 18, 1996, to the date of suit.

---

ordered and there was difficulty in separating them or that they were ordered for a specified purpose and were not fit for that purpose. As to implied warranty, *see* section 15-17 and if the same has been broken, it affords a good defence, for example, if the good are not reasonably fit for the purpose they are required for (*Baretto* v. *Pruce*, A 1939 Nag 19).

If the goods were never intended to be delivered and only the difference due to market fluctuations was to be paid or received the plea that the contract was of a wagering nature and hit by section 30, Contract Act can be taken (*Chiman Lal* v. *Nyamat Rai*, A 1938 Bom 44; *Kong Yee* v. *Lowjee*, 29 Cal 461 PC, 28 IA 239; *Ebrahim* v. *Austin*, A 1946 PC 63).

It is no defence that on the due date the plaintiff was not actually in possession of the goods he had agreed to sell as the plaintiff can succeed even if he can show that he had control of the goods or the capacity to deliver them, if the defendant

The plaintiff claims Rs._____ with interest at 9 per cent per annum from the date of suit to that of payment.

No. 137—Suit for Damages for Non-Delivery of Goods Sold (rr)

1. By a contract in writing, dated April 16, 1995 the defendant sold and agreed to deliver 20 packages of long-cloth D1, each package containing 50 pieces, at Rs._____ per piece, to be delivered at the defendant's godown at Delhi on payment of the price in cash, on October 20, 1995.

The plaintiff tendered the price to the defendant at the defendant's godown, on October 20, 1995, but the defendant refused to deliver any of the said packages of long-cloth.

Particulars of Damage

Loss of profit at Rs.5 per piece on 20 packages containing 1,000 pieces Rs.5,000.

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

---

had called for delivery even by making purchase in the market. According to Nagpur High Court when a seller has no goods to deliver he suffers no damage which he can claim (*Vithulsa* v. *Raoji*, 151 IC 63, A 1934 Nag 129).

(rr) **The contract of sale and its breach must be specifically alleged in the plaint.** Unless the defendant has made a definite promise to deliver the goods, the plaintiff must allege that he demanded delivery (section 35, Sale of Goods Act). Ordinarily a plaintiff is not bound to allege or prove that he was ready and willing to perform his part of the contract unless the defendant expressly pleads and puts him to its proof (*Banarsilal* v. *Haji Abdulla*, 121 IC 723). The damages which can be claimed in such cases are the difference between the contract price and the market price at the date of the breach (*Jamal* v. *Moolla Dawood*, 43 Cal 493 PC; *Arjunsa* v. *Mohanlal*, A 1937 Nag 345; *Firm Bachraj* v. *Firm Khop Chand*, A 1949 Nag 199). If price had been paid, he can recover it with interest from the date of payment to that of judgment along with difference between the contract price and market price on the date of breach (*Rameshwar Das* v. *Refer Sales*, A 1944 Bom 21). In case of repudiation of contract damages cannot be claimed as on the date of repudiation but as on the date fixed for delivery (*Maung Pa* v. *Sa*, A 1933 Rang 25). It has been held in *Shri Ram* v. *Trimbak*, 103 IC 645, 29 BLR 1036, that in such a case the plaintiff cannot get a higher amount of damages than he is entitled to for breach of contract, by describing his claim as one for conversion in the alternative. Where property in goods had passed to buyer he may also sue for declaration and injunction to

No. 138—Ditto

(Form No. 14, Appendix A, C.P.C.)

1. On the____ day of_____19___, the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the____day of_____19___, and that the plaintiff should pay therefore_____ rupees on delivery.

2. On the [said] day plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would accrue to him from such delivery.

No. 139—Suit for not Delivering Goods According to Sample *(ss)*

1. By an agreement, dated June 27, 1995 the defendant sold and agreed to deliver to the plaintiff 60 pieces of Navy Blue serge, each piece being 20 metres, at Rs. 96 per metre, as per sample, on November 20, 1995.

2. The defendant delivered in pretended fulfilment of his contract, 60 pieces on, or about, November 25, 1995. The said 60 pieces did not correspond with the sample and were at once rejected by the plaintiff.

3. The plaintiff has suffered damage by the defendant's breach of contract.

---

prevent the seller from reselling the goods (*Sadhusharan Singh* v. *W.B.S.E.B.*, (1986) 90 CWN 151).

Limitation. Three years under Article 55.

Defence : Denial of the contract or breach or of notice of special damages is the usual defence. But amount of damages may also be questioned or a plea may be raised that the defendant was ready to supply the goods but was prevented from performing the contract by an act of the plaintiff.

(ss) In such cases after accepting delivery, purchaser cannot reject the goods and sue for refund of price on the ground that the goods are not according to the contract but his remedy is a suit for damages (*Ishwar Das* v. *Kannu Mal*, 100 IC 548 Lah; *Nagadas* v. *Vel Mahomed*, 42 BLR 454; *Empire Engineering Co* v. *Municipal Board, Bareilly*, 119 IC 853, 1929 ALJ 674, A 1929 All 801 DB). The Calcutta High Court has held that he can also reject (*Lalchand* v. *Bajt Nath*, 63 Cal 737), but in a subsequent case (*Joseph Mary* v. *Phoni Bhushan*, ILR (1938) 2 Cal 88), where the plaintiff had kept the goods for too long he was held not to be entitled to reject

Particulars

Loss of profit at Rs. 20 per piece on 60 pieces—Rs. 1,200.

The plaintiff claims Rs. 1,200, with interest, from date of suit to that of payment.

No. 140—Suit for Damages for Non-Delivery Alleging Special Damage

1. By a contract in writing, dated May 15, 1984, the defendant sold and agreed to deliver to the plaintiff 500 qtls. of lime at Rs.60 per quintal, f.o.r. Dehradun, on or before June 15, 1984, and the plaintiff agreed to pay the price on delivery.

2. The plaintiff had entered into a contract with one Ram Bilas of Saharanpur to supply him with the said quantity of lime before July 1, 1984, at Rs.80 per quintal, and had purchased the lime from the defendant for the purpose of supplying it to the said Ram Bilas. The plaintiff had verbally told these facts to the defendant at the time of entering into the aforesaid contract with him.

3. The defendant failed to deliver any part of the said lime within the said time, or at all.

4. The plaintiff was unable to purchase similar goods in the market and to supply the same to the said Ram Bilas and lost the profit he would have made on the re-sale.

The plaintiff claims Rs.10,000, as damages, with interest, from date of suit to that of payment.

No. 141—Suit for Damages for Delivering Inferior Goods and not Delivering Part of the Goods

1. By a verbal agreement on November 4, 1994, the defendant agreed to supply to the plaintiff by December 4, 1994, 100 quintals of best Muzaffarnagar wheat, of the sample given by the defendant to the plaintiff the same day, at Rs.500 per quintal.

For principles governing failure to deliver goods according to the agreed time schedule see *Sind Biscuits Manufacturing Co* v. *Delight Engineering Works*, 1984 ALJ 964 DB. On section 73 Contract Act, see *Murlidhar* v. *Harish Chandra*, A 1962 SC 366.

2. The defendant delivered only 60 quintals of wheat and realised Rs.30,000 from the plaintiff, but the said wheat was not the best Muzaffarnagar wheat, and was inferior to the aforesaid sample. He did not deliver the remaining 40 qtls. within the aforesaid time, or at all.

Particulars of Damages

	Rs.
Difference between the market price of wheat contracted for and of the wheat delivered, at Rs. 50 per quintal, on 60 quintals	3,000
Difference between contract price and market price of contract wheat at Rs. 100 per quintal, on 40 quintals	4,000
Total ...	7,000

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

No. 142—Suit in Respect of Articles Prepared to Defendant's Order *(tt)*

1. On December 14, 1995, the defendant verbally agreed with the plaintiff that the plaintiff should make for him a gold necklace of the following specification within one month, and that the defendant should pay Rs.25,000 for the said necklace on delivery thereof.

One necklace of 50 grams of 18 kt. gold, studded with 9 rubies weighing about 2 *ratti* each, and three diamonds each weighing about 1 1/2 *ratti*, of the pattern as given in the sketch on page 35 of the catalogue of Labh Chand Moti Chand, Jewellers of Calcutta, for the year 1995.

2. The plaintiff made the necklace and, on January, 10, 1996 offered to deliver it to the defendant and has ever since been ready and willing to do so.

(tt) The suit will be for damages unless the property has passed or price was agreed to be paid on a fixed day irrespective of delivery, in which case the suit can be for price of the article. A prayer for recovery of price on the plaintiff being made to deliver the article is one for specific performance of a contract, and as specific performance cannot be granted when compensation in money is an adequate relief it cannot be properly made.

3. The defendant has not accepted the said necklace or paid for it.

4. The plaintiff has in consequence suffered damage to the extent of Rs.4,000.

The said necklace, as manufactured to the defendant's order, has no sale in the market, and on being melted, it would yield gold worth Rs. 18,000 and the rubies and diamonds can be sold for Rs.3,000.

The plaintiff claims a decree for Rs.4,000, with interest from date of suit to that of payment.

No. 143—Ditto

(Form No.5, Appendix A, C.P.C.)

1. On the ___ day of _____ 19___, EF agreed with in the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that EF should pay for the goods on delivery _____ rupees.

2. The plaintiff made the goods, and on the ___ day of _____ 19___, offered to deliver them to EF and has ever since been ready and willing to do so.

3. EF has accepted the said goods or paid for them.

No. 144—Suit for Specific performance of a Contract to Sell Goods *(uu)*

1. On November 14, 1995 at Kanpur the plaintiff verbally agreed to purchase from the defendant, and the defendant agreed to sell and deliver to the plaintiff for the sum of Rs. 50,000 a certain old and rare book, being a manuscript copy of Firdausi's Shah Nama written in gold in the reign of Akbar.

2. The defendant failed to deliver the said book to the plaintiff within a reasonable time after November 14, 1995. On January 12, 1996 the plaintiff tendered the sum of Rs. 50,000 and demanded the said book

(uu) Specific performance of a contract to sell movables cannot ordinarily be claimed, as the presumption is that breach of such contract can be relieved by compensation in money (section 10 Expln., Specific Relief Act, 1963). But if the goods are of unusual beauty, rarity or distinction or of special value to the plaintiff by reason of personal or family association or the like, the general presumption is displaced and specific performance can be claimed. The plaint must, therefore, show the special value of the property. The other requirements of a suit for specific performance are the same as that of a suit about immovable property for which see note *(vv)*.

from him, yet the defendant refused to deliver the said book to the plaintiff and still retains and withholds the same from him.

The plaintiff claims:

1. Specific performance by the defendant of his contract to deliver the said book to the plaintiff and Rs. 10,000 as damages for the detention of the said book.

(2) In the alternative, Rs.20,000 as compensation for breach of the contract.

SALE OF LAND

No. 145—Suit by Vendee for Damage for Breach of Contract of Sale and for Specific Performance *(vv)*

1. By an agreement in writing, dated August 1, 1994 the defendant contracted to sell to the plaintiff the land specified at the foot of the plaint, within three months, for a consideration of Rs. 40,000 and the same day

(vv) Every lawyer must have a clear perspective of the provisions of sections 15 to 24 of the Specific Relief Act, 1963 before preparing the pleadings in a suit for specific performance of an agreement for sale. In case of breach of a contract by the defendant, the plaintiff may elect to put an end to the contract and sue for damages for such breach, or he may sue for specific performance and may claim compensation for the delays, or the two claims may be made in the alternative (*Calcutta Improvement Trust* v. *Subarnabala*, 44 CWN 541). When, however, a decree for specific performance is given, compensation is awarded only in exceptional cases when mere specific relief does not satisfy the justice of the case (*Venkataranga* v. *C.S. Ramaswamy*, 93 IC 670, A 1926 Mad 173, 22 LW 786 DB). Grounds of the additional claim of compensation, with particulars of the compensation claimed, should, therefore, always be given in the plaint. A prayer for possession may also be added, if necessary (*Chockalingam* v. *P.K.P.S. Pichappa*, A 1926 Mad 155, 92 IC 599 DB) see also, section 22, Specific Relief Act and *Krishna Kumar* v. *Balbir Singh*, 1984 ALJ 976; *Babulal* v. *Hazaribai*, A 1982 SC 818). The dismissal of a suit for specific performance will bar the plaintiff's right to sue for compensation for breach of contract. It is, therefore, necessary to include such a claim in addition to or in substitution of specific performance. (See sections 21 and 24 of the Specific Relief Act, 1963). The plaintiff may also include in the alternative a prayer for refund of earnest money or deposit paid (section 22). The failure to claim such a relief is however no bar to a separate suit therefor (section 24).

If it is enequitable to grant specific relief, the court would desist from granting a decree to the plaintiff (*A.C. Arulappan* v. *Smt. Ahalya Naik*, A 2001 SC 2783) As specific performance is a discretionary relief and the court may refuse it even in

the plaintiff paid to the defendant Rs. 4,000 as earnest money.

2. The said land is close to the plaintiff's ginning factory and the plaintiff required it for extension of his factory, the season for which commences on November 15. The plaintiff had told these facts to the defendant and the time fixed was, therefore, intended by the parties to be of the essence of the contract.

3. The plaintiff was and has always been ready and willing to perform

---

second appeal (*Dayal Singh* v. *Mahabir*, A 1930 All 165). It is always better to add an alternative claim for damages in such cases, as otherwise section 24, Specific Relief Act will bar a subsequent suit for damages. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the Ist schedule to the Code of Civil Procedure. In every suit for specific performance or damages, **the plaintiff must allege the contract and its breach by the defendant and that he has performed his part of the contract, or is ready and willing to perform it. Omission of an averment of readiness and willingness to perform it may lead to dismissal of the suit** (*Madan* v. *Kamaldhari*, A 1930 Pat 121; *Tah Ah Boon* v. *Johare State*, 163 IC 417, A 1936 PC 236; *Abdul Khader Rowther* v. *P.K. Sara Bai*, A 1990 SC 682; *Krishnan Kesavan* v. *Kochukunju Karunakaran*, A 1988 Ker 107; *Dalmia Jain & Co.* v. *Kalyanpur Lime Works Ltd.*, A 1952 Pat 393; *Ramesh Chandra Chandisk* v. *Chunni Lal*, A 1971 SC 1238; *Useph Varghese* v. *Joseph*, (1969) 2 SCC 539; *Mohd. Shakoor* v. *Chhedi Keori*, 1995 (4) CCC 409 (All); *Oskar Louis* v. *K.V. Sardha*, A 1991 Ker 137). It is not necessary to prove that the plaintiff actually tendered the money (*Sabira Khatun* v. *Syeda Fatima Kahtoon*, A 1995 Gau 104; *Bhag Ram* v. *Pala Singh*, 1996 (1) SCJ 145 P&H).

A distinction may be drawn between "readiness to perform the contract" and willingness to perform the contract". By readiness may be meant the capacity of the plaintiff to perform the contract, this inlcudes his financial ability to pay the purchase money. But the more important question is whether he was willing to perform his part of the contract even if he had the financial capacity to do so. It is there that the plaintiff's conduct has to be properly scrutinised (*Basheskar Math* v. *Radha Krishna*, 1995 AIHC 2589 (P&H)). The provisions of section 16(c) are mandatory in nature. The plaintiff must allege and prove that he has been ready and willing to perform his part of the contract. On failure, the plaintiff is not entitled to decree (*Mohd. Shakoor* v. *Chhedi Koeri*, 1995 RD 28 (All)).

In a suit for specific performance of contract, the plaintiff must allege in the plaint his readiness and willingess to perform the part of his contract from the date of the contract till the date of the decree (*Mohanlal (deceased) his heirs* v. *Mirz. A.G. & another*, (1996) 1 SCC 639; *Jugraj Singh* v. *Labh Singh*, A 1995 SC 945; *Gomathinayagam* v. *Palanisami*, A 1967 SC 884).

The averment is, however, not necessary if the contract has been repudiated (*International Contractors* v. *Prasanna Kumar Sur*, A 1962 SC 77). It is not necessary to allege in the plaint all the steps taken by the plaintiff to show his

his part of the contract within the aforesaid time and, on November 14, 1984 tendered the balance of the consideration to the defendant but the defendant did not execute any instrument of transfer, whereby the plaintiff has lost the benefit of the purchase and has suffered damage.

[*If time was not the essence of the contract, substitute the following for paras 2 and 3*]

[2. The defendant was guilty of gross and unreasonable delay in

---

readiness, as they will be only evidence of such readiness. It is thus not necessary to allege, for instance, that the plaintiff went to the Registration office with the purchase money, or that he purchased the stamp paper and got the sale-deed written out. If the plaintiff's readiness and willingness is disputed then all these facts may be proved by him at the trial and indeed every fact necessary to establish his readiness must be proved by him (*Abdudla* v. *Tenenhaum*, 1933 ALJ 1570 PC). Readiness and willingness implies not only the disposition but also the capacity to perform the plaintiff's part of the contract (*Bijai Bahadur* v. *Shiv Kumar*, A 1985 All 223). The readiness should be to perform the contract as it actually was and not as he alleges it was and the suit was dismissed when the plaintiff had alleged the price to be Rs. 85, and that he was willing to pay that price but the court found the price to be Rs.130 (*Rustomali* v. *Shaikh Ahides*, 45 CWN 837). But where the plaintiff after disputing the amount left to the court and expressed willingness to make such payment as may be fixed by the court, it was held to be sufficient averment of readiness (*Arjan* v. *Lakshmi Ammal*, A 1949 Mad 265, (1942) 2 MLJ 271, 1948 MWN 624).

In case of a breach of contract to purchase or sell immovable property, the time fixed for completion of the contract is not generally of the essence of the contract. But where it is, as when the property is of a fluctuating or diminishing character or when purchase was made for a particular object, the promisee may sue after the last day fixed for performance, and it is sufficient to allege his readiness to complete the contract on such day. It is not necessary to allege his readiness at any time after that day, or to make demand of performance. **But the fact that time was of the essence of the contract should be alleged** (*Ved Prakash* v. *Shishu Pal*, A 1984 All 288; *Govind Parsad* v. *Hari Dutt*, A 1977 SC 1005). If no time was fixed for the performance of the contract, or if time fixed was not of the essence of the contract, **the plaintiff must allege his readiness to perform his part of the contract within a reasonable time, and must allege a demand of performance within a reasonable time.** Ordinarily time is not of the essence of a contract of sale of land (*Jamshed* v. *Burjorji*, 14 ALJ 225, 23 CLJ 358, 20 CWN 744, 40 B 289, 30 MLJ 186, 18 BLR 163, 32 IC 246 PC; *Kalu* v. *Narayan*, 100 IC 578, 29 BLR 56; *Subedar Dubey* v. *Madho Dubey*, 1953 ALJ 121). Where in such cases, there has been improper delay in the performance, the other party has a right to fix a reasonable time within which the contract is to be performed and a distinct notice by him that he will consider the contract as cancelled if not completed within such time, is binding (*Compton* v.

performing his part of the contract after the aforesaid time and therefore notice in writing, dated December 1, 1994 was given by the plaintiff to the defendant personally (*or*, was sent by registered post) requiring the defendant to complete the said sale and receive the balance of the consideration from the plaintiff within a reasonable time, viz., on or before December 15, 1994.

3. The defendant has not completed the sale, whereby the plaintiff

---

Bagley, 1 Ch D 313).

In the case of immovable property there is no presumption as to time being the essence of the contract. The mere fixation of a time period for the performance of the contract does not by itself make time essence of the contract. What is important is that the parties intended to make time essence of the contract. The language employed in the contract, should be capable of leading to the only conclusion, namely, the time fixed is the essence of the contract (*Chand Rani* v. *Kamal Rani*, A 1993 SC 1742; *E.S. Rajan* v. *R. Mohan*, 1995 AIHC 3218 (Kant.) (DB)).

The discretionary power under O. 7, R. 7 does not enable the court to override the statutory limitation contained in section 16 of the Specific Relief Act, 1963 and section 54 of the Limitation Act. 1963 which preclude the grant of the relief of specific performance of a contract except within the period prescribed by the section (*Thakamma Mathew* v. *A. Azamathula Khan*, A 1993 SC 1120). In a suit for specific performance of contract, decree cannot be refused merely on the ground that the description of the property in the agreement is not specific (*Debendranath Mohanty* v. *Annapurana Mohanty*, A 1996 Ori 89).

If, however, the defendant has definitely refused to perform the contract, or has shown such refusal by his conduct, e.g., by selling the property to another person, the plaintiff need not prove any performance of his part of the contract and need not allege any readiness to perform it (*Sreelal* v. *Hari Ram*, 88 IC 784, A 1926 Cal 181 DB).

It must be remembered that though the plaintiff may claim the same damages in the alternative as he could in a suit for damages for breach of contract, yet the measure of damages in awarding compensation to a plaintiff in case the court refuses specific performance is not necessarily the same as that in a suit for damages for breach of contract in which no specific performance is claimed. In the former, the amount of compensation is entirely in the court's discretion. The damages, or compensation, as they should be more properly called, claimed as an alternative in a suit for specific performance, are allowable only when the court refuses specific performance, and it has been held in Bombay that a plaintiff cannot abandon his prayer for specific performance and ask the court to allow him damages on the same measure as he could claim if he had not originally chosen to sue for specific performance of the contract, for when he is not himself prepared to have specific performance, he cannot have suffered any damage by the defendant's refusal. Even

has lost the benefit of the purchase and has suffered damage.

Or,

2. The plaintiff has, on November 14, 1994 and again on November 25, 1994 requested the defendant specifically to perform the said contract on his part, but the defendant refused and has failed to do so, whereby the plaintiff has suffered damage.

---

if the court does not entirely dismiss the suit in such cases, it will take into consideration the plaintiff's abandonment of his claim in awarding him compensation. In *Ardeshar's* case, their Lordships of the Privy Council on appeal deprecated the action of the trial court in allowing the plaintiff to amend his plaint so as to make his claim one for damages *simpliciter*, but as, the suit was dismissed by their Lordships on another ground, they did not decide whether the plaintiff could change his claim from one for specific performance and compensation to one for simple damages, but observed that although the court has got wide powers to allow such an amendment, yet it should be exercised only in a proper case and under suitable conditions (*Ardeshar* v. *Flora Sasson*, 32 CWN 953, 30 BLR 1242, 55 MLJ 523, 55 IA 360, A 1928 PC 208; see also *Ram Saran* v. *Mahabir*, 25 ALJ 74 PC). The Allahabad High Court in a later case after considering the Privy Council ruling in *Ardeshar's* case held that in the circumstances of the case before it, the plaintiff should be allowed to withdraw the claim for specific performance and should be granted a decree for refund of the price paid by him with interest, as defendant had in no way suffered by the suit (*Jaggo Bai* v. *Harihar Prasad*, A 1940 All 41, 1939 ALJ 1107, 1939 AWR HC 821). In another case, where the contract of sale was made by one of several co-sharers of the property and the plaintiff abandoned the prayer of specific performance on the ground that other co-sharers refused to sell their shares, the Lahore High Court allowed the alternative claim for damages (*Mangal Singh* v. *Dial Chand*, A 1940 Lah 159, 188 IC 383). In another case when specific performance was rejected as government had acquired the land, permission to amend the plaint by praying for damages was refused in appeal on the ground that proceedings for acquisition were pending when plaintiff filed his suit yet he chose to sue only for specific performance (*Mohammad Abdul Jabbar* v. *Lalmia*, A 1947 Nag 254). **The plaintiff should, therefore, decide before instituting the suit whether it would be more profitable to take the property or to sue for damages only.**

The proper decree to be passed in a suit for specific performance of a contract of sale of land, when the same has subsequently been sold to a third party is to direct specific performance of the contract between the vendor and the plaintiff and direct subsequent transferee to join in the conveyance (*Durga Prasad* v. *Deep Chand*, A 1954 SC 75). Mere delay does not by itself preclude the plaintiff from obtaining specific performance nor could waiver or abandonment of rights be inferred merely from delay in the institution of the suit. Specific performance of a transaction

3. The plaintiff has been and is still ready and willing specifically to perform the agreement on his part of which the defendant had notice].

Particulars of Damage by Non-performance of Contract

Rs.

Difference between the contract price and the price when default took place ... ...

Interest on Rs. 4,000 paid, and Rs. 36,000 provided by the plaintiff for payment to the defendant at one per cent per mensem, from August 1, and November 14, ...

Total ...

Particulars of Damage for Delay in Performance

Rent paid by the plaintiff for similar land taken by him on lease, for_____ months, at _____ per mensem.

---

which was for proper consideration when it was entered into could not be refused on the ground that at the time of the suit the value of the property had considerably risen. The validity of the transaction should, on principle, be judged as on the date of the transaction (*Sankaralinga Nadar* v. *Ratnaswami Nadar*, A 1952 Mad 399; *Madunsetty Satyanarayana* v. *Lalloji Rao*, A 1965 SC 1405; *S.V.R. Mudaliar* v. *Rajabu F. Buhari*, A 1995 SC 1607; *K.M. Madhavakrishnan* v. *S.R.Swami*, A 1995 Mad 318 (DB); *Godhan* v. *Ram Bilas*, A 1995 All. 257).

A contract entered into by the guardian of a minor cannot be specifically enforced against the minor, even though the guardian in part performance of the contract to sell has placed the vendee in actual possession (*Movva* v. *Mandava*, 110 IC 492, A 1928 Mad 830 DB; *Mir Sarwar Jain* v. *Fakhruddin*, 39 C 232, 9 ALJ 33, 39 IA 1, 13 IC 331, 14 BLR 5; *Manohardas* v. *Tarini*, 34 CWN 135, A 1929 Cal 612 DB; *Singara* v. *Ibrahim*, A 1947 Mad 94, 1947 MWN 463, (1947) 2 MLJ 103) nor can the minor be sued for damages for breach (*Krishna Chandra* v. *Seth Rishabha*, A 1939 Nag 265). A contract by manager of a joint Hindu family having a minor member can be enforced as against the minor, if it was a contract of sale for necessity (*Ramchandra* v. *Sundaramurthi*, 4 MLJ 9 (2); *Krishna Aiyar* v. *Shamanair*, 28 MLJ 610 (617), 17 IC 497; *Adinarayan* v. *Venkatasula*, A 1937 Mad 69; *Haricharan* v. *Kamla*, A 1917 Pat 478, 40 IC 42; *Mt. Dhopo* v. *Ram Chandra*, A 1934 All 1019, 154 IC 235; contra, *Nirpendra* v. *Ekharali*, 57 C 268, 34 CWN 272). But there is nothing illegal in a minor being transferee of property and a minor who has paid the consideration and obtained a transfer e.g., a mortgagee can enforce the transfer (*Zafar Ahsan* v. *Zubaida*, 27 ALJ 114). On the principle of mutuality in agreement

The plaintiff claims:

(1) That the court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said land.

(2) In case specific performance is decreed. Rs._____ compensation for withholding the performance.

---

with minor's guardian, see *Raghavachariar* v. *Srinivas*, 40 Mad 308 (FB).

What contracts can and what cannot be specifically enforced, and by whom and against whom such performance can be claimed, is laid down in the Specific Relief Act (section 15-19). But a suit for damages for breach of a contract always lies, and the measure of damages is generally the difference between the contract price and the current market price. Where in a suit for specific performance of a contract to sell shares plaintiff had claimed damages in the alternative but afterwards abandoned the former and confined his case to the latter, it was held that the damages should be the difference between contract rate and rate on the date of filing the plaint and not the date on which the plaintiff abandoned his claim for specific performance (*United Brokers* v. *Alagappa*, A 1948 Mad 391, (1948) 1 MLJ 178, 1948 MWN 182).

Any costs incurred in making preparations for completing the contract, e.g., in investigating title, purchasing stamp-paper, or procuring money to be paid for consideration, unless procured prematurely, may also be claimed. Interest on deposit or earnest money can also be claimed as damages. Remote damages, such as for the loss of use to which the plaintiff might have applied the money cannot be claimed, unless the defendant had previous notice. The seller may retain the deposit money, if the buyer is in default (*Bishen Chand* v. *Radha Kishan*, 19 A 489; *Fazle Ahmed* v. *Rajendra*, A 1926 Cal 339, 93 IC 195 DB; *S.V. Vipper* v. *Sevat Ram*, 101 IC 686), but must give credit for it in the damages claimed for breach of contract (*Mangal Sen* v. *Mali Singh*, 164 IC 317, A 1936 All 566; *Gopaldas* v. *The Municipality, Hyderabad*, A 1940 Sind 1). But if the deposit is not intended to be in the nature of a security for the performance of the contract it cannot be forfeited (*Pasumarti* v. *Thammandra*, A 1926 Mad 117, 91 IC 765). It has been held by the Privy Council that earnest money is part of purchase money when the transaction falls through owing to vendee's fault (*Kanwar Chiannjit Singh* v. *Har Swarup*, 24 ALJ 248, 94 IC 782, A 1926 PC 1, 3 OWN 168, 1926 MWN 145, 50 MLJ 629; *Krishna Chandra* v. *Khan*, 161 IC 166, A 1936 Cal 51; *Sevanna* v. *Panna*, 99 IC 629; *Murlidhar* v. *International Film Co*., A 1943 PC 34). The fact that there is no forfeiture clause about earnest money in the agreement is immaterial, but the real intention of the parties is to be seen (*Nagar Mahapalika* v. *Sardar Karamjeet Singh*, 1967 ALJ 126).

Compensation should be fixed in the same way as damages under section 73, Contract Act (*Pratapchand* v. *Raghunath Rao*, 169 IC 887, A 1937 Nag 243). If any compensation is stipulated in the contract itself to be paid in case of breach, no sum

(3) In the alternative, Rs._____ as damages for non-performance of contract and repayment of Rs.4,000 paid as earnest money by the plaintiff.

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

No. 146—Suit for Specific Performance

(Form No. 47, Appendix A, C. P. C.)

1. By an agreement, dated the ___ day of _____19__, and signed by the defendant, he contracted to buy of [or, sell to] the plaintiff

in excess of it can be recovered, but the court can grant any compensation up to that limit, whether any actual damages have been incurred by the plaintiff or not (section 74, Contract Act) but the plaintiff cannot claim the amount of his actual loss (*Bhai Panna Singh* v. *Fore*, 27 ALJ 791). If the plaintiff has not suffered any damages but some injury not assessable in money, he can get *nominal* damages on showing the injury, and if damages are apprehended court can assess them and award them as prospective damages (*Ram Chandra* v. *Chinubhai*, A 1944 Bom 76). If a vendor has undertaken to discharge an encumbrance, a vendee plaintiff may pray in the suit for specific performance that the vendor should be ordered to dishcarge the encumbrance before he is allowed to take away the consideration money (*Kathamuthu* v. *Subramaniam*, 94 IC 561, A 1926 Mad 569, 50 MLJ 228, 1926 MWN 271).

Parties : In a suit for specific performance of contract, the vendor and on his death, his legal representatives are necessary party (*Manni Devi* v. *Ramayan Singh*, A 1985 Pat 35). A person not party to the agreement is neither a necessary nor a proper party (*A.K. Singh* v. *S. Misra*, 1995 RD 90 (SC)). A stranger to the contract who claims adversely to the vendor is not a proper party and cannot be ejected in such suit. He can be sued subsequently after success of the suit for specific performance (*Md. Hanif* v. *Marian*, A 1986 Bom 15).

A plaintiff in a suit for specific performance may implead a transferee of the property as a defendant, but the suit cannot be decreed against him, if he is a *bona fide* transferee for consideration without notice of the plaintiff's contract. It is for the defendant to prove this (*Shankar Lal* v. *Narayan Das*, A 1946 PC 97, 50 CWN 603; *Himmat* v. *Vasudeo*, 36 B 446; *Sankli* v. *Mahanaya*, A 1934 Pat 518; *Baburam* v. *Madhab Chandra*, 40 C 565; *Naubat Raj* v. *Dhonkal*, 38 A 184, 14 ALJ 111; *Imam Din* v. *Muhammad Din*, A 1926 Lah 136, 89 IC 422 DB; *Godhan* v. *Ram Bilas*, A 1995 All 357), and the plaintiff need not therefore allege notice in the plaint. In a suit for specific performance of contract, the subsequent vendee who is in possession of the property is a necessary party to the suit (*Narayana Pillai Chandrasekharan* v. *Kunju Amma Thankamma*, A 1990 Ker 177). It is necessary for the transferee to show that he had paid the consideration before he had notice of the previous contract (*Arunchala* v. *Madappa*, A 1936 Mad 949; *Jhandoo* v. *Ramesh Chandra*, A 1971 All 189). If a small portion of consideration was paid before notice and bulk

certain immovable property therein described and referred to, for the sum of _____ rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been, and still is ready and willing specifically to perform the agreement on his part of which the defendant had notice.

The plaintiff claims that the court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in

---

after notice of the previous contract, the transferee cannot be said to be *bona fide* (*Gauri Shankar* v. *Ran Sewak*, A 1934 All 1045, 1934 ALJ 871, 152 IC 39). If his transfer is incomplete, e.g., his sale-deed is unregistered, suit will be decreed against him even if he took, without notice as he is not a 'transferee' (*Loknath* v. *Wahab*, A 1930 Pat 81).

If a plaintiff obtains a decree against the vendor alone, he cannot, after his right of specific performance is barred by limitation, sue a subsequent purchaser with notice for possession after the vendor has executed a sale-deed in his favour (*Gauri Shankar* v. *Ibrahim*, 116 IC 70, A 1929 Nag 298). But a suit cannot be decreed against a subsequent transferee who has a right of pre-emption against the plaintiff (*Dayal Singh* v. *Mahabir*, A 1930 All 166). The interest of a person in whose favour a contract to sell land is made is assignable and the assignee can, therefore, claim specific performance (*Munuswami* v. *Sagalaguna*, 100 IC 399, A 1926 Mad 699, 51 MLJ 229 DB; *T.M. Balakrishna Mudaliar* v. *M. Satyanarayana Rao*, A 1993 SC 2449), but the relief may be refused if the act of the assignee could be regarded akin to champertous (*S.V.R. Mudaliar* v. *Rajabu F. Buhari*, A 1995 SC 1607). One of the co-contractors can sue for specific performance, impleading the other as *pro forma* defendant (*Jagdeo Singh* v. *Bishwambhar*, 171 IC 654, A 1937 Nag 186). A subsequent purchaser's possession is not wrongful, until the plaintiff obtains a sale-deed in his favour in execution of a decree for specific performance, even if he had purchased with notice of the previous contract in plaintiff's favour. He is not, therefore, liable for mesne profits (*Narsingappa* v. *Tuppanna*, 164 IC 152, A 1936 Bom 276). A person claiming adversely to the vendor is not a necessary party where property stands in the name of a person other than the vendor but he may be joined as a proper party on the allegation that he is *benamidar* for the vendor. If such person denies this, the matter cannot be adjudged in this suit but he must be discharged and if plaintiff obtains a decree against the vendor he can institute a suit against such person after having a conveyance executed in his favour, in execution of the decree (*Prem Sundar* v. *Habibulla*, A 1945 Cal 355; *Mt Nagi* v. *Damodar*, A 1948 Nag 181).

Court-fee – A suit for specific performance of a contract of sale should be valued, both for purposes of jurisdiction as well as court-fee, at the amount of the consideration.

full possession of the said property (*or*, to accept a transfer and possession of the said property) and to pay the costs of the suit.

No. 147—Ditto

(Form No. 48, Appendix A, C.P.C.)

1. On the ___ day of _____ 19__, the plaintiff and defendant entered into an agreement in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immovable property described in the agreement.

2. On the ___ day of _____ 19__, the plaintiff tendered _____ rupees to the defendant and demanded a transfer of the said property by a sufficient instrument.

3. On the ___ day of _____ 19__, the plaintiff again demanded such transfer [*or*, the defendant refused to transfer the same to the plaintiff].

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase money of the said property to the defendant.

Limitation : Three years from the date fixed for performance, or if no such date is fixed, from the date when plaintiff has notice that performance is refused by the defendant (Article 113 of 1963 Act). In the absence of either of these dates, limitation of three years runs from the date when the plaintiff can demand specific performance, or when the defendant is in a position specifically to perform his contract (*Venkanna* v. *Venkata*, 41 M 18; *Chando Den* v. *Suraj Kumari*, 1996 All LR 336 All).

Defence : Defendant may plead that he was ready and willing to perform his part of the agreement and the plaintiff himself committed default and is not, therefore, entitled to damages or specific performance, or he may plead, in a suit for specific performance, that the plaintiff has already got compensation for the breach, or that the contract had, by mutual agreement been rescinded. The defendant may show that the plaintiff has no title to the property, he agreed to sell. If the seller is a Hindu father having minor sons of whose existence defendant did not know, the defendant can plead that the title agreed to be conveyed by the father was imperfect (*Ratan Singh* v. *Nanik Ram*, 109 IC 183, A 1927 Sind 219; *Valabh Das* v. *Nagardas*, A 1921 Bom 334 DB). When a manager of joint family agreed to sell without necessity and other members were not made parties and the plaintiff refused to purchase manager's share for the whole consideration then suit was dismissed (*Gulam Nabi* v. *Kishin Chand*, A 1949 Sind 18). Any other plea which can be urged against the specific

The plaintiff claims :

(1) That the defendant transfer the said property to the plaintiff by a sufficient instrument (*following the terms of the agreement*).

(2) _____ rupees compensation for withholding the same.

No. 148—Suit by a Vendor for Specific Performance of a Contract to Purchase Land or for Damages

1. By an agreement in writing, dated October 16, 1995, the defendant agreed to purchase the plaintiff's house No.128 in Shanti Vihar, Nagpur from the plaintiff for Rs.2,00,000. The defendant paid Rs. 5,000 as earnest money to the plaintiff and, by the said agreement agreed that the sale should be completed, and the balance of the purchase money paid on December 16, 1995.

2. On the said October 16, 1995, the plaintiff had told the defendant that he was required to pay Rs.2,00,000 under a pre-emption decree on December 16, 1995 and the said December 16, 1995, was fixed by the parties with reference to this obligation of the plaintiff, and time was of the essence of the contract.

3. The plaintiff was ready and willing, on the date fixed, to execute a proper deed of sale on receiving the balance of the purchase money, and had called upon the defendant to perform his part of the contract and to pay the balance of the purchase money on the date fixed, but the defendant did not do so (*or*, the defendant, on December 14, 1995 refused to purchase the property and to pay the balance of the purchase money).

[*Or, if time was not of the essence of the contract—*

---

performance under the Specific Relief Act may be urged in a suit for specific performance.

It is no defence that the agreement provides damages in case of breach (*V.K. Kandasami* v. *Shammughr*, A 1949 Mad 302; *Metta Rama* v. *Metta Annayya*, A 1926 Mad 144, 49 MLJ 117, 90 IC 551; contra *Monfar* v. *Dewan Rawsan*, A 1943 Cal 586), but where in such a case the plaintiff had on hearing of the vendor's intention to sell the property to another person, given notice to such person that he would claim damage, specific performance against such person was refused (*Daya Ram* v. *Karmumal*, A 1937 Sind 263). Inadequacy of price is no defence (*Bani Madho* v. *Ramnath*, A 1941 Oudh 324, 194 IC 533), nor any other hardship to the defendant (*Ram Sundar* v. *Kali Narayan*, 104 IC 527 Cal; *G W. Davis* v. *Maung Shwe*, 38 IA 155). If a subsequent purchaser with notice has also been impleaded he may claim

2. The plaintiff, on December 14, 1995 and again on December 16, 1995, told the defendant that he was willing and ready to execute a deed of sale, and called upon the defendant to perform his part of the contract and to pay the balance of the purchase money, but the defendant did not do so (*or*, refused to perform his part of the contract on December 14, 1995].

3. The plaintiff is still ready and willing to perform his part of the contract.

4. By reason of the default of the defendant the plaintiff has suffered damage.

Particulars of Damage

Difference between the contract and market price Rs.....

Interest on Rs._____ which the plaintiff borrowed from the Allahabad Bank to pay up the pre-emption decree, at 15 per cent per annum Rs.....

The plaintiff claims:

(1) That the court will order the defendant to pay Rs._____ to the

---

any sum he may have spent in discharging a prior encumbrance on the property (*Nasir Uddin* v. *Ahmad Husain*, 97 IC 543, A 1926 PC 109, 1926 MWN 812).

If the suit is otherwise valid, it is no defence that plaintiff had other remedies which he has allowed to become time-barred (*Sohanlal* v. *Atalnath*, 1934 ALJ 1584, A 1933 All 846). The execution of the sale-deed in pursuance of the agreement would be no defence if the sale-deed required registration but was not registered and was taken out of the vendee's control, so that the vendee could not have it compulsorily registered (*Mohammad Akram* v. *Mula Singh*, 89 IC 414 DB).

A suit for specific performance is not barred even if the plaintiff could bring a suit for compulsory registration of a sale-deed which had been executed by the defendant (*Amir Chandra* v. *Nathu*, 7 ALJ 887, 7 IC 408; *Surendra Nath* v. *Gopal Chandra*, 12 CLJ 464, 8 IC 794; *Nasir Uddin* v. *Sidhu*, 27 CLJ 538, 44 IC 361). But the Madras High Court has taken a different view and has held that if the plaintiff has failed to avail himself of the remedy of a suit under section 77, Registration Act, he cannot bring a suit for specific performance (*K. Satyanarayana* v. *Y. Chinna*, 100 IC 365, A 1926 Mad 530, 50 MLJ 674, 49 M 302, 23 LW 277 DB). Long delay in institution of suit and gross negligence of plaintiff may be pleaded (*Shiam Bahadur* v. *Madan Singh*, A 1945 All 293; *Khushi Ram* v. *Munshi Ram*, A 1940 Lah 225, 189 IC 418). Mere delay, however, is no defence unless it is shown that the claimant knew

plaintiff and to accept a sale-deed from the plaintiff on the terms mentioned in the said agreement.

(2) Rs.____ damages for withholding performance of the contract.

(3) In the alternative to the first and second reliefs, Rs._____. as damages.

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

No. 149—Suit against a Vendor for Refund of Purchase Money on Ground of Latter's Defect of Title *(www)*

1. On June 3, 1987, the defendant executed a sale deed in favour of the plaintiff in respect of the house therein described and referred to for a consideration of Rs.39,000, which the plaintiff paid in cash, and put the plaintiff in possession.

2. One Mt. Shirin Begum, a sister of the defendant instituted a suit against the plaintiff (being suit No. 323 of 1988) in the court of the Civil Judge at Monghyr for recovery of a one-third share in the said property on the allegations that the house had belonged to her father and that she inherited a one-third share in it.

---

that the other party is altering his position on the belief that the claimant has abandoned his claim and even then the claimant does nothing (*Mohd. Wazir* v. *Jahangirmal*, A 1949 Lah 72), or it can be inferred that plaintiff had abandoned his right or it can be shown that on account of the delay there has been such change of circumstances that grant of specific performance would prejudice the defendant (*Arjuna* v. *Lakshmi Ammal*, A 1949 Mad 265, (1948) 2 MLJ 271, 1948 MWN 624; see also, *K. Sambasiva Rao* v. *Bangaru Raju*, A 1985 AP 393). A subsequent purchaser may plead that he was a *bona fide* purchaser for value without notice of the earlier agreement (*Rameshwar* v. *Hari Narayan*, A 1984 Pat 277). Purchaser of a property *pendente lite* cannot claim to be a *bona fide* transferee for value (*Kaulashwari Devi* v. *Nawal Kishore*, 1995 Supp. (1) SCC 141). Defence of frustration of contract (section 56, Contract Act) may be taken if transfer has, after the contract, been absolutely prohibited by law (*Mugneeram Bangur & Co.* v. *Gurbachan Singh*, A 1965 SC 1523), but not where it is permissible with sanction of the authorities and the vendor fails to apply for sanction (*Nanak Chand* v. *Chandra Kishore*, A 1970 SC 446; *Boothalinga Agencies* v. *T.C.P. Nadar*, A 1969 SC 110).

(www) In all such cases the question of limitation is always a serious question and should be carefully studied before the plaint is drafted. Such claim may be for damages for breach of an express or implied contract for good title and quiet enjoyment, or for money had and received by the vendor for the use and benefit of the vendee.

3. The plaintiff defended the said suit but it was decreed on January 4, 1993 and in execution of the said decree, the plaintiff was deprived of possession of a one-third share in the said property on March 8, 1995.

The plaintiff, therefore, prays for a decree for Rs.13,000, being the proportionate consideration of the sale-deed of the defendant in respect of the one-third share lost by the plaintiff.

No. 150—Suit for Refund of Price by Vendee Deprived of Possession owing to Vendor's Fraud

1. On April 4, 1994 the defendant executed a sale deed in favour of the plaintiff in respect of a shop therein described, for a consideration of Rs.80,000 which the plaintiff paid in cash, and put the plaintiff in possession.

The suit can always be filed as one for damages for breach of contract, the limitation for which is 3 years (Article 55). In the case of an implied contract for good title, which is always read into every conveyance by virtue of section 55 (2) Transfer of Property Act, limitation runs from the date of sale (*Ganapa* v. *Hammad*, 49 B 596). But if the vendee obtains possession under the sale-deed, the limitation runs from the date of his dispossession (*Secretary of State* v. *Venkayya*, 40 M 910; *Muhammad Sadiq* v. *Muhammad Nuth*, 124 IC 185 All). In the case of an express contract, for instance, when there is a clause in the sale-deed that the vendor would refund the price in case of the vendee's dispossession by one having superior title, limitation would run from dispossession as that would amount to a breach of the contract (*Ram Dularey* v. *Hardwari Lal*, 40 A 605).

If the sale is void *ab initio* for example, when the vendor has no title whatsoever or where both parties were under a mistake that the vendor has title as in *Rani Kanwar* v. *Mahboob*, 1930 ALJ 327, A 1930 All 252, and the vendee does not obtain possession, the suit for refund of price will be governed by Article 62 (now 24) and limitation will run from the date of sale (*Ardesir* v. *Vajesing*, 25 B 593; *Ratan Bai* v. *Ghasiram*, 134 IC 1157, 33 BLR 1094, 55 B 565). The Allahabad High Court in such a case applied Article 97 (now 47) (*Hans Ram* v. *Chotey*, 171 IC 923. A 1937 All 689), and when the plaintiff's claim for possession was decreed by lower court and was dismissed in appeal, held that time began to run from the date of Appellate Court judgment (*Munalal* v. *Nanhi*, 103 IC 385). In a suit framed as one for damages Madras High Court applied Article 116 (now 55) and held limitation to run from the date of dismissal of plaintiff's suit for possession (*Thillaikannu* v. *Abdur Kadir*, 140 IC 805, 1933 MWN 649, 64 MLJ 336, A 1933 Mad 126), and the Rangoon High Court also applied Article 116 (now 55) but held the date of sale to be the starting point of limitation (*P.L.A.V. N.K. Chettyar Firm* v. *Adinmanlagi*, 167 IC 809, A 1937 Rang 39).

If the sale is voidable and the vendee has not obtained possession Article 97 (now 47) would apply and limitation would run from the date when the vendee is

2. One Ram Lal obtained a decree for possession of the said property against the plaintiff (being decree No. 100 of 1986) from this court on the basis of a sale-deed executed in his favour by the defendant on April 1, 1984 and in execution of the said decree obtained possession of the said property on October 25, 1995.

3. The plaintiff had, at the time of his purchase, no knowledge of the sale-deed in favour of Ram Lal.

---

obstructed in obtaining possession (*Hanuman* v. *Hanuman*, 19 Cal 129; *Tulsiram* v. *Murlidhar*, 26 B 750). There is no fresh start of limitation by any subsequent efforts of the vendee to obtain possession through court and therefore if the vendee brings his suit for possession and the suit is dismissed he does not get a fresh limitation from the dismissal of the suit.

If, however, in either case, i.e., whether the sale is void or voidable, the vendee obtains possession and is subsequently dispossessed he can sue for refund of his money within three years provided by Article 97 (now 47) from the date of his dispossession (*Abdul Rahim* v. *Kadu*, 118 IC 203 Sind) or, if the dispossession is made through court, from the date of the adverse order against him. The Patna High Court has applied Article 116 (now 55) to such cases (*Devi Prasad* v. *Haji Syed*, A 1940 Pat 81, 18 Pat 654). If dispossession has been made through court, actual dispossession in execution of the adverse order will not give a fresh start of limitation, nor will an appeal from such adverse decision (*Sigamani* v. *Munibadra*, A 1926 Mad 255; *Juscurn* v. *Prithi Chundra*, 46 C 670, 17 ALJ 514).

If a suit for damages for breach of contract is barred but a suit for refund of price under old Article 97 (now 47) is not, there is no objection to the plaint being drafted as one under Article 97 (now 47) or the plaintiff may even claim damages or refund of price alternatively under Article 116 or 97 (now 55 or 47). When the sale-deed was registered, the longer period of six years provided by old Article 116 could be availed of (*Abdul Rahim* v. *Kadu*, 118 IC 203; *Mt. Lakhpat Kr.* v. *Durga Prasad*, 117 IC 654, A 1929 Pat 432; *Babu Ram* v. *Amba Prasad*, A 1946 All 159), but now under Article 55 the distinction between registered and unregistered contract has been done away with.

In case of breach of contract the plaintiff can recover damages and not only refund of price. According to the Bombay and Allahabad High Courts, therefore, the purchaser can recover the value of the property on the date of his eviction even if it exceeds the price paid by him (*Nagar Das* v. *Ahmad Khan*, 21 B 175; *Ram Sing* v. *Sajan*, 101 IC 704, A 1927 Sind 120; *Muhammad Sadiq* v. *Muhammad Nuh*, 124 IC 185). The Nagpur Court has, however, held that in such a case a vendee can recover only the value on the date of his purchase (*Zingaraji* v. *Nagasa*, 99 IC 313). This latter view is based on a narrow interpretation of section 73, Contract Act, which, it is submitted, is not justified.

If the vendor has committed a fraud, for example by previously, selling the property to another, the vendee is entitled to avoid the sale and claim refund of the

The plaintiff claims :

(1) Refund of Rs.80,000.

(2) Rs.2,000 on account of interest thereon from October 25, 1995 to date of suit at 1 per cent per mensem by way of damages.

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

No. 151—Suit for Refund of Price of Auction Purchase when Judgement Debtor had no Saleable Interest *(xx)*

1. The plaintiff obtained a decree No.213 of 1981 against one Chatrapat Singh from the Court of the Civil Judge at Hazaribagh and, in execution thereof certain properties detailed in Schedule 'A' attached to the plaint were sold in different lots and were purchased by the plaintiff on November 19, 1982 for total sum of Rs.1,40,500 which the plaintiff paid in cash into the court.

2. Sheoraj deceased, father of the defendant, had also obtained a money decree against the said Chatrapat Singh (being decree No. 403 of 1981) and had applied for rateable distribution of the sale-proceeds realised on execution of the plaintiff's decree, and under an order of the court, obtained Rs.28,000 out of the money in deposit, on February 15, 1983.

3. Smt. Meena Kumari, wife of the said Chatrapat Singh, brought a suit in the court of the Civil Judge at Hazaribagh for declaration of her title to a portion of the said property, viz, to the property detailed in Schedule 'B' attached to the plaint, and made Chatrapat Singh also a defendant and her suit was decreed on appeal to the High Court on December 11, 1991 and therefore the said Chatrapat Singh was held to have no saleable interest in the said property and the said Smt. Meena Kumari took possession of the said property on September 29, 1977.

---

price inspite of a clause in the sale-deed that the vendor would not be liable for any defect in his title (*Akhtar Jahan* v. *Hazari Lal*, 103 IC 310 All).

If the contract of sale is void as being in contravention of any Act of Legislature a refund of the price cannot be claimed (*Sada* v. *Hayat*, 109 IC 633 Lah).

(xx) Such a suit by an auction purchaser, against the decree-holder does not lie according to the Allahabad and Calcutta High Courts (*Ram Sarup* v. *Dalpat*, 58 IC 105, 43 A 60, 18 ALJ 905; *Amar Nath* v. *Firm Chotey Lal Daya Prasad*, 1938 ALJ 95 FB; *Risheecase* v. *Manik*, 96 IC 64, 53 C 758, 43 CLJ 418, A 1926 Cal 971 DB). A full bench of the Oudh Chief Court (one Judge dissenting) has, however, held that

4. The said property mentioned in Schedule 'B' had been sold for Rs.1,32,950 and the rateable sale-proceeds which the defendant's father Sheoraj received out of this amount of Rs.1,32,950, was Rs.26,500.

5. The said Sheoraj died in 1993, and the defendant is his son and only heir.

The plaintiff claims a decree for Rs.26,500 with Rs. _____ on account of interest at ___ per cent per annum from the date of plaintiff's dispossession to the date of suit, with future interest up to date of payment, against the assets of Sheoraj in the hands of the defendant.

No. 152—Suit for Unpaid Purchase Money, by Enforcement of Charge *(yy)*

1. By a sale-deed of June 14, 1991 executed by the plaintiff and registered on June 26, 1991, the plaintiff sold the property specified at the foot of the plaint to the defendant for a consideration of Rs.10,000 and put the defendant in possession.

2. Out of the consideration the defendant paid Rs.6,000 at the time of registration of the sale-deed, and verbally agreed to pay Rs.4,000 within four months (*or*, and by a bond executed by him on June 14, 1991, agreed to pay the remaining Rs.4,000 in four monthly instalments of Rs.1,000 each on July 14, August 14, September 14, and October 14, 1991).

---

such suit would lie (*Bahadur Singh* v. *Rampal*, 124 IC 641, 7 OWN 232, A 1930 Oudh 148). The same view has been taken by the East Punjab High Court (*Amolok Chand* v. *Md. Shafi*, A 1948 East Punjab 1); and also by a Full Bench of the Madras High Court (*Nacha* v. *Kattara*, A 1936 Mad 50, 159 IC 625) and Rajasthan High Court (*Thakural* v. *Nathulal*, A 1964 Raj 140); but when the defect was not in the entire property, but the judgment-debtor was found to have no title in a part of the property, no suit lies according to the Madras High Court (*Firm Narasingi* v. *Suryaderara*, A 1945 Mad 363). Such a suit must be brought within three years provided by Article 113 (previously six years under Article 120) from the date of decree or order declaring that judgment-debtor had no saleable interest, the date of plaintiff's dispossession being immaterial (*Amolok Chand* v. *Md. Shafi*, A 1948 East Punjab 1).

(yy) A vendor can sue for recovery of the purchase money remaining unpaid, even if the same is recited in the sale deed as having been paid (*Meghraj* v. *Abdulla*, 12 ALJ 1304, 25 IC 208). The fact of such recital need not be alleged in the plaint, though the plaintiff will certainly have to give convincing explanation of it in his evidence. A suit for recovery of price has been held to be one for specific

3. The defendant has not paid Rs.4,000 or any part thereof.

4. The plaintiff claims payment of Rs.4,000 with interest from the date of suit to that of payment or in default sale of the property specified at the foot of the plaint.

No. 153—Suit for Breach of Agreement to Purchase Land

(Form No. 13 Appendix A, C.P.C.)

1. On the ___day of _____19__, the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

[*Or*, On the ___day of _____19__, the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty *bighas* of land in the village _____of _____ for _____ rupees.]

2. On the ___day of _____19__, the plaintiff being then the absolute owner of the property (and the same being free from all

---

performance of a contract so that if the sale-deed is unregistered, it can be admitted in evidence in the suit under the proviso to section 49, Registration Act (*N.A.S.S. Subramanian* v. *S.N.A.M. Arunachalam*, A 1943 Mad 761).

Section 55, clause 4 (b) of Transfer of Property Act, creates a charge on the property sold and a suit may be brought either for a simple money decree or for enforcement of the charge. Even if simple money bond is passed for the balance of the price, the charge is not extinguished (*Webb* v. *Macpherson*, 31 C 67). The charge cannot be enforced against a *bona fide* transferee without notice (*Guru Dayal* v. *Haran Singh*, 33 A 554). If the plaintiff is entitled to interest, e.g., if it is agreed to be paid or if the money is payable under a written contract, or if the plaintiff is entitled to it as damages, the interest will also probably be a charge on the property (see, *Gangaram* v. *Nathu Singh*, 5 L 425 PC).

If part of the purchase money has been left with the vendee for payment to vendor's creditor, and the amount is not paid, the vendor can recover the amount and can enforce the charge (*Meghraj* v. *Abdulla*, 25 IC 208, 12 ALJ 1024; *Subramania* v. *Subramania*, 39 M 99; *Reghunath* v. *Sadagopa*, 12 IC 353, 10 MLT 300), even though he had not discharged the debt (*Ram Prasad* v. *Huchhe*, 7 Mys LJ 233; *Sheopati* v. *Jagdeo*, 1930 ALJ 1141; *Mt. Naima Khatoon* v. *Basant Singh*, A 1934 All 406 FB) or suffered in any other way from non-payment (*Pyarelal* v. *Mt. Kalawati*, A 1949 All 348, 1948 OWN 421; but see *Mahadeo* v. *Mahipal*, 12 ALJ 921, 25 IC 939). A Full Bench of the Allahabad High Court has taken the view in *L. Shanti Sarup* v. *Janak Singh*, 1957 ALJ 875, that the vendor has in such cases two other remedies also. He can, before he actually suffers damage, bring an action to have himself put in a position to meet the liability which the purchaser had

encumbrances, as was made to appear to the defendant), tendered to the defendant a sufficient instrument of transfer of the same (*or*, was ready and willing, and is still ready and willing and offered to transfer the same to the defendant by a sufficient instrument) on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

---

undertaken to, but had failed to, discharge. He can also file a suit on the contract of indemnity and recover the loss he has suffered as a consequence of the failure of the vendor to discharge the liability. Under the Limitation Act of 1963, the Article applicable to both the cases would be Article 55.

It has been held in *Makund Lal* v. *Bholanath*, 131 IC 686, 1931 ALJ 985, A 1931 All 419, that the fact that interest on the debt is mounting up is sufficient to show that plaintiff is damnified. A creditor can also sue for such sum on the ground that the vendee was trustee for him (*Sriranganma* v. *Seethamma*, 6 Mys LJ 576). But it has been held by a Full Bench in Madras that the creditor cannot sue the transferee, except where a trust, express or implied, has been created in his favour, or where there has been a novation of obligation undertaken by the transferee (*Trimulu Subbo* v. *Arunchalam*, 58 MLJ 420, A 1930 Mad 382, 124 IC 55). The same view has been taken in Lahore (*Maghimal* v. *Darhara*, 143 IC 755, A 1933 Lah 695). If the creditor sues the vendor and realises the money from him, the vendor gets a new cause of action to sue the vendee on the ground of implied indemnity (see precedent No. 52). If purchaser sues for possession, a decree can be given to him conditionally on his paying the money to the vendor (*Pearylal* v. *Hub Lal*, A 1945 All 139).

Limitation : For such a suit is three years for simple money decree and 12 years for a suit for enforcement of the charge, from the date fixed for payment. If no such date is fixed, and money is left for payment to a creditor, limitation runs either from the date of sale-deed or within a reasonable period thereafter (*Kallu* v. *Ram Das*, 26 ALJ 53), or the date when the vendee repudiates his liability or the date when by the payment of the debt by the vendor himself the performance of the contract is rendered impossible (*Ram Rachhya* v. *Raghunath*, 5 Pat 860). If the suit was for damages it was held in some cases that it was governed by old Article 115 or 116 (now 55) and limitation ran from the date when the vendor is damnified (*Gulzari Mal* v. *Maghi Mal*, 141 IC 435, A 1933 Lah 109; *Narainami* v. *Vendaniveka*, 56 M 724, 1933 MWN 370, A 1933 Mad 424, 144 IC 558; *Bhanji* v. *Govind*, A 1933 Nag 379; *Chand Bibi* v. *Santosh*, 60 C 761, A 1933 Cal 641, 146 IC 863; *Gouri Lal* v. *Ram Lal*, A 1941 Pat 11; *Mt. Dulbin Sio Sakhi Koer* v. *Ram Avtar Singh*, A 1950 Pat 21, and in some cases by Article 83 (*L. Shanti Sarup* v. *Janak Singh*, 1957 ALJ 875).

USE AND OCCUPATION *(zz)*

No. 154—Suit for Damages for Use and Occupation

1. The defendant occupied the house described below on January 4, 1995 with the permission of the plaintiff and remained in possession upto July 4, 1995 it being verbally agreed that the amount of rent would be settled later on.

(Description of the house)

* * * *

2. No rent was in fact settled. The use and occupation of the house was reasonably worth Rs.125 a month.

The plaintiff claims Rs.750 for use and occupation for six months, with interest from the date of suit to that of payment.

No. 155—Ditto, Statutory Form

(Form No. 9, Appendix A, C.P.C.)

1. That the defendant occupied [the house No..... Street] by permission of the said XY, from the __ day of _____19__, until the __ day of _____ 19__, and no agreement was made as to payment for the use of the said premises.

(zz) This form is necessitated when the defendant's possession of the plaintiff's property is not wrongful (in which case, a suit for mesne profits would be maintainable), nor that of a tenant (in which case, a suit for rent would lie), nor that of a licensee without consideration (in which case, no suit would lie). Damages for use and occupation can be claimed when the defendant has been in possession of the property of the plaintiff without any express agreement to pay rent, but with the permission of the plaintiff. In such a case the law presumes an intention to pay a fair and reasonable rent. The Calcutta High Court has held that such a suit can be brought even against a trespasser, for the owner may disregard the trespass and treat the trespasser as tenant (*Sammiulla* v. *Nil Mamud*, 97 IC 564 Cal). It is always better to make an alternative claim for mesne profits, as the defendant may deny occupation by permission. If, in a suit for arrears of rent and ejectment, the plaintiff is unable to prove the term of the tenancy, he may amend his plaint and get a decree for damages for use and occupation. This often happens when the terms of tenancy are incorporated in a document which is not admissible in evidence e.g., in unregistered *kirayanamah*, or where not reduced to writing though under the law a lease was necessary (*Raghubar* v. *Sheo Baksh*, 110 IC 875, A 1928 Oudh 479 DB; see also *Sheo Karan Singh* v. *Maharaja Prabhu Narain Singh*, 31 All 276 FB. In this case decree for use and occupation was given in a suit for rent without an

2. That the use of the said premises for the said period was reasonably worth _____ rupees.

3. The defendant has not paid the money.

The plaintiff, as executor of XY, claims (*relief claimed*).

No. 156—Alternative Suit for Damages for Use and Occupation or Mesne Profits

1. The plaintiff is the owner of the house described below :

(Description of the house)

* * * *

2. The defendant occupied the said house on January 4, 1995, with the permission of the plaintiff and remained in possession upto July 4, 1995. No agreement was made for payment of rent.

3. Alternatively, the defendant took possession of the said house and occupied it wrongfully.

4. The letting value of the said house is Rs.125 per mensem.

The plaintiff claims:

(1) Rs.750 with interest from date of suit to that of payment as money due for use and occupation for six months.

(2) Alternatively, the like sum as mesne profits for the defendant's wrongful possession of the said house.

No. 157—Alternative Suit for Rent or for Damages for Use and Occupation

1. The plaintiff let the house described below to the defendant on January 4, 1995, by written agreement of that date at a rent of

---

amendment). In such cases, an alternative claim for use and occupation may be safer. If the defendant's possession was permissive, the plaintiff's title need not be alleged, as the defendant cannot deny it (section 116, Evidence Act). In a pure suit for use and occupation, therefore, plaintiff's title need not be alleged but, **if an alternative claim for mesne profits is added, the plaintiff's title must clearly be alleged.** No notice of demand is necessary before suit (*Bhai Jai Kishen v. People's Bank*, A 1944 Lah 136).

Limitation : Three years under Article 55 as there is an implied contract in such cases to pay for use of the land. If the suit is against a co-sharer taking joint land into his exclusive use, Article 113 (three years) will apply as there is neither contract nor tort.

Rs.120 per mensem. Alternatively, the use and occupation of the said house was reasonably worth Rs.120 a month.

(Description of the house)

* * * *

2. The defendant remained in possession of the said house from January 4, 1995 to July 4, 1995.

The plaintiff claims :

(1) Rs.720 with interest from date of suit to that of payment, as rent for six months.

(2) Alternatively, the like sum as money due for use and occupation for the said period.

WORK *(aaa)*

No. 158—Claim for Work Done under a Contract

1. By a contract in writing, dated July 4, 1995 the plaintiff agreed to paint all the doors, windows and railings of the defendant's house at No. 33, Cotton Street, Calcutta, and the defendant agreed to pay for it on completion of the work at the rates given below:

Rates ... ...

2. The plaintiff has completed the aforesaid work on November 14, 1995 and a sum of Rs.5,200 is due to him at the aforesaid rates. The defendant has not paid the same or any part thereof.

The plaintiff claims Rs.5,200 with interest from the date of suit to that of payment.

Defence : The defendant may plead that he has been in possession adversely to the plaintiff, or that the damages claimed are excessive or that there was a contract to pay a lesser amount as rent.

(aaa) Suit for work done lies when work is done by the plaintiff for the defendant under a contract, express or implied. But when work is done by the plaintiff on his own material in making an article to be delivered to the defendant under a contract of sale e.g., preparing a pair of boots for the defendant, the work is done by the plaintiff for himself and not for the defendant and the suit should be brought for price of goods or for damages for not purchasing of goods ordered, and not for work done. A volunteer, who does work on the property of another in such a way that the other has no option but to accept the work, in not entitled to any compensation, e.g., a trespasser making repairs in the defendant's house.

No. 159—Suit for Failure to do Work according to Contract

1. The plaintiff was a contractor for the construction of the building of the New Normal School at Muzaffarnagar. The defendant is a sub-contractor.

2. By the contract in writing, dated October 14, 1994 the defendant agreed to do all the painting work for the plaintiff in the said building with the best material, and to fix glass panes on all the doors and windows of the said building, and to finish the said work by March 25, 1995.

3. The plaintiff had to deliver the completed building to the Education Department on April 1, 1995 and had given notice of this fact to the defendant. Time was, therefore, the essence of the contract with the defendant.

4. The defendant did not do all the painting work of the said building with the best materials nor did he fix all the glass panes by March 25, 1995.

Particulars

(i) The defendant did not paint the doors of the superintendent's quarters, the boarding-house, kitchen and the latrines.

(ii) The defendant painted all the other doors and railings with poor quality paint *beroja* and linseed oil.

(iii) The defendant did not fix any glass panes in the doors of the almirahs of the boarding house.

(iv) The defendant fixed the other panes so negligently that they fell down on account of the blowing of the wind.

5. The plaintiff has suffered the following damages:

A suit for work done can be brought after the whole work has been completed, unless there was a contract for payment for part of the work (section 39, Contract Act). If material was also used by the plaintiff for the defendant he can add a claim for its cost. He can also sue for loss of profit (*A.T. Brij Paul Singh & Bros* v. *State of Gujarat*, A 1984 SC 1703).

In a suit for breach of contract for doing work or for doing the work negligently and not according to the agreement, **the term of the agreement which has been broken by the defendant must be alleged and the breach should be alleged in the words of the agreement, particulars of the breach and damages being added.**

Rs.

Employment of extra labour at a specially heavy cost to do the work left undone by the defendant and to remove all the paint applied by the defendant and to have the doors and railings re-painted with good quality paint (22 labourers for five days at Rs.____ per man per day) ... ...

Cost of 100 glass panes for doors of the boarding house almirahs and of 200 panes substituted for the broken panes

Cost of good quality paint ... ...

Total ... ____

Deduction of the balance which was due to the defendant from the plaintiff under the agreement ... ...

Total ... ____

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

No. 160—Suit against a builder for defective Workmanship

(Form No. 17, Appendix A, C.P.C.)

1. On the ___day of_____ 19__, the plaintiff and defendant entered into an agreement, and the original document is hereto annexed, *(Or, state the tenor of the contract)*

[2. The plaintiff duly performed all the conditions of the said agreement on his part].

When special damages over and above those which ordinarily arise from the breach, are claimed for breach of a contract **it should be alleged in the plaint that notice was given to the defendant at the time of the contract that such damages would be claimed.**

Limitation : Three years under Article 18.

Defence : In a suit for price of work done the defendant may plead any defects in the work, or that it was not according to the contract, or that it was not done under defendant's order, or may claim a set off for any damages for delay in

3. The defendant [built the house referred to in the said agreement in a bad and unworkmanlike manner].

No. 161—Suit for Special Damages for Breach of Contract to do work within time

1. The plaintiff hires out motor cars for the journey from Jammu to Srinagar and back. The season for such journey is from May 1 to the end of October.

2. On February 12, 1995 the plaintiff took his car to the defendants, who are car repairers, to have it overhauled and put into perfect running order. The plaintiff, at that time, told the defendants that he required the car to be in prefect running order by April 25, in order to carry passengers from Jammu to Srinagar. He further told the defendants that if the car was not in perfect running order by that date he could lose a profit of Rs.1,000 a week.

3. The defendant verbally agreed to put the car into running order for a sum of Rs.14,200 and to deliver the same on April 25, 1995.

4. In breach of the said contract, the defendant failed to deliver the said car by April 25 and did not in fact deliver the same until June 6, 1995. The plaintiff has consequently suffered damage. He has lost the use of the car from April 25 to June 5 and has thus suffered a loss of profit of Rs.5000.

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

No. 162—Suit for Services at a Reasonable Rate

(Form No. 7, Appendix A, C.P.C.)

1. Between the ___day of _____19__, and the ___day of _____19__; at _____, the plaintiff [*executed sundry drawings, designs and diagrams*] for the defendant at his request; but no express agreement was made as to the sum to be paid for such services.

---

completing the work. He may plead that defendant used inferior material or that the payment was subject to a certificate by an engineer and the same has not been obtained. In a claim for bad work, the defendant may plead that the work was done according to the agreement, or that the damages claimed are too remote.

He may plead that he had no notice that any special damage to that plaintiff would result from the breach.

2. The services were reasonably worth _____ rupees.

3. The defendant has not paid the money.

No. 163—Suit for Service and Materials at a Reasonable Cost

(Form No. 8, Appendix A, C.P.C.)

1. On the ___day of _____19__, at , the plaintiff built house [known as No. _____, in _____], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2. The work done and materials supplied were reasonably worth _____ rupees.

3. The defendant has not paid the money.

No. 164—Suit for Work done at a Reasonable Cost *(bbb)*

1. Between February 1, 1996 and April 25 1996 at Meerut, the plaintiff stitched a number of clothes and furnished all materials except the upper cloth, at the request of the defendant, but no express agreement was made as to the rate at which the plaintiff was to be paid for his services and the materials.

2. The cost of the materials furnished by the plaintiff and the plaintiff's stitching charges at reasonable rates come to Rs.2,225 as per details given at the foot of the plaint.

3. The defendant has paid Rs.245 and has not paid the rest of the sum due or any part thereof.

The plaintiff claims Rs.1,980 with interest from the date of suit to that of payment.

(bbb) This form of action becomes necessary when work is done without any express agreement about wages, but with no intention of doing it gratuitously. (*see* section 70, Contract Act).

II—PLAINTS IN SUITS FOR TORTS*

ANIMALS

No. 165—Suit for Damages for the bite of Defendant's Dog *(a)*

1. The defendant kept at his house in Mohalla Nai Basti, Agra, a dog which, on January 1, 1995 attacked and bit the plaintiff and caused him personal injuries. The plaintiff has, in consequence, suffered damage.

2. The said dog was of a fierce and mischievous nature, and accustomed to attack and bite mankind, and the defendant kept the said dog well knowing that it was of such fierce and mischievous nature and so accustomed.

Particulars of the Injuries Caused

The plaintiff was bitten in the right leg, there upon he fell down on the pavement and received hurt in his left arm and the head. He was, when lying, again bitten by the dog in his right arm.

Particulars of the Special Damages Claimed

	Rs.
Travelling expenses to and from Kasauli for self and two attendants	2,000
Expenses of treatment and residence at Kasauli at Rs. 200 per day, for 15 days	3,000
Loss of business as a broker for one month that the plaintiff remained in hospital	3,000

*In suits for damages for tort, generally speaking, the particular tortious act must be specifically alleged. It is necessary for the plaintiff to bring himself within the four corners of some recognised head of law and there is no right of action for damages at large nor can judges invent new heads of injury. The law of tort is administered in India as rule of justice, equity and good conscience and though English law need not be applied in all its details when that is found to be unsuitable to local conditions, yet English law is recognised as the basis (*Baboo* v. *Mt. Subashni*, A 1942 Nag 99). Institution of civil proceedings maliciously and without a reasonable or probable cause is not a tort and no action would lie for damages (*Bhupendra* v. *Trinayani*, A 1944 Cal 289). If general damages are claimed no allegation about them is necessary but particulars of any special damages claimed must be given