

Chapter VII

ALTERNATIVE AND INCONSISTENT PLEADINGS

Alternative Pleas : There is nothing in law to prevent a plaintiff from relying upon several different rights in the alternative, or to prevent a defendant from raising as many distinct and separate defences as he likes. Such pleas or rights may even be inconsistent.¹ A party to a suit may set up such sets of facts as may give rise to different rights in law. O.7, R.8 specifically permits a plaintiff to seek relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds. He may rely upon one set of facts for his success, failing which he may fall back upon the other set of facts. Neither O.6, R.2 nor any other provision of the Code prohibits a party from taking alternative or inconsistent pleas. A party should not be precluded from taking such pleas, provided all the facts, should clearly and distinctly be stated and no injustice or prejudice would be caused to the other party. Thus where in a suit for specific performance of a contract to sell a house the plaintiff pleaded that in part performance thereof he had paid the defendant a certain sum of money and had been put in possession of the house, and the defendant in his written statement denied the contract but set up the case that he had taken that sum of money as a loan and it was only for facilitating payment of interest due on the loan that the plaintiff had been put in possession, the court disbelieved the plaintiff's case but decreed the suit on the basis of the defendant's own plea. The defendant in such a case can neither contend that he had been taken by surprise nor that he was not given an opportunity to adduce evidence.² Again where in a suit to enforce a mortgage security the defendant's plea that the mortgage was void was upheld by courts, the Privy Council held that it was open to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution under section 65, Contract Act. Although no such alternative claim was made in the plaint or in the courts below, the Privy Council allowed it to be advanced

1 *Bhutan Mohini Dasi v. Kumud Bala Dasi*, A 1924 Cal 467, 82 IC 954 (DB);
Indubai v. Jawahar Lal, A 1990 MP 80.

2 *Firm Srinivas Ram Kumar v. Mahabir Pd.*, A 1951 SC 177.

and gave a decree on the ground that the defendant-respondent could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit.³

In case of an apprehension of prejudice being caused to the other party or of fair trial being embarrassed by inconsistent pleadings the court may take recourse to O.6, R.16 and pass orders for amending the pleading or for striking out any portion of it.⁴ Where the suit on the new or inconsistent case or cause of action would be barred by limitation at the time it is sought to be put forward the court will thus not allow any amendment in the pleadings for setting up that case.⁵ But if the amendment amounts merely to different or additional approach to the same facts, then amendment should be allowed even after expiry of limitation.⁶ The party may also be put to election in case of likelihood of prejudice to the other party.

It has thus been held that as a matter of law a party may claim ownership and easement rights in the alternative.⁷ But in such cases the difficulty of proof may arise, for a person claiming a prescriptive right of easement has to establish that he had exercised the use as an easement, i.e., he had the requisite animus, for the requisite period.⁸ Alternative pleas of joint ownership of *rasta* land and of easement of right of way have also been held to be permissible.⁹ It has been held that an easement of necessity and an easement by prescription can alternatively be pleaded.¹⁰ Such a plea must, however, be clearly made and proved. Mere suggestion

3 *Mohan Manucha v. Manzoor Ahmad*, A 1943 PC 29, 70 IA 1; followed by Supreme Court in *Firm Srinivas Ram Kumar*, supra.

4 *M Mohammad v. A Narayana Rao*, 1973 KLT 511.

5 *Bhagwanji Morarji Goculdas v. Alembic Chemical Works*, A 1948 PC 100.

6 *A.K. Gupta & Sons v. Damodar Valley Corporation*, A 1967 SC 96.

7 *C.Mohammed v. Ananthachari*, A 1988 Ker 298; *Sayrabai v. Ahmedji*, A 1960 MP 111; *Laxminarayan v. Fajjulal*, A 1933 Nag 257; *Vyas Gopichand v. Mattoo Lal*, A 1971 Raj 237; *Purani Dhiraj Lal v. Sankleshwar*, A 1976 Guj 180.

8 *Lalit Kishore v. Ram Prasad*, A 1943 All 363; *Raychand v. Manaklal*, A 1946 Bom 266 (FB); *Subha v. Akkamal*, A 1942 Mad 392; *Chapsibhai v. Purushottam*, A 1971 SC 1878; *Ram Dev v. Ram Badan*, A 1984 All 206; *Imam Din v. Nizam*, A 1943 Lah 267.

9 *Atiqa v. Aquila*, A 1956 All 415.

10 *Sengoda Gounder v. Sengoda Gounder*, 1999 (1) LW 422 Mad.

in the relief clause that there was uninterrupted possession for over twelve years and that the plaintiff had acquired an adverse title was held not to be enough as long possession was not necessarily adverse possession and the prayer clause was not a substitute for a plea. It was required to be averred as a fact as to why hostile possession was asserted, *i.e.*, when the possession became adverse.¹¹ Where the Government claimed title as well as prescription of title by adverse possession the property was recorded as Government property in records, and the Government had been exercising right over the statutory period, the pleas of title and adverse possession were held not inconsistent pleas.¹²

A pre-emptor may claim partial pre-emption alleging vendor's want of title to the portion not claimed, and in the alternative, pre-emption for the whole if the court found vendor's title to the whole.¹³ Similarly, in a suit for pre-emption there is nothing to prevent a defendant from setting up a plea of estoppel in addition to a plea denying the custom of pre-emption.¹⁴ A suit for declaration of proprietary title or in the alternative for pre-emption is maintainable.¹⁵

Similarly, a defendant may plead in suit on a bond that he did not execute it, and in the alternative that the claim is barred by limitation. But facts on which each alternative claim (*see* O. 7, R. 8) or defence is based must, as be distinctly and separately stated.¹⁶ If they are not clearly set out, the court will not permit an attempt to show that any particular ground can be covered by implication from certain allegations. Thus, in a suit by son to set aside certain transfers made by his mother the plaintiff simply alleged that his mother at the time of making the transfers, was of unsound mind, and added that the donee was residing with the said mother who was entirely under her dominion and control and the donee was well aware of the mental condition of the donor. The Privy Council held that on these allegations the plaintiff can be said to base his claim only on unsoundness

11 *S.M. Karim v. Bibi Sakina*, A 1964 SC 1254.

12 *Karnataka Waqf Board v. State of Karnataka*, A 1996 Kant 55 (DB).

13 *Afeal Husain v. Huran Bibi*, 27 ALJ 589, 116 IC 16, A 1929 All 398 (DB); *Rambhau v. Ganesh Deorao*, A 1948 Nag 32.

14 *Sankaranayana Iyer v. The Kotayam Bank Ltd.*, A 1950 Tr. Co. 66.

15 *Bhagwati Saran v. Parmeshar Das*, 12 ALJ 798, 25 IC 283, 36 A 476.

16 *Official Assignee v. Badiya*, 30 CLJ 428, 145 IC 181.

of mind of the donor and claim on the ground of undue influence cannot be entertained, because if he wanted to make an alternative case of undue influence he ought to have pleaded that separately. The statement that the donor was under the dominion and control of the donee was considered to have been made only incidentally in connection with the allegation of mental incapacity.¹⁷ Where the plaintiff alleged in the plaint merely that forward transaction was settled because of great fluctuation in market and consequent decision of Vyapar Mandal to that effect, he was not allowed to contend that since the defendant had failed to pay margin money demanded from him, the transaction had been settled.¹⁸

Inconsistent Pleas : The litigant, availing himself of the right to press inconsistent cases before the court and trying to establish both by contradictory oral testimony, however, plainly places himself in peril and may find himself entangled in inextricable difficulty, for evidence in support of two absolutely inconsistent cases, can hardly be expected to secure confidence. A plaintiff may set up two inconsistent cases, though the circumstance might militate strongly against his succeeding in the case.¹⁹

A defendant cannot take plea that he has interest in the property as a member of the Joint Hindu Family and at the same time take the plea of adverse possession.¹ The pleas of tenancy and adverse possession or licensee are inconsistent pleas and are not permissible.² The plea of benami and the plea of a long possession may be inconsistent, but a defendant can resist the suit and take the said inconsistent pleas.³ In a partition suit it is open to the defendant to take the plea of adverse possession, though in the earlier execution proceedings, he pleaded possession by way of partition.⁴ In a petition under Sec. 9 of the Hindu Marriage Act for restitution of conjugal rights, in alternative relief of divorce may be prayed.⁵ Where certain fact is admitted, the question of law automatically follows. Where

17 *Ismail v. Hafiz Boo*, 33 C 773, 33 IA 86.

18 *Ganesh Lal v. Joti Prasad*, 1969 ALJ 1104.

19 *Sheonarain v. Bhullar*, A 1950 All 352.

1 *Arjan Dev v. Om Prakash*, A 1992 Delhi 202 (DB).

2 *Conrad Dias v. Joseph Dias*, 1995 (3) Bom CR 218 (Bom).

3 *Chatur Bhuj Prasad Khattri v. Hari Narain Khattri*, A 1991 All 72.

4 *Thimaiah v. Madegowda*, A 1989 Kant 83.

5 *Krishna Devi v. Addl. Civil Judge, Bijnore*, A 1985 All 131.

the plaintiff admits the defendant as monthly tenant in the suit premises, the defendant's plea, though not taken in the written statement that the lease in question was against the public policy, cannot be said to be not consistent with the pleadings of the parties.⁶

General Principle: The following may be taken to be the general rule:

There can be no objection to preferring alternative and inconsistent claims or raising inconsistent pleas, provided they are based on facts which are not inconsistent.⁷ Even pleading of inconsistent fact is not prohibited as a matter of law, but alternative claims or pleas which are based on facts which are so inconsistent that the evidence required to prove one fact is destructive of the plea of the other fact, should be discouraged,⁸ except when the facts are not within the personal knowledge of the party pleading them. If the alternative pleas are such as may tend to prejudice, embarrass or delay the fair trial of the suit, the court may order any matter in the pleading to be struck out or amended under O. 6, R. 16 (b).

A few illustrations will elucidate this: A decree-holder can attack a transfer as sham and in the alternative as fraudulent.⁹ A mortgagor may allege that the mortgage money has been paid and may, in the alternative, offer to pay the portion that may still be found to be due.¹⁰ A plaintiff in an ejectment suit may claim a decree on the ground that the defendant is his tenant or that he is a trespasser.¹¹ Similarly, a defendant in an ejectment suit may claim right as tenant or title by adverse possession.¹² In a suit for possession under a deed of *waqf* the defendant pleaded that she did not execute the deed, and that the plaintiffs who were related to her

6 *Hindustan Commercial Co. v. Baidyanath Bhattacharjee*, A 1991 Cal 88 (DB).

7 *S. Narayan v. K. Bank*, A 1950 Tr. Co. 66 (FB); *V.V. Kamble v. Mascarenhas*, A 1967 Goa 97.

8 *Mottilal v. Judhistir*, 20 CWN 310, 22 CLJ 254, 311 IC 181.

9 *Ouseph Skaria v. Cheman Joseph*, A 1965 Ker 288; *Bhola Ram v. Peari Devi*, A 1962 Pat 168 (undue influence).

10 *Butchanna v. Vernahalu*, 24 M 408.

11 *Lakshmibai v. Hari*, 9 Bom HCR 1; (see Chap. VIII for cases where suit is based only on relationship of landlord and tenant and on failure to prove the same, relief may be granted on the basis of title.)

12 *Chhaikuddin v. Ram Narayan*, A 1926 Cal 364, 90 IC 670 (2) DB; *Atma Ram v. Paras Ram*, A 1971 HP 11; *Ram Rachhya v. Kamkhya Narain*, A 1925 Pat 216.

deceived and falsely told her that in order to facilitate the management of her property, she should get a deed completed, suggesting thereby that the deed was obtained from her, without her being actually told what it was, by fraud and undue influence. The alternative pleas of denial of execution and fraud were allowed as there was no inconsistency in the facts on which they were founded.¹³ Similarly, a defendant may deny her marriage with the plaintiff and may, in the alternative, plead that if the ceremony which she went through with him amounted to marriage it was null and void, as her consent was not taken. In a suit by an adopted son, the defendant who claimed under a deed of gift from the widow of the adoptive father was allowed to deny the adoption, and at the same time to plead that, even if the adoption was made, it was conditional on the provision of the will in favour of the widow being acquiesced in by the plaintiff's natural father.¹⁴ Such inconsistent pleas were permitted because the defendant was no party to the will or the alleged adoption.

When a plaintiff sued as reversioner of his maternal grandfather A and the defendant claimed under a sale deed from a daughter of A, the defendant was allowed to plead that the sale by the daughter was justified by legal necessity and, in the alternative, that A had left a son on whose death, the property passed to A's widow, as mother, and on her death, the plaintiff became entitled to the property and he lost that right by adverse possession of A's daughter.¹⁵ The reason is that though the two pleas, one involving an admission of the title of A's daughter and the other involving a denial of it are inconsistent, yet the inconsistency causes no embarrassment and the evidence of the two pleas is by no means conflicting. A plaintiff sued for enhancement of rent on the allegation that the rent was produce rent, but, as it was wrongly entered in survey records as cash he accepted the entry and wanted enhancement. It was held that there was no inconsistency in the claim.¹⁶ Likewise, a suit for a declaration that the plaintiff is owner under a valid title, or, in the alternative, on the ground of adverse possession would be maintainable.¹⁷ For, though ownership and

13 *Farid-un-nisa v. Mukhtar*, 46 IC 488.

14 *Narayan Swami v. Ramaswami*, 14 M 172; cf. A 1928 All 582 (A stranger to a transaction may be allowed to take inconsistent pleas about it).

15 *Sri Rang v. Rancheyya*, 13 IC 128, 13 CLJ 439.

16 *Parmeshwar v. Ramanandan*, 42 IC 620, 2 Pat LJ 226.

17 *Luvar Popat Kala v. Bachu*, A 1958 Bom 152.

adverse possession are inconsistent things, yet there is no conflict in the evidence which would be required to prove either; even for adverse possession one has to assert possession under claim of ownership. A gift may be attacked as non-existent and in the alternative as having been made to defraud creditors.¹⁸ The following cases where inconsistent pleas were allowed may also be seen.¹⁹

A plea of payment should not ordinarily be permitted to be joined to plea that the bond is a forgery and that the defendant never borrowed the money. Nor is it proper to permit defendant to deny a contract and allege it was intended to be wager. But where he is merely a representative of the original party he may be allowed to raise both these defences, if he has no personal knowledge of the transaction. For example, when the sons were sued for money misappropriated by their deceased father, they were allowed to plead alternatively that there was no misappropriation and that the father having acted dishonestly and his acts amounting to a criminal offence, the sons are not liable under the Hindu Law.¹ But the Allahabad High Court held, on the authority of English precedents, that the pleas that defendant did not execute the bond and that he has paid it up can be taken together, and that such pleas are generally taken as a matter of tactics when it is intended to force the plaintiff into the witness-box to prove the deed and thus to get an opportunity to cross-examine him with regard to the other plea.² Similarly it is permissible in a suit for libel to plead that the words complained of were not published of, and concerning, the plaintiff and that they constituted fair and *bona fide* comment.³

The plaintiff was not permitted to take the inconsistent pleas that there was joint family nucleus from which the property in question was

18 *State of Punjab v. Giani Birsingh*, A 1968 Punj 479.

19 *T.S. Mohd. v. A Fathummal*, A 1973 Mad 302 (Gift or release); *Janaganti China Venkata Rajaum v. Kappojee*, (1912) 15 IC 382 (Mad DB) (free-hold or service tenure); *S.S.Hameed & Co. v. Universal Fire Insurance Co.*, A 1924 Rang 317, 83 IC 593 (contract of insurance not in existence at time of fire or if it did, condition precedent not satisfied).

1 *Toshanpal v. The District Judge of Agra*, 51 A 386.

2 *Muhammad Zafar v. Zahur Hasan*, 49 A 78.

3 *Union Benefit Guarantee Co. v. Thakor Lal*, 161 IC 769, A 1936 Bom 144.

acquired and that the property in question was self-acquired property and was blended with the joint family property and as such became joint family property.⁴ Again, a plaintiff assailing an agreement as void on the ground of fraud was not permitted, in the same suit, to pray in the alternative for specific performance of the same contract,⁵ though, as provided in section 37, Specific Relief Act 1877 (corresponding to section 29 of the 1963 Act), a plaintiff suing for specific performance of the contract can alternatively ask for rescission of the contract.⁶

There is thus no difficulty about taking alternative pleas which are based on mutually consistent allegations of facts, or about claiming alternative reliefs on the basis of the same allegations; the only difficulty is about inconsistent pleas on the basis of inconsistent factual allegations. Even when in theory inconsistent factual pleadings are allowed, a pleader would be ill-advised to raise them, for a judge is likely to come to the conclusion that a party who had to rely on inconsistent statements has a case of very little merit. It is thus a great risk for any pleader to take, for, if the pleas are contradictory, they work out their own retribution by disproving each other to the extent of that contradiction. The Bombay High Court in respect of a writ petition observed that objections to the petition on the ground of delay and that it is premature are mutually destructive.⁷ A pleader should rather decide on one line of defence without introducing matters which will certainly give rise to suspicion. Where, however, a party is, from obscurity or from complexity of facts, in honest doubt as to the relief available to him, inconsistent claims may be entertained.⁸ Inconsistency may be ground for viewing both allegations with suspicion but does not render the suit unsustainable.⁹ It is certainly open to a party to raise inconsistent defences in the alternative but at the same time when evidence is led he has got to elect as to which of the two alternative or inconsistent defences he is going to prove.¹⁰ The plea of

4 *Balbhadra Nishanka v. Suka Dibya*, (1972) 38 CLT 325, 1972 (1) CWR 513.

5 *Kamlabai v. Moti Ram*, 1983 MPLJ 343.

6 *Prem Raj v. DLF Housing Ltd.*, A 1968 SC 1388.

7 *Damomal v. Union of India*, A 1967 Bom 335.

8 *Mt. Daiwati v. Mt. Tunki*, 164 IC 804, A 1936 Pat 474.

9 *Sheo Narain v. Bhaller*, A 1950 All 352.

10 *Raychand v. Maneklal*, A 1946 Bom 266 (FB).

adverse possession and alternative plea for retention of possession by operation of section 53A, of the Transfer of Property Act, being inconsistent, pleas are not available.¹¹ Where the plaintiff alleges that the deed executed by her is a forgery, the Court should not allow pleading an inconsistent issue whether it was executed under undue influence. The plaintiff cannot be permitted to allege two absolutely inconsistent state of facts each of which is destructive of the other.¹² The defendant contesting the will propounded by the plaintiff on the ground of forgery cannot be allowed to set up an alternative claim of undue influence.¹³

An alternative plea by the plaintiff which not only changes the entire nature of the suit but may also take the case out of the jurisdiction of the court which the court is called upon to exercise in that particular proceeding cannot be permitted; thus a plaintiff who has filed a suit in the ordinary civil court on the ground that the defendant is a trespasser cannot be permitted in the same proceeding to claim possession on any ground available, under the provisions of the Rent Act.¹⁴

11 *Mohanlal v. Mirz. A. G.*, (1996) 1 SCC 639.

12 *Abdul Rahim v. Md. Azimuddin*, A 1965 Pat 156.

13 *Gobinath v. Chumi Lal*, A 1953 Nag 316.

14 *Govind Ghai v. New Shorrock Mills*, A 1984 Guj 182.

Chapter VIII

VARIANCE BETWEEN PLEADING AND PROOF

Variance between Pleading & Proof : As a general rule, a plaintiff is bound by his pleading and should not be allowed to contradict the facts stated therein, or to succeed on a case not made out in his pleadings.¹ The ordinary rule of law is that evidence should be given only on plea properly raised and not in contradiction of the plea.² The pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings and propound a new and different case.³ A party cannot be allowed to adduce evidence for setting up a case inconsistent with the one alleged in its pleadings.⁴ For instance, a defendant, basing his case as adopted son of plaintiff's deceased husband, cannot prove his title as adopted son of the plaintiff.⁵ Although a party can raise several alternative and inconsistent pleas⁶ it does not follow that if he has raised only one plea, he can be permitted to raise another at a later stage of the case. He must be held to the claim or defence set up by him in his pleading and cannot be allowed to build a case inconsistent with that in his pleading,⁷ or with his oral statements under O. 10 (which too have the character of pleadings)⁸, although he could, if he chose, have alleged that other ground of claim or defence in his original pleading.

1 *Om Prabha Jain v. Abnash Chand*, A 1968 SC 1083, (1968) 3 SCR 111; *Prakash v. Smt. Bhagwani*, (1995-2) Punj LR 491 (P&H); *Shankar Mandal v. Deputy Collector, Land Reforms*, A 1992 Pat 38(FB); *Mahipalpur Co-operative Society Ltd. v. Prabhati*, A 1986 Delhi 94.

2 *Om Prabha*, supra

3 *Vinod Kumar v. Surjit Kaur*, A 1987 SC 2179.

4 *State of W.B. v. Mir. Fakir Mohammad*, A 1977 Cal 29.

5 *Deoki Nandan v. Murlidhar*, A 1957 SC 133.

6 See Chap VII, ante.

7 *Hemendra Nath Roy v. Upendra Narain Roy*, 22 CLJ 419, A 1916 Cal 829 (FB); *Annandacharan v. Hargovind*, 27 CWN 2496, 37 CLJ 552, A 1922 Cal 570; *Gopal v. Abdul*, 65 IC 640, 34 CLJ 319; *S.M. Gopala v. Secretary of State*, 101 IC 346 Mad; *Ratan Singh v. Nanikram*, A 1927 Sindh 219, 109 IC 183; *Gondli v. Joynai*, 26 CWN 294; *Esher Chander v. Sharma Churn*, 11 MIA 7; *Maganlal v. Krishan Bibi*, A 1935 All 303, 153 IC 1068; *State of W.B., supra*; *Abdul Khalique v. Bepin Behari*, A 1936 Cal 465.

8 *Md. Yahya v. Rahem Ali*, A 1929 Lah 165, 117 IC 712.

In the undernoted case⁹ the defendant lady in her written statement had denied the genuineness of the pronote, which was put in issue, but while giving evidence at the trial she admitted her signature and proceeded to set up an entirely new case by explaining how her signature was obtained. The Chief Court of Oudh strongly deprecated this. In another case,¹⁰ the Privy Council characterised as irregular the procedure of the trial court in allowing evidence to be adduced on points not raised in the pleadings or issues and held that this should not have been allowed without amendment of pleadings and issues. But in seeing whether there has been a variance between pleading and the case set up at the trial, a court should not look merely at the wording of the plaint but also the issues and the manner in which the case was fought out.¹¹ A mere incidental mention of particulars about ornaments in a schedule annexed to the plaint was not, however, considered as conclusive or irrebutable against the plaintiff.¹² A plea of protection under section 76(a) of the Transfer of Property Act not raised in the pleadings cannot be allowed to be raised at the time of arguments.¹³ Where the defendant in written statement has not pleaded that the sale deed has been executed for discharge of antecedent debt, the evidence led on that score by him is without jurisdiction and the court has no jurisdiction to come to a finding on that score on the basis of the said evidence.¹⁴ In the absence of any pleading, or any issue, that sub-letting was made with the permission of the landlord, the court has no jurisdiction in holding that it was done with the landlord's permission.¹⁵

Whether a plaintiff can be allowed to abandon his case and adopt that of the defendant and claim relief on that footing depends on the circumstances of the case.¹⁶ A plaintiff who fails to prove all the facts

9 *Rudra Pratap Narain Singh v. Gajraj Koer*, A 1935 Oudh 165, 152 IC 977.

10 *Hemchand v. Peareylal*, A 1942 PC 64.

11 *Sagar Mal v. John Carspiet*, 124 IC 187; *Bejoy Kumar v. Satish Chandra*, A 1936 Cal 382; *Mohammad v. Secretary of State*, A 1939 Lah 330.

12 *Waziran v. Rashidan*, A 1937 All 783, 172 IC 61.

13 *K. C. Bhaskaran Nair v. Carona Shoe Co. Ltd.*, A 1987 Ker 132.

14 *Biramchi Narayan Hadu v. Krishnapriya Debi*, A 1991 Orissa 55; *Siddique v. Saran*, A 1930 PC 57.

15 *Gapulal v. Dwarkadheeshji*, A 1969 SC 1291.

16 *Firm Srinivas Ramkumar v. Mahabir Prasad*, A 1951 SC 177 (permitted); *Mohan Manucha v. Manzoor Ahmad*, A 1943 PC 29 (permitted); *Nagendra v.*

alleged by him may yet obtain the whole or part of the relief if the facts pleaded by the defendant and found by the court show him to be entitled thereto. Thus where the plaintiff sued as assignee of mortgagee and the defendant pleaded that the assignment was sham and bogus, the court found that the assignment was made *benami* and plaintiff was a *benamidar*. The suit was decreed on the ground that a benamidar can always sue in his own name.¹⁷ In another case, plaintiff in a suit on a bond pleaded cash consideration and the defendant, while admitting execution, denied the receipt of cash and it was found that there was no cash consideration, the court held that relief could be given on the basis of admission of execution by the defendant.¹⁸ Where the plaintiff and the defendant had jointly executed a bond in favour of third party, and the plaintiff alone was compelled to pay the whole amount, he brought a suit for recovery of the whole amount from the defendant contending that the latter was the principal debtor and the plaintiff was a mere surety. Though this case was not established the plaintiff was allowed to recover a proportionate amount as co-debtor, as it was held that this alternative claim for contribution was impliedly covered by the pleadings.¹⁹

The plaintiff sued for recovery of Rs. 500/- said to have been advanced on receipt, but it was proved that there was no cash advance and defendant had promised to pay the plaintiff Rs. 500/- if the plaintiff

Pyari, 20 CWN 319, 21 CLJ 605 (not permitted); *Faizul Kamdar v. Hafiz Nazi*, 141 IC 769 (permitted); *Devanna v. Madappa*, 14 Mys. LJ 305 (permitted); *Lakshmi Kuttis v. Narain Pillai*, A 1968 Ker 57 (permitted); *Permanandas v. Shankar Path*, A 1951 Ori 11 (permitted); *Khali Panigrabi v. Kamla Devi*, A 1967 Ori 100 (permitted); *Kandaswamy Udayear v. T.S. Karuppudaya*, (1969) 2 MLJ 222 (partial acceptance of defendant's version, not permitted); *Sudarshan Trading Co. v. D'Souza*, A 1984 Karn 214 (Defendant's plea of lease different from the lease pleaded by plaintiff accepted, and relief granted: following *Kamalakashia Rai v. Keshava Bhatta*, A 1972 Ker 110, per *Krishna Iyer J.*: *Shikhar Chand v. Mst Bari Bai*, A 1974 MP 75 (permitted); *Ranjivaya v. Bala Pd.*, A 1978 Pat 91(permitted); *Syed Jaleel v. Venkata*, A 1981 AP 328 (permitted); *Ram Dayal v. Jummun Toy*, 14 Cal 791 (FB) (not permitted); *Govindsami v. Kandasamy*, 1956 (2) MLJ 578 (not permitted); *Lodd Bala Mukund Das v. Kothandapani*, A 1971 Mad 422 (not permitted).

17 *Narayan Rao v. Hanumant Rao*, 65 IC 503, A 1923 Nag 273.

18 *Bhikulal v. Ganpat Sita Ram*, 1941 NLJ 530, A 1942 Nag 12.

19 *Jayawickreme v. Amarasuriya*, A 1918 PC 287.

did not bid at an auction sale and the plaintiff kept to his agreement, the Nagpur High Court held that as the agreement was lawful, plaintiff should get a decree.¹ A plaintiff's case as laid in the amended plaint was that the Raja of Ajaiagarh had constructed the well and dedicated it to the public and that they and the *mohalla* people had been drawing water from the well since time immemorial. The plaintiffs failed to prove that well was constructed by Raja and was dedicated by him. They tried to fall back on customary right to draw water. The High Court did not accept the contention that the plaintiffs should be denied relief on technical construction of plaint.² In a case where plaintiff failed to establish the mortgage of occupancy holding set up by him relief was granted on the basis of a different mortgage set up by the defendant.³ In another case, when one party pleaded separation and the other jointness, the court held that there was reunion after separation.⁴ When the parties went to trial knowing full well what they were required to prove and adduce evidence of their choice in support of the respective claims and that evidence was considered by both the courts below, they cannot turn round and say that there was no proper pleading on that aspect.⁵ Though there is no specific pleading or issue whether the landlord bona fide needed the premises, when the parties adduced evidence on that issue, finding on that issue, cannot be interfered with on the ground of absence of pleading.⁶ In a recent decision the Supreme Court pointed out that want of pleadings or the raising of an issue would arise when a party has been put to prejudice. In a case where the facts are writ large and the parties go to trial on the basis that the claim of the other side is clearly known to them, we fail to understand as to how the law of pleadings would prejudice them.⁷

In a suit by the landlords the defendant's contention that there was only one landlord was upheld but the plaintiffs were not allowed to claim

1 *Mahafazul Rahim v. Babulal*, A 1949 Nag 113.

2 *Maheshwari Prasad v. Munni Lal*, A 1938 All 438.

3 *Shri Ram v. Thakur Dhan Bahadur Singh*, A 1965 All 223.

4 *Tukaram v. Govinda*, 95 IC 294, A 1926 Nag 385.

5 *Kali Caraseal Agarwalla v. Bharat Coking Coal Ltd.*, A 1989 SC 1530; *Bhagwati v. Chandrammal*, A 1966 SC 735.

6 *Sundar Singh v. Rajaram*, A 1991 MP 51; *Arvind v. Rear Admiral*, A 1985 Delhi 248.

7 *Bank of India v. Lekshmanidas*, 2000 (3) LW 346 SC.

that decree be passed in favour of one landlord on the admission of the defendant. It was observed that the defendant had set up a different contract of tenancy and plaintiffs could succeed on admission, only if liability was admitted without reservation.⁸

If neither party discloses the entire truth and the evidence adduced discloses a set of facts midway or different from the case set up by either party, the court is obviously bound to take notice of true facts and to give effect to legal rights which arise on that state of facts. Thus in a case the plaintiff claimed half share in a house alleging that it was joint property of his vendor and the defendant. The defendant's case was that the plaintiff's vendor had separated and lived in another house, that the defendant's grandfather lived in the house in suit, and that when it fell down, the defendant rebuilt it. The court found that the house had two portions, the front one occupied by the defendant's grandfather and the back portion occupied by the plaintiff's vendor, that the latter fell down and the plaintiff's vendor shifted to another village and defendant's grandfather built on the back portion more than 12 years ago. Held, that the suit could be dismissed on these facts.⁹

A plaintiff who claimed title by right of survivorship was not at a later stage permitted to claim decree as heir,¹⁰ nor was a plaintiff who based his suit wholly on the allegation that the suit land was a burning ground allowed to contend at the trial that the land was also a graveyard,¹¹ nor was a decree allowed on the ground of possessory title when the proprietary title on which the claim was based not proved,¹² nor was a plaintiff suing as trustee for P permitted later to take the stand that he was suing in his individual capacity.¹³ The decision of a case cannot ordinarily be based on grounds outside the plea of the parties and it is the case pleaded which has to be proved.¹⁴

8 *Parekh Bros v. Kartick Chandra Saha*, A 1968 Cal 532.

9 *Abdul Ghafoor v. Ram Sewak*, A 1925 Oudh 617.

10 *Kamalakant v. Madhvji*, 37 BLR 405, A 1935 Bom 343; *Thimmiah v. Narrayanappa*, 15 MysLJ 418.

11 *Ranglal v. Lakshmidhar*, A 1945 Pat 92.

12 *Redden v. Vadla*, A 1946 Mad 537; see however, *Karuppanam v. Sundara*, 1939 MWN 1179.

13 *Ram Chandra Das v. Hira Lal Modi*, A 1978 Orissa 172.

14 *Trojan & Co. Ltd v. Nagappa Chettiar*, A 1953 SC 235; *Raruha Singh v. Achal*

In the absence of pleading plaintiff was thus not allowed to rely upon an acknowledgement to save limitation,¹⁵ nor in a suit on the basis of title to contend in appeal that he was in possession and had rights under section 53A, Transfer of Property Act.¹⁶ The plaintiff was also not allowed to raise the plea of rights as a riparian owner in a suit for damages for diversion of water on the ground of title;¹⁷ likewise, a riparian owner claiming gradual accretion to his alluvial land was not allowed to turn around at the hearing and contend that he was the owner of the whole river bed including the area in suit.¹⁸

In a writ petition by a dismissed employee, who in his petition had denied the very factum of disciplinary inquiry, was not allowed to contend at the hearing that the procedure at the inquiry held had been illegal and that he had not been given proper opportunity to lead evidence.¹⁹ Where the husband had not put forward the plea of cruelty as a ground of relief in suit for dissolution of marriage under Hindu Marriage Act but included it later in replication which was filed after the wife had alleged that husband was having adulterous relations with his sister-in-law, no relief was granted on the ground of cruelty.²⁰ Such a course is indeed barred by O. 6, R. 7 which lays down that no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.¹ The court may, however in exceptional cases take into consideration even a plea taken in a rejoinder or replication though not taken in the original pleading even without amendment of the latter if it is satisfied that no prejudice was caused to the other party which went to trial with full knowledge of it.² It is nevertheless always advisable to seek

Singh, A 1961 SC 1097; *S. Venkappa Devadiga v. Mahendra Narayan Singh*, A 1981 Pat 133; *Kishorilal v. Chaltibai*, A 1959 SC 504.

15 *Ram Padarath Thakur v. Harinarayan Pd.*, A 1965 Pat 224; see however, *Vidya Nath v. Coal Purchase Co.*, A 1971 Pat 229.

16 *Illikkal Devasavom v. Potta Kokat*, A 1966 Ker 96.

17 *Siv Ranade v. Union of India*, A 1964 SC 24.

18 *Balsu Ramalakshamma v. Collector*, 26 IA 107, 22 M 464 (PC).

19 *Model Mills Nagpur v. State Industrial Court*, A 1967 Bom 382.

20 *Sulochna v. Ramkumar Chauhan*, A 1981 All 78.

1 *Viswapathi v. Venkata*, A 1963 AP 9 (DB) (para 20).

2 *Sri Subramania Pandarasannadi v. State of Madras*, A 1965 SC 1578.

a formal amendment of the original pleading instead of being content with an averment in such supplementary pleading.

In a suit for declaration and injunction, and in the alternative for possession, the plaintiff alleged that during his minority his mother was the guardian but in evidence he introduced his uncle-in-law as the person factually looking after his property. This variation between pleading and proof was discredited.³ A plaintiff claiming title under a sale-deed, which the defendant pleaded was bogus, and the plaintiff could not prove, was not allowed a decree on the ground that he was *benamidar* for his vendor.⁴ Where a plaintiff failed to prove the case of negligence set up by him, he was not allowed in the Appellate Court to ask the court to find negligence established on quite different *species facti*.⁵

In a suit based on pronote, defendant pleaded want of consideration, the consideration being unlawful and against public policy. The defendant's evidence related to some sort of breach of contract. This was held to be at variance with the defence and prejudicial to the other party.⁶ Where the pedigree though made part of the plaint, was not denied by the defendant, the defendant was not allowed to succeed on the basis that the pedigree was incorrect.⁷ In a Calcutta case, the plaintiff simply denied the genuineness of a deed of gift, but the trial court, while holding the document proved, rejected it on the ground that the transaction was extremely questionable. It was held on appeal that forgery and fraud being different pleas, the court should not have rejected the deed on ground not set up by the plaintiff.⁸ Where the plaintiff alleged definitely a contract of particular date, he was not permitted to prove a contract of a different date.⁹ When a sum is claimed as *Lambardari Haq*, it cannot be decreed as *Mukaddami Haq*.¹⁰ In a suit for rent on the ground of *Kabuliyat*, where the *Kabuliyat* could not be proved the plaintiff was not allowed in second appeal to

3 *Hadu Parida v. Sama Govinda Misra*, A 1970 Ori 32.

4 *Bhushanchandra v. Manujendra Dut*, A 1940 Cal 148.

5 *Raymond v. Alice*, 63 MLJ 275, A 1932 PC 95, 136 IC 151.

6 *Indermal Tekaj Mahajan v. Ram Prasad Gopi Lal*, A 1970 MP 40.

7 *Mazhar Ali v. Gulam Murtujah*, A 1958 AP 8.

8 *Kalamjan v. Sahajana*, 111 IC 746, A 1929 Cal 77 DB.

9 *Jugal Kishore v. Parasral*, A 1930 Lah 325.

10 *Bani Bai v. Mahadeo*, 106 IC 659 Nag.

support his claim on the principle of part performance.¹¹ In such a case, there is a conflict of an opinion on whether he can get a decree for damages for use and occupation without amending the plaint.¹² An ejectment suit on the basis of relationship of landlord and tenant where such relationship is denied and remains not proved by the plaintiff, but the plaintiff's title is established and the defendant's adverse possession for the requisite period is not shown, the court can decree the suit for possession if the defendant is not taken by surprise and matters regarding title are substantially touched in the issues and evidence thereon has been led without objection.¹³

It cannot, however be granted where no evidence was adduced nor issue raised on the question of title.¹⁴ In the undernoted case,¹⁵ even though the suit against a tenant for ejectment was dismissed a decree for rent from the date of suit to the date of decree was passed in order to avoid multiplicity of suits.

The Patna High Court has held that where the defendant pleaded an express contract of waiver of enhancement, and failed to prove it, the court cannot infer waiver from other circumstances.¹⁶ Similarly, where plaintiffs definitely alleged that contracts were signed by B under express authority of the proprietors, it was held that they could not subsequently allege that B must be taken to have implied authority on behalf of the proprietors to enter in the contract.¹⁷ These decisions may, however, require reconsideration in the light of the undernoted decision of the

11 *Ganga Prasad v. Sukhdeo Sahu*, 100 IC 566 All.

12 *Triveni v. Ram Dass*, 105 IC 34 Nag (Yes); *Rangaraju v. Gedala*, 97 IC 935, A 1926 Mad 107 (No); *Paturi v. Ganapati*, A 1949 Mad 421 (No); *Bochoo v. Mohd. Umrao*, A 1940 Pat 555 (No but amendment may be allowed); *Kirpa Shanker v. Janki Pd.*, A 1942 Pat 86 (No).

13 *Bhagwati Prasad v. Chandramaul*, 1966 ALJ 799 (SC), A 1966 SC 735; *Abdul Ghani v. Mst. Babui*, 25 A 256 FB; *Balmukund v. Dalu*, 25 A 498 (FB); *Ponniah Pillai v. Pannani*, A 1947 Mad 282; *Jamaluddin v. Qazi Zamirul Hasan*, 1984 All LR 329; *Amulya Ratan v. Kali Pada*, A 1975 Cal 200 (Tenancy alleged in plaint not proved; ejectment as rank trespassers upheld).

14 *Kazi Taufiqur Rahman v. Elachi Bibi*, A 1973 Gau 139.

15 *Chiranjilal v. Ghanshyamdas*, 1983 MPLJ 595 (relying on *Girdharilal v. Hukam Singh*, A 1977 SC 129, (1977) 3 SCC 347).

16 *Kamandas v. Radhika*, A 1929 Pat 717.

17 *Ralli Bros v. Firm Bhagwandas*, A 1945 Lah 35.

Supreme Court¹⁸ in which it was held that where compensation is claimed under an oral contract for work done for the defendant, and such oral contract is not proved, the court can grant compensation under section 70, Contract Act, on the basis of an implied contract. The Privy Council also, in a suit to enforce a mortgage where the mortgage was discovered after the institution of the suit to be void, granted relief under section 65, Contract Act, by way of restitution, although section 65 was not pleaded as a separate ground of claim in the plaint. Their Lordships held that a defendant who when sued for money lent pleads that the contract was void can hardly regard with surprise a demand that he restored what he received there under. They added that by allowing the plaintiff relief under section 65 no injustice could result to the defendant; on the contrary not to allow it would hardly be just.¹⁹

Their Lordships of Privy Council held in a case that a court has no jurisdiction, without amendment of pleadings, to consider and grant a declaration on the basis of a question which is not only in issue but which the party was precluded from argument due to his admission.¹ A party can only succeed on what was alleged and proved (“*Secundum allegata et probata*”). This is based mainly on the principle that no party should be taken by surprise by the change of case introduced by the opposite-party.² A party is, therefore, expected and is bound to prove the case as alleged by him and covered by the issues.³ Having claimed a property as personally belonging to him, plaintiff was not allowed to claim it as one of the members of Joint Hindu family when he was not the manager of the family.⁴ The ordinary rule is that evidence is to be given on a plea properly

18 *Subramanyam v. Thayappan*, A 1966 SC 1034; see also *Aries Advertising Bureau v. C.T. Devaraj*, A 1995 SC 2251 (on facts section 70 Contract Act found not applicable).

19 *Raja Mohan v. Manzoor Ahmed*, A 1943 PC 29 (See however, *Murlidhar v. International Film Co.*, A 1943 PC 34, in which case while a claim for restitution u/s 64, Contract Act was permitted to be raised amendment was insisted on, so that the defendant could claim equitable set off).

1 *Attorney General of Colony of Fiji v. J.P. Bayly Ltd.*, A 1950 PC 73.

2 *Indermal Tekaj Mahajan v. Ram Prasad Gopi Lal*, A 1970 MP 40.

3 *Bhohimder Singh v. Charan Singh*, A 1950 EP 256; *Afsar Sheikh v. Sulaiman Bibi*, A 1976 SC 163.

4 *Allam Gangadhaera Rao v. Golapalli Gangarao*, A 1968 AP 297.

raised and not in contradiction to it.⁵ The true scope of the rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another issue which was not in the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to case where parties go to trial with the knowledge that a particular question is in issue though no specific issue has been framed thereon and adduce evidence thereon.⁶

However, plea about the non-maintainability of a suit can be accepted without any specific plea or any precise issue.⁷ In another case where conflicting claims were set up by the parties on the basis of two sale-deeds, the Supreme Court held that the court could hold that one of the sale deeds was contingent and was to take effect if the other sale was not completed, though there was no such plea.⁸

Every Variance not Fatal: But the only reason for this rule being that a party will be seriously prejudiced if his opponent is allowed to substantiate a case different from that pleaded,⁹ every variance between pleading and proof is not necessarily fatal,¹⁰ and a slight variance will not be regarded as such.¹¹ When the plaintiff claimed a house on the basis of a *patta* standing in his name and alleged that consideration was paid by him, he could be allowed to prove that though consideration was not paid by him, he was entitled to the house.¹² Where the plaintiff wife in the plaint alleged that the purchase money for the suit property was paid by her, but in evidence she stated that the purchase money was jointly paid by her

5 *Mohan Lal v. Anandi Bai*, (1971) 1 SCC 813; *Chandra Das v. Hiralal Modi*, A 1978 Ori 172.

6 *Nagu Bai v. Shama Rao*, A 1956 SC 593; *Kunju Kasavan v. M.M. Phillip*, A 1964 SC 164; *Union of India v. Khes Karanapura Colliery Ltd.*, (1968) 3 SCR 784 (*re* : writ pleading.); *Kali Prasad v. Bharat Coking Coal Ltd.*, A 1989 SC 1530; *Rajbir Kaur v. S.Chokosin & Co.*, A 1988 SC 1845; *Ram Sarup Gupta v. Bishun Narain Inter College*, A 1987 SC 1242.

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

8 *P.V. Ayyappa Reddian v. Ayyapan Janardhan Pilla*, A 1971 SC 2092.

9 *Gendi v. Joynal*, 26 CWN 294, 64 IC 565, 35 CLJ 103.

10 *Bankey v. Gudo*, A 1930 Pat 476; *Krishnaji v. Secretary of State*, A 1937 Bom 449; *Balram Das Agarwal v. Kesar Dev Khemka*, 71 CWN 51.

11 *Gulam v. Azim Bibi*, 139 IC 662, A 1932 Lah 570.

12 *Bhim Singh v. Kan Singh*, A 1980 SC 72.

and her husband out of her fund, it was held that as it is not uncommon to find husband effecting actually the operations on behalf of his wife, the plaintiff could not be non-suited on account of this variation in pleadings and proof.¹³

Every variance should be carefully watched to see that the opposite party is not taken by surprise,¹⁴ as in all such cases, the real test is whether the other party has been taken by surprise,¹⁵ and where there has been no surprise and parties have understood what each wanted to prove and what the real issue was and justice is better done by deciding the case on the merits as presented by the parties, this technical rule need not be enforced¹⁶ and the defect in pleading may be remedied by amendment, if necessary.¹⁷ The Supreme Court has held that the doctrine that relief should be founded on the pleadings of the parties should be applied in the light of the principle that considerations of form cannot override legitimate considerations of substance. Therefore, if a plea, though not specifically made, is yet covered by an issue indirectly or by implication and the parties knew that the plea was involved in the trial and led evidence about it, the objection that it was not pleaded is not maintainable.¹⁸ On this principle, on failure of proof of tenancy a suit for possession was decreed on the ground of defendant's possession being by leave and license, as appearing even from defendant's stand.¹⁹

The Patna High Court has held that a plea not raised in pleading may be entertained at a later stage, sometimes even in appeal, provided there is no prejudice to the other party and all material facts to supply the basis of the plea are already on record.²⁰ Where even though a plea was not set

13 *Bhupendra Kumar R. Parikh v. M.K. Lakshmi*, A 1990 Mad 46 (DB).

14 *Danmmu v. Narasingha*, A 1940 Pat 187.

15 *Ratanshani v. Bannuji*, A 1925 Nag 434; *Krishnaji v. Secretary of State*, A 1937 Bom 449; *Chabial v. Jharulal*, A 1971 Cal 540.

16 *Ananda Chandra v. Brojalal*, 50 C 292, A 1923 Cal 142 (DB); *Jugal Kishore v. Gomti*, 25 IC 280 All; *Ghulam v. Mahomed*, 144 IC 467, A 1933 Lah 342; *Ramdas Trust v. Damodar Das*, 1967 Raj LW 273; *Arvind Berry v. A.P.S. Bindra*, A 1985 Del 248.

17 *Motabhoy v. Mulji*, 13 ALJ 529, 39 B 339, 17 BLR 460, 17 MLT 402.

18 *K.C. Kapoor v. Radhika Devi*, A 1981 SC 2128, (1981) 4 SCC 487 (para 37).

19 *Bhagwati Pd. v. Chundramaul*, A 1966 SC 735.

20 *Vaidya Nath Sahai v. Ram Badan Singh*, A 1966 Pat 383; compare, *Kundan v. Kanhaiya*, A 1953 HP 91.

up in the pleading, the pleader for the party setting it up openly declared at the trial, to the knowledge of the other party, his intention to produce evidence in proof of that plea, the other party produced rebutting evidence, and the trial court considered and decided it, it has been held that the appellate court cannot shut its eyes to such a plea simply because it was not taken in the pleading.¹ The better procedure, however, is that the Judge should insist upon an amendment of the pleading and if necessary should direct further issues to be raised and further opportunity to be given to the other party to meet the altered case.² In case where the plaintiff raised a new case at the time of the hearing and led evidence in support of such new case and the defendant did not ask for an adjournment to rebut the new case set up by the plaintiff, it was held that the decision on such a new case was not vitiated.³

In a suit for declaration that an adoption made by the plaintiff, a widow, was null and void on the ground of fraud, it was alleged that she was made to sign the adoption deed on the representation that *pattas* had to be written, and she, relying on the word of the defendant who used to look after her business, and in the absence of any independent advice, signed the deed. It was held that the court could give relief even if it found a case of undue influence established instead of fraud.⁴ Where plaintiff sued on the ground of title as owner, the court gave him a decree on the ground of possessory title when it was satisfied that the defendant was not taken by surprise and had a fair and adequate opportunity to meet the case,⁵ but not when defendant is taken by surprise.⁶ In a suit for prompt dower based on an express agreement, the question whether the court could pass a decree on the basis of Muhammadan Law or custom even if the agreement was not proved is the subject of conflicting decisions.⁷ The

1 *Satgur v. Har Narayan*, 111 IC 817, A 1929 Oudh 44; *Budhulal v. Ram Sahai*, 9 OWN 523, 138 IC 808, A 1932 Oudh 244; *Goodhan v. Ali Bux*, A 1981 Raj 206.

2 *Nagardas v. Vali Mohd.*, 32 BLR 454.

3 *B.N. Railway v. Moolji*, A 1929 Cal 654; *Murtu v. Giari*, 1972 SLJ 209.

4 *Narayan Bhat v. Akkerbai*, 33 IC 576, 18 BLR 27; see also *Mohammad Ibrahim v. Umutulla*, 39 IC 798.

5 *Karuppanan v. Sundara*, 1939 MWN 1179, 110 LW 65.

6 *Kalulal v. Mannalal*, A 1976 Raj 108; see also *Reddem v. Vadla*, A 1946 Mad 537.

7 *Mahbuban v. Muhammad*, 8 Pat 645, 117 IC 207, A 1929 Pat 207 (Yes); *Bhuri v. Asghari*, 94 IC 959 Lah (No).

High Court of Madras has however taken the view that whether the parties are Shia or Sunni, dower must be presumed to be prompt unless payment of the whole or any part of the dower is expressly postponed.⁸ Where plaintiff claimed title to land as reformation *in situ* the court gave him a decree on the ground of accretion.⁹ Where the defendant pleaded *res judicata* which is only a plea of estoppel by judgement, but circumstances disclosed on the record made out another species of estoppel, there may be no reasonable ground for refusing relief to him.¹⁰

In a suit for declaration that certain property belonged to A, having been allotted to him under a partition with his brother B, the defendant, a creditor of B, pleaded that it had been allotted to B. Both parties failed to prove their case and the court held the property to be joint. The Nagpur Court held that the relief could be given on this finding.¹¹ Where the question of adverse possession was not raised in the written statement but was urged without objection by the plaintiff in the trial court as well as in Appellate Court, no objection to the determination of that question could be taken in second appeal.¹² But this cannot always be allowed, especially when the plaintiff cannot get full relief against the defendant without impleading a new defendant.¹³ Where a suit was brought under Section 68 (c), Transfer of Property Act, for mortgage money and it was found that there was an express provision for sale in the deed and the suit for sale could not otherwise be met on facts or law, it was held that it would be proper for the court, even in second appeal, to avoid multiplicity of suits, to grant a decree for sale under clause (a).¹⁴

In a suit against the Secretary of State for damages for breach of contract, the defence denied that the plaintiff had any legal claim or right, and the absence of a valid contract as required by Section 30(1)¹⁵

8 *Sheikh Md v. Ayesha Beevie*, 1937 (2) MLJ 779.

9 *Sarat Chandra v. Bhupendra*, 56 CLJ 263.

10 *Chiranjilal v. Ram Kanwar*, A 1948 EP 26; *Zingu v. Mahadeo*, A 1948 Nag 358; compare, *K.C. Kapoor v. Radhika*, 1981 SC 2128 (plea of estoppel implied).

11 *Behari Lal v. Gore Lal*, A 1926 Nag 203, 90 IC 263.

12 *Sharavan v. Fattu*, 98 IC 911, 29 BLR 1357.

13 *Shib Ram v. Fakira*, 89 IC 103 All.

14 *Ramkumar v. Mahipal*, A 1928 All 188, 174 IC 292.

15 Now Art. 299, Constitution of India.

Government of India Act was not expressly pleaded, it was held that the latter plea could be allowed to be raised in appeal and could be made the basis of the decree.¹⁶ In a suit for declaration of title based on a written conveyance, the writing was held to be inadmissible for want of registration and suit was therefore dismissed, though it was proved that plaintiff had paid the price and was in possession. The Lahore High Court held that plaintiff should have amended his plaint by changing the cause of action from one based on an actual transfer of title to one based on part-performance under a personal contract but that the absence of this amendment was not fatal and that the plaintiff should get a decree for declaration that he was lawfully in possession of the property which was delivered to him and over which he had a lien for purchase money paid by him.¹⁷

In a money suit, there was no averment in the plaint in what manner the suit was within time and how limitation was saved. However, one of the dates in the paragraph stating the cause of action was the same as the date of acknowledgment. There was also an issue whether the suit was barred by limitation. The Patna High Court, while rejecting the contention that the absence of a specific averment in the plaint that limitation was saved by acknowledgment, held that such an absence was a mere irregularity which caused no prejudice to the defendant.¹⁸

As a general rule a party to a suit can only succeed on the strength of his own case as made out expressly or impliedly in the pleading. He may also succeed on the basis of admission of his adversary but he cannot be allowed to take advantage of the weakness of the other party's case to his prejudice. Even though the plaintiff fails on the case that he made out in his plaint, he can still succeed on the case where liability is clearly admitted by the defendant without reservations.¹⁹ Where the pleadings on a particular point were vague, but all facts were before the High Court, and the particular aspect of the case was fully argued without objection and the High Court considered and decided the point; the objection for

16 *Krishnaji v. Secretary of State*, A 1937 Bom 449.

17 *Shankri v. Milka Singh*, A 1941 Lah 407.

18 *Vidya Nath Mandal v. The Coal Purchase Company*, A 1971 Patna 229; see however, *Ram Padarath v. Harinarayan*, A 1965 Patna 224.

19 *Parekh Bros v. Kartic*, A. 1968 Cal 532

consideration of the point was not permitted by the Supreme Court.²⁰ No court has power to set up a new case for a party not involved in the pleadings, much less an inconsistent case. There must always be some foundation in the pleas in order to enable the court to grant a relief.¹

A plaintiff shall succeed or fail on the basis of his own pleadings and evidence and not on the basis of any mistake committed by the defendant.² The court cannot make out a case inconsistent with the claim or the defence.³ But in applying this rule not merely the relief clause but the whole plaint should be seen and the court should look at the substance and not merely the form.⁴ A mere mention of a wrong provision of law is not, however, a good ground for refusal of relief if it can be granted under the correct provision.⁵ A lesser

20 *Union v. Khas Karanpura & Co.*, A 1969 SC 125.

1 *Srinivas Ramkumar v. Mahavir Prasad*, A 1951 SC 177; *Nirakar Das v. Gourihari Das*, A 1995 Ori 270.

2 *Kannu Reddiar v. Palanirajan*, 1996 (1) MLJ 118 (Mad) (DB).

3 *Sheodhani Rai v. Suraj Prasad Rai*, A 1954 SC 758; *Kuppala Obul Reddy v. Narayan Reddy*, (1984) 3 SCC 447 (para 15); see also, *Maung Sin v. Maung Byang*, A 1941 PC 51 (Relief adjusted on issues indirectly raised in pleadings); *Appa Trimbak v. Waman Govind*, A 1941 PC 85 (As respondent not represented, it was not considered right to determine any matter not strictly within the pleadings and issues as they stood); *Nawab Ibrahim v. Umeatul Zohra*, 19 All 267 PC; *Lutifulallah v. Mohd. Siddiq*, A 1946 Sind 117 (case law discussed).

4 *Janakirana Iyer v. Nilkanta*, A 1962 SC 633; *Kedar Lal v. Hari Lal*, A 1952 SC 538; *C. Abdul Shakoor v. Arji Papa Rao*, A 1963 SC 1150; compare, *Shipping Corporation v. Nissar Export Corporation*, (1981) 1 SCC 564 (whole of written statement seen for holding that a particular averment of plaint was denied though inadvertently particular para not mentioned as denied).

5 *Raja Shatrunji v. Azmat Ali Khan*, 1971 Rev. Decns. (UP) 197 SC (Application given under wrong provision treated as under correct provision) compare, *Titaghur Paper Mills v. Orissa State Electricity Board*, (1975) 2 SCC 436; *Malik Ahmad Wali Khan v. Shamsi Jehan Begam*, 28 All 482, 33 IA 81 (PC); *Shanti Devi v. Amar Kumar Banerjee*, (1981) 2 SCC 199 (para 4) (wrong averment of law cannot alter true character of deed); *Haji Abdulla H.A.S. Dharmasthapanam v. T.V. Hameed*, A 1985 Ker 93 (DB) (where the substance of a section is disclosed in the pleading, omission to mention Section is immaterial); *S. Mallaiiah v. Eisther*, 1994(2) ALT 356 (AP) (DB); *M. Seshireddy v. Subba Reddy*, 1995(3) ALT 635 (AP) (Quotation of wrong provision of law is no ground for rejection of a petition. It is the substance and not the form which has to be seen); *Yashoda Devi v. B. Dayakar Reddy*, 1994 (3) ALT 10(DB).

relief than one claimed can always be granted⁶ unless it would be inconsistent with the plaintiff's pleading or would cause prejudice to defendant.⁷ Where necessary facts have been stated in the plaint, the court can grant appropriate relief even though the relief in the plaint may have been inartistically drafted.⁸ It is the duty of the court to mould the relief to be granted to the parties according to the facts proved, which, however, should not be inconsistent with the pleadings.⁹

Court not to Set up New Case : The court should, however, not set up an entirely new case which was never presented by the parties, nor should draw an inference inconsistent with the case set up by the parties,¹⁰ but the determination of the case should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made.¹¹ Where a claim has never been made in the defence presented, no amount of evidence can be looked into upon a plea which has never been put forward.¹² As this principle applies even at the trial stage, undoubtably such a new question of fact could not be entertained at any appellate stage.¹³ The rule applies to the appellate as well as to the trial court and it has been held that a conclusion of the Appellate Court which is based on

6 *Ashok Kumar v. Usha Rani*, (1985) 1 CCC 113 (Delhi); *Laxman v. Gangabai*, A 1955 MB 138.

7 *Ammalu v. Namagiri*, A 1918 Mad 300, 43 IC 760.

8 *Babulal v. Bindhyachal*, A 1943 Pat 305.

9 *Mehar Chand v. Milkhiram*, A 1932 Lah 401 (FB); *Kesavelu Naidu v. Doraiswamy Naidu*, 1958 (2) MLJ 189.

10 *Malaraju v. Venkatadri*, 59 IC 767, 19 ALJ 97, 33 CLJ 171, 40 MLJ 144, 23 BLR 713 PC; *Ramjiwan v. Mt. Maharani*, A 1936 Nag 295; *Arb Jhanglu v. Panjalshah*, A 1938 Sind 198; *Deo Narain v. Kamta*, 171 IC 174, A 1937 Nag 143; *Gopalsingh v. Sheokumar*, 169 IC 954, A 1937 Nag 85; see however, *Beharilal v. Gorelal*, A 1926 Nag 203; *Sheodhari v. Suraj Prasad*, A 1954 SC 758; *Gobind Prasad v. Mst. Kulwanti*, A 1985 Pat 31 (see also Chap. XIV under heading "Court's power to grant different relief")

11 *Isharchander Singh v. Shamacharan*, 11 MIA 7 at 20; followed in, *Kanda v. Waghlu*, A 1950 PC 68 (para 11).

12 *Siddi K. Mohd. Shah v. M.I. Saran*, A 1930 PC 57; *Ishar Fatima v. Anwar Fatima*, 182 IC 801 (2), A 1939 All 348; *Chander Kali Bai v. Jagdish Singh*, A 1977 SC 2262, (1977) 4 SCC 402.

13 *Bhagat Singh v. Jaswant Singh*, A 1966 SC 1861; *Bachan Singh v. Dhain Das*, A 1974 SC 708; *Chander Kali v. Jagdish Singh*, A 1977 SC 2262.

nobody's pleading and on nobody's responsibility for any such pleading cannot be supported in second appeal,¹⁴ and where a plea of joint family status was not raised in the plaint but was entertained in appeal for the first time, the High Court interfered in second appeal.¹⁵ Where a suit for partition on the allegation that the parties were members of a joint Hindu family was dismissed on the ground that there had been separation, the Appellate Court refused to allow a decree on the basis of an agreement under which plaintiff was entitled to a share.¹⁶

In a case where the only issue was one of priority between a mortgage and a *takavi* advance, the court was held to be wrong in holding that the *takavi* had not been given for the benefit of the property,¹⁷ a point never raised by the parties. In another case, a zamindar sued for possession, alleging that W was his tenant who had lost his right as he had sold his holding. Defendant pleaded that it was W's father who was the original tenant, and as his other heirs were still tenants, the zamindar had no right of re-entry. The court found that W's father was the tenant but that by subsequent conduct on the part of the other heirs, W alone had become entitled to the holding. It was held that the court was not entitled to set up this new case.¹⁸ Where the plaintiff sued for joint possession alleging that his cattle grazed on the land, and the court, finding the title not proved, gave a decree for grazing rights, it was held that such an inconsistent case could not be established.¹⁹ Similarly, a finding that the plaintiff was an occupancy tenant in a suit in which he had pleaded that he was a subordinate tenure-holder was not held good.²⁰

In suit for declaration of a customary right of taking out a procession with music, decree was not given on the basis of common law right of a citizen when the plaintiff failed to prove the pleaded customary right.¹ If a similar claim is based on easement, decree cannot be given on the ground

14 *Joti Prasad v. Baru Singh*, 132 IC 426, A 1931 All 219.

15 *Gauri Shankar v. Thakur Mewa Ram*, A 1931 All 600, 131 IC 513.

16 *Narayanamurti v. Satyanarayna*, 168 IC 98, A 1937 Mad 122.

17 *Munshi Babu Ram v. Babu Ram*, 66 IC 620, 9 O LJ 343.

18 *Joad Ali v. Srimati Rai Kishori*, 85 IC 753 Cal.

19 *Mahmood Shah v. Fatha*, 53 IC 43 Lah.

20 *Badr-ud-din v. Herajatulla*, 54 IC 979 Cal.

1 *Muchumarri v. Yerravullu*, 93 IC 226 Mad.

of customary right.² Where in a suit for demolition of defendant's wall built in front of plaintiff's door, the plaintiff could not prove his easement of way through that door, the court was held not entitled to declare that the plaintiff could open another door as easement of necessary.³ In a suit for possession of a *takia*, well and mosque on the ground of ownership being dismissed, plaintiff was not allowed to plead in appeal that the property was *waqf* and that he was the *mutawalli*,⁴ nor was a plaintiff who sued as a *mutawalli* for possession of a mosque property wrongfully alienated, allowed a decree on the ground that he was a worshipper, on failure to prove that he was a *mutawalli*.⁵ Where in a case under section 3 Charitable and Religious Trusts Act, the applicant alleged that a certain *math* was a public endowment and a certain temple situate within its precincts was a public temple, and the non-applicants did not dispute these facts, the court was not competent to hold on the evidence of some witnesses that the temple was under the control and management of the *mahant* of the *math*.⁶ In a Punjab case, the plaintiff claimed as donee from the owner or by adverse possession, and the court found that he was donee from the widow of the owner's son, who had herself taken possession without title, it was held that the plaintiff could not rely on adverse possession of the widow followed by his own adverse possession.⁷ Where an estoppel was pleaded on the basis of a particular compromise, the court could not find an estoppel on the basis of another compromise.⁸ Where defendant did not plead waiver, held that it was not proper for the court to base its judgment on any such hypothesis.⁹ A new plea regarding waiver is not ordinarily allowed to be taken for the first time in argument if it is not raised in the written statement.¹⁰

Where plaintiff sued as partner, which fact was found against him, he could not succeed on the ground that he had obtained the right of a partner

2 *Baldeo Bind v. Sheikh Abdul Aziz*, A 1948 Pat 425.

3 *Laldin v. Abdul Ghani*, 8 LLJ 547, 27 PLR 771, 99 IC 922, A 1927 Lah 36.

4 *Sharaf Din v. Mokham*, 33 IC 748; *Pitam v. Kallu*, 42 PLR 94.

5 *Debendranath v. Shefatulla*, 99 IC 205, 42 CLJ 339.

6 *Ram Kishorelal v. Kamalnarain*, A 1947 Nag 87.

7 *Jhanda Mal v. Gopal Das*, A 1925 Lah 519.

8 *Shera v. Gahana*, 106 IC 474 Lah.

9 *Mukat v. Gulab*, 1931 ALJ 363, A 1931 All 229, 131 IC 422.

10 *State of Bihar v. S.S. Devi*, A 1972 Pat 220.

by assignment.¹¹ In a suit by a commission agent against the State and the principal for price of the goods seized by the government, the agent did not claim lien over the goods in the plaint. It was claimed in arguments in Supreme Court but the argument was not accepted as it amounted to variance between pleading and proof.¹²

Where the plaintiff brought a suit for account against the defendant as agent in respect of a partnership transaction, the court was held incompetent to give a decree for account of partnership on the finding that the plaintiff and defendant were partners.¹³ Similarly, in a suit for dissolution of partnership a decree for partition was not passed.¹⁴ A plaintiff brought a suit for challenging a widow's transfer on the allegation that he was the next reversioner. It was found that there was a nearer reversioner. The plaintiff was not allowed to rely on the latter's alleged refusal to sue,¹⁵ or, on his collusion with the widow.¹⁶ A plaintiff having alleged a particular custom, was not allowed to prove another custom.¹⁷ In a suit to set aside a decree on the ground of guardian's fraud and collusion, the court was held incompetent to consider the guardian's negligence, when fraud and collusion were not proved.¹⁸ When a wife brought a suit for maintenance on the ground of her chastity and her husband's misconduct and both were disproved, she was not allowed to fall back on a plea of her infidelity and subsequent reformation which was neither advanced nor supported by evidence.¹⁹ Where a plaintiff admitted that a certain deed was merely an agreement for sale and set up a subsequent oral sale, held that it was not open to the court to hold contrary to the pleadings that the deed was a complete sale.²⁰

11 *San Kauk v. Maung Po*, 101 IC 367, 5 Bur LJ 233.

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

13 *Krishnaswami v. Jayalakshmi*, 54 M 671, 31 MWN 497, 130 IC 766, 60 MLJ 315, A 1931 Mad 300.

14 *Tajammul Husain v. Ahmad Ali*, 167 IC 839, A 1937 Oudh 438.

15 *Sitasaran v. Jagat*, 102 IC 296 All.

16 *Bigan Kuer v. Radha*, A 1950 Pat 585, 190 IC 196.

17 *Mohammad Masooq Ali v. Harunnissa*, 114 IC 113, A 1926 Oudh 204.

18 *Bhaglu v. Ram Avtar*, 162 IC 178, A 1936 Pat 442.

19 *Jeeva Ammal v. Ranganatha*, 50 LW 200, A 1939 Mad 788.

20 *Jiwan Mal v. Allah Jawaya*, A 1931 Lah 595, 133 IC 646.

The rule, generally speaking, is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet.¹ But when the alternative case which the plaintiff could have made was not only admitted by the defendant in his written statement but was also expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes.² Again, the court can and ought to take notice of the altered circumstances since the institution of the suit and mould the relief accordingly in order to shorten litigation and to do complete justice between the parties.³ Even the appellate court can do so under O. 41, R. 33 (*This topic is elaborated later in this chapter under the heading 'Subsequent Events'*).

A plaintiff setting up an easement cannot in second appeal set up a grant or custom as the basis of his claim.⁴ A dispute between the plaintiff and his brother's widow in mutation proceedings was settled by an agreement that the widow should take 1/4th share. Afterwards the plaintiff sued the widow for recovery of possession of the 1/4th share on the ground of title, ignoring the agreement. The lower court maintained the agreement and dismissed the suit. The plaintiff was not allowed to argue in appeal that under the agreement itself the widow had only a life interest.⁵ In a suit for enhancement of rent the plaintiff alleged a customary rate but failed to prove it. He was not allowed to ask the court to determine a fair rent.⁶ In a case plaintiff sued for recovery of deposit alleging several previous demands without specifying any dates and a final demand within three years of suit but defendant denied the deposit and also all demands. On the plaintiff's witness stating in cross-examination that a demand was

1 *Mohanlal v. Anandibai*, (1971) 1 SCC 813; see also, *Kaniz Fatima v. Shah Naim Ashraf*, A 1983 All 450; *Babulal v. Motilal*, A 1984 All 378.

2 *Srinivas Ramkumar v. Mahabir Prasad*, A 1951 SC 177; (see Chapter VII ante and other decisions cited on this topic in this Chapter earlier).

3 *Satish Chand v. Govardhan Das*, (1984) 1 SCC 369 (para 5); relying on *Pasupuleti Venkateshwarlu v. Motor & General Traders*, A 1975 SC 1409, (1975) 1 SCC 770; *Rameshwar v. Jot Ram*, A 1976 SC 49.

4 *Ganpat v. Lalman*, 100 IC 21 Nag.

5 *Ram Charan v. Mst. Sartaji*, A 1926 Oudh 22, 90 IC 766.

6 *Satindra v. Bama Sundari*, A 1926 Cal 432, 88 IC 512 (DB).

made more than three years ago, the court dismissed the suit as time-barred. It was held that the court had no power to do so.⁷

Where the illegality of a transaction was shown to the court, the Madras High Court refused to give relief on it even though the illegality was not pleaded,⁸ or the objection was taken at a very late stage.⁹ Similarly, where illegality appeared from plaintiff's own admission, it was held that the court was bound to take notice of it.¹⁰ But in a suit for royalty at increased rate which was payable only in a certain contingency, the defendant who had made payments at that rate for some time but who denied his liability to increased rate and claimed that the over-payments should be set off against the money really due, was not allowed to set up the nature of the mistake under which the payment was made as he had not specifically pleaded that the payment was made under a "mistake of fact".¹¹

It has been held by Nagpur High Court that if there is any question of statutory requirement which compels the doing of a thing, the courts must take note of that fact, even though not pleaded.¹² In another case, the Madras High Court held that if the facts found by court give rise to a particular situation in which the law provides that certain consequences should follow, the court should apply the law though the parties did not specifically raise the plea. In that case in a suit against three persons on a pronote one defendant denied execution but the other two admitted it, setting up other defence, and the court found the signature of the former to have been forged, it was held that the whole pronote became void under section 87, Negotiable Instruments Act, and no decree should be given even against the other two defendants.¹³

7 *Puttu v. Vidya Ram*, A 1934 All 10.

8 *Lakshmiyya v. Murahari*, A 1930 Mad 547.

9 *Abdulla v. Guruappa*, A 1944 Mad 387.

10 *Alice Mary Hill v. Clarke*, 27 A 266, 1 ALJ 632; *Mulchand v. Khem Chand*, 118 IC 202 Sind.

11 *Shiva Prasad v. Maharaja*, A 1943 Patna 327.

12 *Radha Kisan v. Jamna Das & Co.*, ILR 1941 Nag 702.

13 *Rangayya v. Sundaramurty*, A 1943 Mad 511; compare, *State of Madhya Pradesh v. Forest Product Co.*, 1984 MLPJ 431 (where necessary facts regarding illegality of contract are available in plaint itself, defendant can rely on it even though plea of illegality not raised in written statement; case law discussed).

In the case where the plaintiff had put in the plaint all the facts on which he based his claim without deducing the legal position properly from those facts and thus based his suit on a wrong cause of action it was for the court to apply the correct legal principles and give the plaintiff that which is due to him.¹⁴ In an English case although the plaintiff had filed the suit on a plea of negligence and had failed to establish negligence, yet it was held that the court could give relief on the ground that defendants were guilty of trespass when that clearly appeared from the facts alleged by the plaintiff (as it was observed that the plaintiff was not bound to state the legal effect of the facts on which he relied) and when the defendants had not suffered an injustice in the way of being shut out from giving evidence. The action was treated as one of trespass.¹⁵ The sole object of pleadings is that each side may have an opportunity of bringing forward evidence appropriate to the issues and so long as the result is obtained an issue cannot be objected to on the ground that it was not prominently raised in the first instance.¹⁶

In a suit for specific performance and recovery of earnest money as damages against the contracting party and his joint sons, the former died and the High Court passed a decree, against the sons, for the earnest money on plaintiff giving up his prayer for specific performance, merely on the finding that the father had received the money and inspite of the trial court holding that the contract was made without necessity. The Privy Council dismissed the suit, remarking that the character of the suit was not altered by giving up the prayer for specific performance, and refused leave to amend the suit into one for money had and received.¹⁷ In another case for specific performance and in the alternative for return of earnest money, where the contract was not proved but it was proved that the defendant had received the money, it was held that the plaintiff was not entitled even to recover the same.¹⁸

14 *Adhilakshmi v. T. Nallaswin*, A 1944 Mad 530.

15 *Konakier v. Goodman*, (1918) 1 KB 42; cited with approval in *Ram Chandra v. Chinu*, A 1944 Bom 76.

16 *Sayed Muhammad v. Fatteh Muhammad*, (1894) 22 IA 4 (PC).

17 *Ram Saran v. Mahabir*, 100 IC 56, 25 ALJ 74, 6 Pat 323.

18 *Bengal Coal Co. v. Prosanna Kumar*, 45 CLJ 110, 134 IC 921.

NOTICE u/s 80 C.P.C.: In a suit against government, although the allegation of due service of notice under section 80, C.P.C. not having been denied the defendant was held not to be entitled to adduce evidence to show that proper notice was not served, yet it was held in one case that if the notice produced by the plaintiff himself showed that it was not in conformity with the requirements of section 80, the court was bound to take notice of the defect and refuse to entertain the suit on the ground that the mandatory provisions of law had not been complied with.¹⁹ This case proceeded on the ground that notice under section 80 cannot be waived; but as it is now settled that notice, though mandatory,²⁰ can be waived¹ a plea of want of notice may be disallowed if taken at a very late stage.²

Negotiable Instruments and Original Debt : Where a suit was brought on a *hundi*, decree cannot be passed on the debt.³ nor can a suit, fought in two courts on the basis of a promissory note be remanded in second appeal to see whether the plaintiff succeeded in proving the original debt;⁴ it is, however, always open to the plaintiff to claim alternative relief on the basis of the original debt,⁵ if the loan was independent of the promissory note⁶ and if the instrument was not

19 *Governor-General in Council v. Amilai*, A 1947 Pat 81, 250 IC 274; compare, *Secretary of State v. Sagarmal*, A 1941 Pat 517.

20 *Bihari Chowdhary v. State of Bihar*, (1984) 2 SCC 627; see however, *Ghanshyam Das v. Dominion of India*, (1984) 3 SCC 46, (substantial compliance enough).

1 *Dhian Singh v. Union of India*, A 1958 SC 274; *Velleyan Chettiar v. Province of Madras*, A 1947 PC 1974, 7 IA 223.

2 *Wasaint Shripat v. G.M. Khandekor*, A 1949 Nag 25; *Union of India v. Tej Narain*, A 1957 MB 108.

3 *Chhotey Lal v. Girraj Kishore*, 93 IC 63 All; *Sambasiva Rao v. T. Balakotaiah*, A 1973 AP 342 (FB);

4 *Mst. Thakurian v. Tota Ram*, A 1926 Oudh 40.

5 *Firm Sadasuk Janki Das v. Sir Kishen Pershad*, A 1918 PC 146; see also *T. Chandari v. Kambrath Kanarakutty*, A 1990 Ker 122; *Kallappa Pundalik Reddi v. Laxmibai Dattaba Vellaram*, A 1995 Bom 160.

6 *Bollam Venkataiah v. Venkata Reddy*, A 1985 AP 26; *Chaudhari Karan Singh v. Lal Singh*, A 1933 All 109; see also, *Rajivbhai v. Ranchhod*, A 1930 Bom 66; *Baburam v. Ochhelal*, A 1954 MB 117; *G.A. Sundara Iyer v. Arumugam Pillai*, A 1954 Mad 520; *Ghulam Mohd. v. Habibulla*, A 1966 J & K 127.

given in discharge of the loan⁷ but merely as collateral security⁸ or as conditional payment.⁹

The exceptions to the rule of *secundum allegata et probata* have thus been aptly summarised as follows :

“(a) when the new case involves only a pure question of law arising on admitted or proved facts;

(b) where the party entitled to object to the new case has waived his objection expressly or by his conduct in adducing evidence against the new case;

(c) where the main or cardinal question was in controversy between the parties and a variance in a subordinate detail or particular is not such as to cause surprise or prejudice to the party concerned”.¹⁰

As to the power of court to grant a relief different from that claimed see Chapter XIV, post.

Subsequent Events¹¹ : Ordinarily, the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to have the decision of the court on the altered circumstances (including a change either in fact or in law) in order to shorten litigation or to do complete justice between the parties, it is incumbent upon the court to take notice of events which have happened since the institution of the suit to mould its decree according to the circumstances as they stand at the time the decree is made.¹² Leave to amend the pleadings may be granted for this purpose. Courts often take notice of such events

7 *Lakshmi Narain v. Aparna Devi*, A 1953 All 535; *Sheikh Akbar v. Sheikh Khan*, (1881) 7 Cal 256.

8 *Kshitish Chandra v. Raj Kishore*, A 1980 Ori 10; *Abdul Md. Khan v. Mahananda*, A 1931 Pat 293; *Subramaniam v. Muthia*, A 1984 Mad 215; following, *Salig Ram v. Radhey Shyam*, A 1931 All 560.

9 *Sheonath Prasad v. Sanjoo Nenia*, A 1943 All 220 (FB); see also, *Bishambher v. Vishwanath*, A 1985 All 12 (case-law discussed).

10 *Lulufullah v. Md. Siddiq*, A 1946 Sind 117; *Bhim Singh v. Kan Singh*, (1980) 3 SCC 72, A 1980 SC 727; *Kidar Lal v. Hari Lal*, A 1952 SC 47.

11 Refer also Chap. X, under heading ‘Subsequent Events’.

12 *Pasupuleti Venkateswarlu v. Motor & General Traders*, A 1975 SC 1409.

and even of events occurring during the pendency of appeal and permit pleadings to be amended for including a prayer for relief on the basis of such events.¹³ This doctrine is of an exceptional character and is applied to avoid multiplicity of proceedings or to do complete justice between the parties, or when the original relief claimed has, by reason of change in the circumstances, become inappropriate.¹⁴ In a suit for declaration that the impugned order of compulsory retirement was invalid and claim for salary till the date of superannuation, the court was entitled to take notice of superannuation in order to do complete justice and to avoid multiplicity of litigation.¹⁵

Difficulty often arises in regard to application of this principle to cases where the plaintiff's suit would be wholly displaced by the proposed amendment and a fresh suit by him would be barred by limitation. The power to allow such amendment does exist but is exercised only in exceptional circumstances and not normally.¹⁶ In cases where it would not be so barred different considerations might come into play.¹⁷ Thus, if a suit for redemption is premature, the Madras High Court held that it cannot be decreed because the period of mortgage has expired during its pendency.¹⁸ But in Lahore, Patna and Peshawar a contrary view has been taken and the suits have been decreed.¹⁹ A suit for removal of trustee cannot be decreed according to the Calcutta High Court on the ground of the latter's denial of the *debutter* nature of the property

13 *Sashi Bhushan v. Tulsi Charan*, 4 DLR (Cal) 81; *Bhanu Prakash Agarwal v. Munnalal Bhanu*, A 1979 MP 157.

14 *Banwarilal v. Shaikh*, A 1940 Pat 204, 188 IC 337; *Mandli Prasad v. Ram Charanlal*, A 1948 Nag 1; *Meghaji Mohanji Thakkar v. Anant Pandurang Chattrre*, A 1948 Bom 396, 50 BLR 274; *Netai Chandra Ghosh v. Gour Mohan Ghosh*, A 1976 Cal 58; *Rameshwar v. Jot Ram*, 1976 SCR 847, A 1976 SC 49.

15 *Ramanugrah Jha v. State of Bihar*, A 1966 Pat 97; compare, *Gulzar Ahmad v. U.P. Govt.*, 1950 ALJ 212 at 223; *Laxmibai v. Waman Rao*, A 1953 Bom 342.

16 *Charan Das v. Amir Khan*, A 1921 PC 50, 57 IC 606; *Laxman v. Nanabhai*, A 1964 SC 11; *Pirgonda Hongonda Patil v. Kalgonda Shindgond Patil*, A 1957 SC 363 (para 10); *L.J. Leach & Co. Ltd. v. Jardine Skinner & Co.*, A 1957 SC 357 (para 16).

17 *Zahur Din v. Jalal Din*, 1944 Lah 319.

18 *Rangayya v. Basana Simon*, 94 IC 639, A 1926 Mad 594.

19 *Kuldip v. Md. Hashim*, A 1928 Pat 396; *Tulsiram v. Dinanath*, A 1926 Lah 145 DB; *Ghulam Md. v. Rahmat*, A 1926 Pesh 33.

in the written statement.¹ The Lahore High Court has taken a contrary view and held that a decree should be passed in such cases.² In another suit, the Madras High Court has also passed a decree for a sum to which the plaintiff became entitled on the date of decree though he was not entitled to it on the date of suit,³ and where a suit to recover possession was filed a month before the lease term expired, it was held that the suit need not be dismissed as premature.⁴

Where a plaintiff in a declaratory suit acquired during the pendency of the suit the right to ask for some consequential relief, it was held that he was entitled to the declaration although it was open to him to ask for leave to amend the plaint and claim the consequential relief.⁵ The same High Court refused relief to a party of the right which existed at the date of the suit when that right did not continue to exist but was lost before the relief could be granted. In that case a money decree-holder who had attached a mortgaged property was impleaded by the mortgagee in his suit but was released by the court as unnecessary party. He filed a revision against this order, but before the hearing of the petition, he purchased the property in execution of his decree and also in execution of the mortgage decree, and thus it remained no longer necessary to give him the relief he claimed in the revision, viz. that he should be impleaded in the mortgagee's suit.⁶ In an Allahabad case where one of the two lessors had brought a suit for his share of rent and the defendant pleaded that he had paid the whole rent to the co-lessor, it was held that the payment was collusive and though plaintiff could not institute a suit for portion of the rent, yet his suit should be decreed on the ground that according to defendant's case the co-lessor's share of rent has been paid off.⁷

It is the duty of the court to mould its decree so as to suit altered circumstances.⁸ In a case, defendant's land was acquired under Land

1 *Kali Kumar v. Ananda*, 108 IC 589 Cal.

2 *Kanshi Ram v. Jaimal*, 75 IC 562 Lah; *Dera v. Basti*, A 1940 Lah 194, 188 IC 616.

3 *Vaddadi v. Doddi*, 93 IC 955, A 1926 Mad 377, 1926 MWN 9.

4 *A. Suleman v. Abdul Shakur*, A 1950 Nag 99; *Sangeshar v. Asib Lal*, 190 IC 675.

5 *Mammad v. Neerarayan*, 1929 MWN 165.

6 *Annamalai Chettiar v. Srinivasagva Iyengar*, A 1938 Mad 293, 178 IC 595.

7 *Joti Bhushan v. B.N. Sarkar*, A 1945 All 311.

8 *Ram Chandra v. Mst. Bibi*, A 1945 Pat 369; *Bishwanath Singh v. Mujataba Husain*, A 1941 Oudh 422, 195 IC 402.

Acquisition Act and leased out to Railway Co., but defendant did not part with possession and government brought a suit for ejection. The suit was dismissed as the Railway Co., and not government was held entitled to present possession. During the pendency of the appeal the management passed into the hands of the government and the Appellate Court held that court could take notice of this fact and give a decree for possession to the government.⁹ (*For further discussion on amendment of pleading see Chapter X, post*).

Where in a suit by a *de facto* shebait, his competency to bring the suit was questioned, the court was allowed to take into consideration the facts of plaintiff having become *de jure* shebait during the pendency of the suit.¹⁰ So, when one of the two mortgagees sued on the mortgage and the other died during the pendency of the suit, it was held that plaintiff should be given a decree, though on the date of the suit he was not entitled to one.¹¹ It has been held that in partition suits the rights of the parties should be finally settled having regard to events accruing up to the date of the decree.¹²

The court should, in any case, take into consideration such patent facts as a compromise between the parties.¹³ In cases for dissolution of marriage, courts can take notice of grounds furnished during the pendency of proceedings provided a duly verified statement is furnished showing such grounds and petitioner's non-collusion and non-connivance.¹⁴ In petition for divorce, the Court can take notice of subsequent events.¹⁵

In one case D, owner of a machinery, had hypothecated it to P, and afterwards sold it to M, who had agreed to pay the money due to P. P sued for declaration and injunction to protect his possession against

9 *Tej Narain v. Governor General*, A 1947 Pat 263.

10 *Sri Chandra v. Upendra*, 54 CLJ 544.

11 *Sarju Pd. v. Badri Pd.*, A 1939 Nag 242.

12 *Mst. Ghulam v. Abdul Aziz*, A 1933 Sind 371.

13 *Meyappa v. Seerthachi*, 171 IC 145, A 1937 Mad 200.

14 *Visla Duncan v. George Duncan*, 184 IC 801, A 1939 Rang 352.

15 *Ramesh Kumar v. Kesho Ram*, A 1992 SC 700; *Hasmat Rai v. Raghunath Prasad*, A 1991 SC 1711; *K. Lalitha Kumari v. Ramprasad Rao*, 1992 (2) ALT 631; *Sriram Mahadev v. Sriram Yadabai*, 1995 A.I.H.C. 1983 (AP) (DB).

interference by M, and claimed in the alternative his money which had not then become due but became due by the first hearing of the suit. The court gave a decree for the money as a matter of justice, though the right to call for the money had not accrued on the date of suit.¹⁶

The Appellate Court, like the trial court, is not only entitled but bound to take notice of events and changes in the legal position arising after the decision of the original court for doing justice between the parties. This is so because an appeal is in the nature of a rehearing of the original case.¹⁷ Where plaintiffs who had sued on a mortgage claiming to be heirs and representatives of the original mortgagee on the basis of a will executed by the latter in their favour and the High Court dismissed their suit holding that the will had not been properly attested, applied for probate of the will and obtained it in their favour during the pendency of appeal in the Supreme Court, the probate was taken into consideration in the Supreme Court and on its basis the suit was decreed.¹⁸ In another case where a provision of law had been amended with retrospective effect during the pendency of the appeal, effect was given to the amended provision by the Supreme Court.¹⁹ So also where one notification which gave the plaintiff a right to claim ejection had been cancelled during the pendency of the litigation by another notification taking away that right, effect was given to the latter notification on the ground that the court was bound to apply the law as it found it on the date of its judgment.²⁰

16 *Kimat Rai v. Mangha Ram*, A 1943 Sind 182.

17 Per *Bhagwati*, J in *Chunnihal Khushal Das v. H.K. Adhyarn*, A 1956 SC 655, 1956 SCJ 685; *Chandika Singh v. The Board of Revenue*, 1956 ALJ 883; *Punjab Co-operative Bank v. Amrik Singh*, 1964 ALJ 1008, A 1966 All 216.

18 *Surinder Kumar v. Gian Chand*, A 1957 SC 875.

19 *State of U.P. v. Raja Mohad. Saadat Ali Khan*, 1961 ALJ 79.

20 *Mohan Lal Chunilal v. Tribhovan Haribhai*, A 1963 SC 358; see also, *Indermall Lonia v. Subordinate Judge*, A 1958 AP 779; *Amritlal N. Shah v. Alla Annapurnamma*, A 1959 AP 9; *Har Prasad v. L. Sitaram*, 1958 All 36; *Jagannath Jha v. Ugrakant Chaudhry*, A 1981 Pat 200.

Chapter IX

AMENDMENT OF PLEADINGS ON DIRECTION BY COURT

Several Modes of Revision : When the pleading of a party is defective or incomplete, his opponent's remedy is to apply:

- (1) For particulars, or further particulars;¹ *or*,
- (2) For having the objectionable portion of the pleading struck out or amended;² *or*,
- (3) If the pleading is a plaint and is so defective that it does not disclose any cause of action, for having the same rejected.³

Even when no such application is made by the opposite party, the court has also power to pass any of the three orders specified above *suo motu*, or to require the party to file a written statement, or additional written statement, in case the former pleading is incomplete.⁴ It has also general power to have such amendments made as may be necessary for the purpose of determining the real questions in controversy between the parties.⁵

The amendment ordered by the court either *suo motu* or on application of the opposite party is what may be called *compulsory amendment*.

The party whose pleading is defective or incomplete may himself revise it :

- (1) By filing further particulars with the leave of the court; *or*,
- (2) By filing a written statement, if plaintiff, or an additional written statement, if a defendant, with similar leave of the court;⁶ *or*,
- (3) By amending it with the leave of the court.⁷

1 O. 6, R. 5.

2 O. 6, R. 16.

3 O. 7, R. 11.

4 O. 8, R. 9.

5 O. 6, R. 17.

6 O. 8, R. 9.

7 O. 6, R. 17.

(This may be called *optional amendment* and will be dealt with in the next Chapter).

Further Particular : If a party does not state in his pleading full particulars of any material fact, as required by rules,⁸ the court has power to call for further and better particulars.⁹ The purpose of this rule obviously is :

- (1) To do away with any ambiguity in the pleadings.
- (2) To exclude all irrelevant matter.
- (3) To pin down the parties to definite issues.
- (4) To give each party a chance to know what claim of his adversary he has exactly to meet.
- (5) To avoid multiplicity of suits.

It is the function of every court to get all the defects in the pleadings removed in order to ensure a fair trial without any prejudice to any party opposing each other in the suit. This might be done *suo motu* or on the application of the opposite party. Such applications are, at present, very rarely made in our country, but regard being had to the importance of particulars, they should be encouraged in all proper cases. An application should be made for particulars whenever a pleading is worded so vaguely that the opposite party cannot be sure what his opponent's line of attack or defence will be at the trial. Though such applications can be made at any time, yet, as a general rule, they should be made with reasonable promptitude and, if the applicant is a defendant, he should ordinarily make the application before putting in his defence, though he does not waive his right to call for particulars by merely putting in his defence. But if the plaintiff does not take objection that the defendant's pleading is not precise and takes no steps against it, he cannot make any grievance at the close of the case.¹⁰ The court may either order particulars to be filed by the plaintiff before the defendant files his defence, or, if the court thinks fit, it may order the defence to be filed before calling upon the plaintiff to furnish particulars. Where thus the question is whether there are any nearer

8 See Chapters III & VI *ante* and O. 6, R. 4.

9 O. 6, R. 5.

10 *Sardar Dayal Singh v. Tulsidas*, A 1945 Bom 177.

reversioners of the deceased than a certain named person, the court may require the defendant, before the plaintiff produces his evidence, to state whom he claims to be such nearer reversioner.¹¹ Such an application cannot be made in an Appellate Court when the applicant did not do so in the trial court.¹² Where the relief claimed is ambiguous and vague a duty lies on the court to direct the plaintiff to furnish better particulars.¹³

Discovery and Particulars : Sometimes a party who is ordered to file particulars applies for discovery, and the question then arises whether he should be compelled to file particulars before discovery or discovery should be given before particulars are filed. The answer to this question depends on the circumstances of each case and the Judge must exercise a reasonable discretion in every case after carefully looking at all the facts. Where the party pleading is unable to give the particulars without first obtaining discovery from his opponent, discovery may be ordered before particulars or where it is necessary for him to inspect the opponent's account books, he may be allowed to do so.¹⁴

When a defendant knows the facts, and the plaintiff does not, the defendant should give discovery before the plaintiff delivers particulars.¹⁵ For example, in a suit by a principal against his agent employed to purchase grain, the former alleged that the agent had paid higher prices and secretly received commission from the vendors. The agent insisted on particulars. The principal was held entitled to inspection of the agent's books before he could be called upon to give particulars as the plaintiff was not expected to have own knowledge of the facts necessary to enable him to give such particulars.¹⁶ Likewise, where a commission agent was the plaintiff and the principal was the defendant who had acted on the account of the plaintiff, it was the plaintiff who was ordered to give discovery.¹⁷ In a

11 *Kanhaylal v. Mt. Champa*, 153 IC 545, A 1935 All 203

12 *K. C. De v. Hira Bewa*, 167 IC 461, A 1937 Cal 51.

13 *Paramjit Singh v. Balwinder Kaur*, A 1985 P&H 255.

14 *Rama Krishniah v. Satyanandan*, 55 M 704, 62 MLJ 226, 1932 MWN 93, 137IC 636.

15 *Per Bowen*, LJ in *Millar v. Haper*, (1888) 38 Ch D 110 at 112; *Edelston v. Russell*, (1888) 75 LT 927.

16 *Whyte v. Ahrens*, (1884) 26 Ch D 717; *Rama Krishniah v. Satyanandan*, A 1932 Mad 284.

17 *Rama Krishniah v. Satyanandan*, A 1932 Mad 284.

libel case, however, when the defendant pleaded justification for the charge of "imposter" and a "charity swindler" made by him against the plaintiff, the court ordered him to deliver particulars and held that he was not entitled to discovery and inspection of the plaintiff's account books before furnishing particulars, as "to apply the practice," namely, the practice mentioned above in respect of a suit by a principal against agent, "to the case of a libel would be to sanction the publication of a libel when the libellor knew no facts justifying the libellous statement, because he believed he could by process of discovery, elicit such facts."¹⁸

Particulars should not, however, be asked for in the following cases:

(1) Where it would be oppressive or unreasonable to make such an order, as, where the information is not in the possession of either party or could only be obtained with great difficulty.¹⁹ In such cases, e.g. when the party sues or is sued in a representative capacity, an order may be made for the best particulars the party can give.

(2) Particulars can be given of an affirmative allegation and not of a mere denial. For example, where the plaintiff alleged that a committee did not act *bona fide*, fairly, or judiciously in declining to re-elect him as a member, and the committee denied these allegations, it was held that the plaintiff was not entitled to particulars of the facts or grounds upon which the committee based their decision.²⁰ So, in a suit for malicious prosecution when the plaintiff alleged want of reasonable and probable cause and the defendant *merely denied* the allegation, the defendant was not ordered to give particulars of his reasonable and probable cause.²¹ If the defendant had *affirmatively* alleged a reasonable and probable cause for the prosecution, he could be ordered to give particulars.²²

(3) Particulars cannot be asked of an allegation which is immaterial.

18 *Zierenberg and Wife v. Labouchere*, (1893) 2QB 183.

19 Bullen and Leake's *Precedents of Pleadings*, 11th Ed., p. 58.

20 *Weinberger v. Inglis*, (1918) 1 ChD 133.

21 *Roberts v. Owen*, (1890) 6 TLR 172.

22 *Mure v. Key*, 4 Taunt 34.

(4) Particulars cannot be ordered of facts which are not material fact but which are merely evidence of material facts.

(5) When plaintiff sues for account to be taken of the money due to him, no particulars can be ordered from him.

Every party required to furnish further and better statement of nature of his claim or defence or to furnish further and better particulars has a right to file objections. If he succeeds in showing that it is a matter in which further statement or particulars should not be asked for on any one or more of the above grounds or that it would not be in the interest of the fair trial of the suit, or that the particulars could not be supplied without laborious inquiries or unnecessary expense, the court may, after hearing the parties, reject the prayer for further particulars or revise its own orders, if necessary, or pass such orders as may be considered appropriate.

But it is no objection to an application for particulars that the applicant must know the true facts better than his opponent, for he is entitled to know the outline of the case that his adversary will try to make out against him, which may be something different from the true facts. Nor is it a valid objection that if the order is made, it will indirectly compel the party giving the particulars to name his witnesses.

Terms on which Ordered : O. 6, R. 5, provides that a court is entitled to make the order for particulars "upon such terms, as to costs and otherwise, as may be just". Any reasonable terms can be imposed. An order may be made that if particulars are not delivered, the suit shall be dismissed,²³ or that the vague allegations will be struck out and the party making them shall not be allowed to give evidence in support thereof. Order to pay a certain sum as costs as a condition precedent of filing the further particulars may, and in fact in the majority of cases should, be made. If this order is disobeyed, the suit may be dismissed, if the plaintiff is in default, and the defence may be struck out, if the defendant is in default.¹ Where, however, the fact of which particulars are ordered is not the sole fact constituting the cause of action for the suit or constituting the

²³ *Gajadhar v. Gokuldas*, A 1940 Nag 261, 190 IC 719.

¹ *Gauri Shanker v. Manki Kunwar*, 21 ALJ 571, 45 A 624, 74 IC 466, A 1924 All 17 (DB).

defence, the whole suit need not be dismissed and the whole defence need not be struck out. In such cases it would be fair to order the striking out of the allegation of such fact from the pleading, and if, after striking it out, there still remain other facts on which the case can be tried, it should be tried. The Madras High Court has held that even if no conditions are initially imposed while ordering delivery of further particulars under O. 6, R. 5, the court may subsequently direct that the defence be struck out under O. 6, R. 16, for defendant's failure to comply with the order.²

Striking Out or Amending Opponent's Pleadings : Ordinarily the court is not to dictate to parties how they should frame their pleas.³ But as pointed out by Bowen, L.J., this rule is "subject to this modification and limitation that the parties must not offend against the rules of pleading which have been laid down by the law, and if a party introduces a pleading which is unnecessary, and tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right."⁴ His opponent may, in such cases, apply that the pleading be struck out or amended, though sometimes it may be strategically expedient to leave it alone than to give opportunity to the opponent to reform or improve his pleading. If, however, the pleader thinks it is worthwhile to make such an application he should do so under O. 6, R. 16. Where thus a plaint is verbose, loose, and unintelligible, and does not give particulars, say, of the contract (breach of which is alleged) nor of the special damages claimed, nor any dates, the plaint ought to be struck off under O. 7, R. 11, or an order for its amendment should be made so that an intelligible case is presented and the defendant put in a position to know what case he has to meet.⁵ Or to put it differently, so that he is not embarrassed in meeting it. Assertions which are not unnecessary, scandalous, frivolous or vexatious cannot be struck off under O. 6, R. 16.⁶ Though an application under O. 6, R. 16, may be made "at any stage of the proceeding", yet it is

2 *The Nedungadi Bank v. Official Assignee*, A 1930 Mad 473.

3 *Bombay Corporation v. Pancham*, A 1965 SC 1008.

4 *Knowles v. Roberts*, (1888) 38 Ch D 263 at 270.

5 *Banerjee v. Manzar Ali*, 114 IC 906, 27 ALJ 496; *Randhir Singh v. Ravi Inder Singh*, A 1981 P & H 45.

6 *Roop Lal v. Nachhattar Singh*, A 1982 SC 559; *Naresh Kumar v. Prakash Narain*, A 1988 All 102; *Amar Nath v. Janardan Prasad*, A 1988 All 116.

strategically expedient to make it with reasonable promptitude, as the court has discretion to reject it if made at a very late stage.⁷

Any matter can, under this rule, be ordered to be struck out or amended which is "unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit or which is otherwise an abuse of process of the court. But the court will exercise this power with great care, caution and discrimination.⁸ A written statement should not be struck out unless it is clear beyond doubt that allegations therein cannot afford a defence to the action and if not struck out, would unnecessarily delay the suit.⁹ If the decision depends on the question of admissibility of evidence to prove facts involved in the objectionable plea, such latter question should not be determined in a proceeding on the application under O. 6, R. 16.¹⁰

An opportunity should be given to the party either to amend the pleading or furnish particulars or to have the concerned paras struck off.¹¹

Scandalous Matters : "Scandal is calculated to do great and permanent injury to all persons whom it affects, by making the records of the court the means of perpetuating libellous and malignant slanders, and the court, in aid of the public morals, is bound to interfere to suppress such indecencies which may strain the reputation and wound the feelings of the parties and their relations and friends."¹² The court has inherent power to expunge unnecessary and scandalous remarks from any petition or affidavit.¹³ An allegation containing imputations against the opponent or charging him with bad faith or misconduct is of a scandalous nature, and so is a statement containing indecent or offensive matter. Imputations of partiality even against a trial judge may be expunged as scandalous by an appellate court from a memorandum of appeal.¹⁴ It will be struck out by

7 *New Fleming Spinning and Weaving Co. v. Kessowji*, 9 B 373; *Saraswathi v. S.S. Somasundaram Chettiar*, (1970) 2 MLJ 119.

8 *Tennet v. Michael*, 29 CWN 670; *A.I.R. v. Dater*, A 1951 Nag 412.

9 *Anant Balkrishna Naik v. Govind Datta Gaidalkar*, A 1976 Goa 74.

10 *Anderson v. Walter Mitchel*, 88 IC 434, 29 CWN 670, A 1925 Cal 860 DB.

11 *Ram Raj Tewari v. Vijaiya Laxmi*, A 1986 All 325.

12 *Story's Equity Pleadings*, 10th Ed. Section 270.

13 *J.B. Patnaik v. Bennet Coleman & Co. Ltd.*, A 1990 Orissa 107; *Amalgamated Commercial Properties (P) Ltd. v. Hariprasad*, 1965 (2) MLJ 477.

14 *Zamindar v. Bennayya*, 22 M 155.

the court itself if the party declines to do so,¹⁵ and it is not for the court to amend it so as to make the allegations less scandalous. For instance, where a party alleged that the suit had been brought at the instance of plaintiff's son who was an *awara*, and the court simply allowed the word to be changed into *awara gard*, it was held that the word should have been entirely struck out.¹⁶ The words '*awara*', '*chalaak*' and '*qamarbaz*' were held scandalous and irrelevant when used in written statement and were ordered to be expunged.¹⁷ But, however grave the imputation may be, it will not be struck out if it is relevant to any issue in the case e.g., in an heir's suit to set aside a will on the ground of undue influence of the legatee on the testator, the allegation that she (*i.e.*, the legatee) had immoral connection with the testator at the time, though scandalous, will not be struck out, because it is relevant. For nothing can be scandalous which is relevant. A mere general charge of immorality against Hindu father while challenging an alienation made by him or a debt incurred by him cannot, however, be permitted to stand, not because it is scandalous but because of vagueness, obscurity and want of particulars.¹⁸

An application to strike out scandalous matters can be made not only by a party to action, but even by a third person who is affected by the scandalous matter with the leave of the court.¹⁹

Unnecessary Matter: To determine whether an allegation is necessary for the formulation of the plaintiff's case or defendant's defence or relevant for the purpose of the decision of any issue. The test for this would be whether the allegation could form part of the evidence which the party making it would be bound to lead for the purpose of obtaining the relief asked for by him.²⁰ Where an allegation in the written statement cannot offer a defence to the action, and would unnecessarily delay the suit it must be struck off.¹ Unnecessary matter, even if not scandalous,

15 *Sheonarain Jafa v. Sri Gupta*, 1961 ALJ 52.

16 *Sumat Prasad v. Ram Sarup*, A 1946 All 204.

17 *Jagannath Prasad v. Ramchandra*, A 1952 All 408.

18 *Jagdish Narain v. Hazari Lal*, A 1932 All 467.

19 *Crackwell v. Janson*, 11 Ch. Div. I; *Jagannath v. Ram*, A 1952 A 408 (DB).

20 *P. W. Shamdasni v. Central Bank*, A 1944 Bom 198; *Triveni Lal Srivastav v. Banaram Kriplani*, 1970 MPLJ Note 25; *K. Saraswathi v. P.S.S. Somasundaram Chetiar*, (1970) 2 MLJ 119.

1 *Singhai v Kesridhal Mill*, A 1976 MP 54.

need not be ignored as harmlessly superfluous, as it also tends to obstruct the fair trial of the suit. For as seen in earlier Chapters, prolix, verbose and irrelevant pleadings may cloud the real issues and cause difficulty to the opponent in understanding what case he has to meet and deciding what evidence to lead or rebut and what not.

Embarrassing Matter: In considering the question whether a matter tends to “prejudice, embarrass, or delay the fair trial of the suit”, liberal interpretation should be given to the words “trial of the suit”, and any matter which embarrasses a party not exactly at the trial but at any stage of the proceeding, e.g., in drawing up his defence, would be equally embarrassing. A pleading is embarrassing if it is ambiguous or unintelligible, such as a plea of justification in a libel suit leaving it doubtful how much of the libel the defendant intends to justify, or if it is so vague, or so general as not clearly to indicate what case the opposite party has to meet at the trial, or when full particulars are not given which are necessary. But pleading is not necessarily embarrassing merely because it is prolix, or because it contains allegations which are inconsistent or stated in the alternative. In a suit for possession, the defendant denied the genuineness of a deed of *waqf* and, in the alternative, pleaded that the deed had been obtained from her by fraud and undue influence, it was held, that there was nothing to embarrass, delay or prejudice the fair trial.² A plaint in which there is an improper *misjoinder* of causes of action, e.g. in contravention of O. 2., R. 5, or of causes of action and parties, may be embarrassing.

The allegations in a plaint which are not only unnecessary but also tend to prejudice and embarrass the defendants in the fair trial of the suit; have to be struck out.³ An embarrassing plea is liable to be struck off. The question whether a plea is embarrassing is a question of fact in view of the facts and circumstances of the case. A claim or defence which a party is not entitled to make use of or a pleading which contains irrelevant allegations is embarrassing.

Where a plea affronts a legal provision; it is liable to be struck off.⁴ It was held therein that in a suit for recovery of the loan on the basis of a

2 *Farid-un-nissa v. Mukhtar*, 40 IC 448, 4 PLJ 230.

3 *Paramnath v. Rajiv Gandhi Foundation*, A 1999 Delhi 40.

4 *Arjees Wool and Fur Industries v. Allahabad Bank*, A 1992 All 111.

mortgage by deposit of title deeds, a plea for foreclosure is an affront to sections 67 and 96 of the Transfer of Property Act and is liable to be struck off.

The court may order (a) partial amendment of the pleading by striking out the objectionable portion if the objectionable part be severable, or (b) strike out the whole pleading, if either the objectionable part is not severable or the entire pleading suffers from the objectionable features mentioned above or (c) give leave to amend.⁵

The trial court is expected to afford an opportunity to the plaintiff of striking out so much part of the plaint including the relief clause attracting the applicability of O.6 R.16 and in the event of the plaintiff failing to comply with the order of the court, the court should not hesitate to exercise its power to strike out so much of the plaint averments as would, in its opinion, amount to unnecessary, scandalous, frivolous or vexatious or tend to delay the trial or amount to the abuse of the process of the court.⁶ The Supreme Court has held that the court striking off certain paragraphs as unnecessary, frivolous or vexatious or likely to prejudice, embarrass or delay the trial has to record a finding as otherwise the direction will not be proper.⁷

Application for Rejection of Plaint: If a plaint does not disclose a cause of action, e.g., if it omits allegation of a material fact which is essential to give the plaintiff the relief which he seeks, it is not necessary for the defendant to file a defence on the merits but he may make an application that the plaint should be rejected under O. 7, R. 11. For instance, in a suit by an anomalous mortgagee for realisation of the mortgage money by sale of the mortgaged property, if the plaint does not show that a power to realise the mortgage money by sale was specifically given to the plaintiff under the mortgage deed, it does not disclose a cause of action and can be rejected. The court may pass an order of rejection at any stage of suit when the defect is brought to its notice, even after the plaint has been registered.⁸ Distinction, however, must be drawn between a case where

⁵ O. 6, R. 17, see next Chapter.

⁶ *Meera Asthana v. Rajendranath Asthana*, A 1994 MP 18.

⁷ *Roop Lal Sathi v. Nachhattar Singh*, A 1982 SC 1559.

⁸ *Kishor v. Sabdal*, 12 A 553; *Venkatesha v. Ramaswami*, 18 M 338; *Pudmanand v. Anant Lal*, 34 C 20; *Kiranchandra, v. Puranchandra*, 40 CWN 1590; *Sakthi*

the plaint itself does not disclose a cause of action and one in which after considering the entire material on record, the court may come to the conclusion that no cause of action is disclosed. In the latter case plaint cannot be rejected.⁹ If on a meaningful, not formal, reading of the plaint it is manifestly vexatious or meritless, in the sense of not disclosing a clear right to sue, the court should reject the plaint under O. 7 R.11.¹⁰ But a plaint must be rejected as a whole; it cannot be rejected in respect of a part of the claim.¹¹

The court can, of course, instead of rejecting the plaint, permit the plaintiff to amend the plaint if a cause of action does really exist but has not been sufficiently disclosed, or can pass any other equitable order.¹²

Like Power in Election Petitions : In respect of election petitions also it is necessary for the petitioner to set out full particulars of any corrupt practice, vide section 83 (1) (c) of the Representation of the Peoples Act, 1951 (in the case of elections to Parliament or State Legislatures) or corresponding provision of the relevant statute (in the case of elections to other bodies). The general averments deficient in requisite pleadings of all the constituent parts of the corrupt practice did not constitute a pleading of full cause of action and, therefore, had to be ignored and struck out in accordance with O.6, R.16.¹³

In respect of undue influence, thus, it should be stated, for instance, who attempted to induce voters to believe that voting for a particular person would render them objects of divine displeasure or spiritual censure and in what manner such attempts were made.¹⁴ Thus better particulars

Sugars Ltd v. Union of India, A 1981 Del 212; contra *Faliya v. Suppanair*, 2 M 308; *Umesh Chandra Saxena v. Administrator General, Allahabad*, A 1999 All 109, 125.

9 *State of M.P. v. Gangacharan*, 1974 MPLJ 533.

10 *Ariyanandam v. Sathyapal*, A 1977 SC 2421; *Ratanlal v. Kanthiyalal*, 1998 All IC 3586 (Raj); *Sanjay Kaushish v. D.C. Kaushish*, A 1992 Delhi 118.

11 *Maqsood Ahmad v. Mathra Datt & Co.*, A 1936 Lah 1021; *Balwant Singh v. State Bank of India*, A 1976 P & H 316; *Venkata v. Secretary of State*, A 1931 Mad 175; *Apparao v. Secretary of State*, A 1935 Mad 389; *Maqsood v. Mathra & Co.*, A 1936 Lah 1021.

12 *Mahomed Fateh Nasib v. Saradindu*, 162 IC 689, A 1936 Cal 221.

13 *Manohar Singh v. Patil*, A 1996 SC 796.

14 *Lakhi Prasad v. Nathmal*, A 1969 SC 583, (1969) 2 SCR 41.

may be called for and in case of non-compliance the court can order striking out of the vague charges.¹⁵ But the petitioner cannot be allowed to add new grounds or new charges by amending his petition, if a fresh petition on those allegations would on the date of the proposed amendment be barred.¹⁶ This applies also to addition of a necessary party or to curing any other defect on account of which the petition is required to be dismissed.¹⁷ To this extent the powers of the court in regard to permitting amendment of an election petition are narrower than the powers of a court to permit amendment of pleading in a civil suit, one important reason being that a petitioner in an election case cannot claim the same latitude on notions of equity or justice as a plaintiff in a civil suit, for in an election petition the entire electorate is involved and the fight is not in respect of civil rights of two private parties; the courts are, therefore, loath to interfere lightly with the collective verdict of the constituency.¹⁸ Another reason for greater strictness in election disputes is that allegations of corrupt practices are quasi-criminal in nature, and proof of a single corrupt practice may be fatal to an election; hence specific plea and strict proof are enjoined. Hence it is only if the material facts are already stated then more and better particulars can be given later, but if the material facts themselves are wanting in the original petition, they cannot be allowed to be supplied through amendment, as that would amount to making a fresh petition.¹⁹ If no material facts are pleaded at all, or if the allegations of charges are incomplete, then such allegations are liable to be struck off under O. 6, R. 16,²⁰ and if the petition is based solely on such allegations as do not make out any statutory ground at all then the petition can be dismissed under O. 7, R. 11 for failure to disclose a cause of action.²¹

15 *Bhikaji Keshav v. Brijlal*, A 1955 SC 610 (para 8).

16 *Ram Dayal v. Brij Raj Singh*, A 1970 SC 110, (1969) 2 SCC 218.

17 *Mohan Raj v. Surendra Kumar*, A 1969 SC 677, (1969) 1 SCR 630.

18 *Rahim Khan v. Khurshid Ahmad*, A 1975 SC 290.

19 *Samant N. Balkrishna v. George Fernandes*, A 1969 SC 1201, (1969) 3 SCC 238;

Vatal Nagaraj v. R.D. Sagar, A 1975 SC 349, (1975) 4 SCC 127.

20 *Dhartipakar v. Rajiv Gandhi*, A 1987 SC 1577.

21 *Udhav Singh v. Madhav Rao Scindia*, A 1976 SC 744; *Charan Lal Shau v. Giani Zail Singh*, (1984) 1 SCC 390, A 1984 SC 309.

Chapter X

VOLUNTARY AMENDMENT OF PLEADINGS

(1) By Filing Further Particulars: When a party, who has in the original pleadings, or in compliance with an order of the court, given all particulars then within his knowledge, subsequently discovers some new matter which he desires to add to the particulars already given, he should obtain leave to deliver further particulars. For, without such leave, he has no right to deliver further particulars, and unless he delivers such particulars, he will not be entitled to give evidence of the new facts and his evidence shall be confined to the particulars already given. Such an application will generally be allowed where the addition of particulars will cause no injury to the opposite party, except such as can be compensated by costs, but it shall not be allowed if it is sought thereby to introduce a new cause of action, e.g. raise a charge of fraud for the first time, or to increase the amount claimed after the defendant has paid into court the full amount originally claimed. Such application, if made at the time of trial is, as a rule, refused.

(2) By Filing Additional Pleading: A party may file an additional pleading in the shape of a written statement,¹ if plaintiff, or an additional written statement, if defendant, when the original pleading is incomplete. But this, too, can be done only with the leave of the court, and not otherwise.² A minor, on attaining majority during the pendency of the suit, can, with the leave of the court, file another written statement or amend the written statement filed by his guardian *ad litem* previously.³ If a defendant makes certain new allegations in the written statement and the plaintiff wants to reply to them, he has to obtain leave to file a written reply, except that when he wishes to plead to the defendant's claim for a set off, he can do so as of right and no leave of the court is necessary.⁴ Similarly if the

1 The expression 'written statement' used here comprises a replication, *vide* O. 8, R. 9.

2 *Malkiat v. Om Prakash*, A 1995 Raj 38; *Cawnhon Dunkenley & Co. Ltd. v. Steel Authority of India*, A 1993 Ori 141; *Saiyad Serajul Hasan v. Syed Murtaza Ali Khan Bahadur*, A 1992 Delhi 162.

3 *Ramkhelawan Singh v. Ganga Prasad*, A 1937 Pat 625, 172 IC 513; *Shiva Kumar Singh v. Kari Singh*, A 1962 Pat 159.

4 O. 8 R. 9.

defendant has, by mistake, omitted to state any important fact in his written statement, he can obtain leave to file an additional written statement, but no additional statement can be filed after the plaintiff's case has been closed,⁵ or after the parties have entered upon their cases at the hearing,⁶ or so as entirely to change the defence set up in the original written statement.⁷

Departure : No subsequent pleading should raise any new ground of claim or defence or contain any allegation of fact inconsistent with the previous pleading.⁸ In other words, what is technically known as a "departure" in pleading is not allowed. When a plaintiff claimed a decree as owner alleging that the decree-holder was her *benamidar*, her allegation in the replication that she had a charge on the decree was ignored and was not put in issue.⁹

In O. 6, R. 7, it is laid down that no pleading shall raise any new "ground of claim", but the word "claim" seems to have been used in a much wider sense here so as to include the claim of the defendant also, though it would have been better to have said "new ground of claim or defence". Therefore, this rule prohibits the raising of a new plea in defence as well as a new ground of claim, as there is no justification for making any distinction between the pleading of a plaintiff and that of a defendant in this respect.

If a party intends to set up a new ground of claim or a new plea or to allege a fact inconsistent with his previous pleading, his proper course is to apply for leave to amend his original pleading¹⁰ and not to apply for leave to deliver an additional pleading nor can he set up new grounds in the guise of further particulars¹¹ or in a rejoinder.¹²

(3) By Amendment : The third and the most important way in which a plaintiff or defendant can revise his pleading is by amending it. This is

5 *Venkataswami v. Uppilpalayam*, 153 IC 453, A 1935 Mad 117.

6 *Haji Saboo v. Ayeshabai*, 30 IA 127.

7 *Douglas v. Collector of Benares*, 5 MIA 271 (290).

8 O. 6, R.7.

9 *Govind Singh v. Mungaji*, 57 IC 684 Nag.

10 *Hardial Singh v. Sardarni Jaswant Kaur*, A 1943 Lah 159.

11 *Mehnga Das v. Maya Singh*, A 1937 Lah 795.

12 *Vishwapati v. Venkat Krishna*, A 1963 AP 9.

sometimes necessitated by fresh information, may be (i) by replies to interrogatories served on the opponent, (ii) by discovery and inspection, (iii) discovery of documents whose existence could not be previously known by exercise of due diligence, and (iv) by the own pleas of his adversary. All or any one of these factors may require re-shaping of the claim or defence with the resultant prayer for voluntary amendment.

Statutory Provision : The provision of the Code of Civil Procedure on the subject of voluntary amendment is contained in O. 6, R. 17, and has been borrowed, word for word, from the rule on the subject followed in the English Courts. It is in the following terms :

“The court may, at any stage of the proceeding, allow either party to alter or amend his pleading in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such a far-reaching discretionary power is governed by judicial considerations and wider the discretion, greater are to be the care and circumspection on the part of the court.¹³ It must, however, be remembered that amendment can, in no case, be claimed as a matter of right but it is absolutely in the court's discretion,¹⁴ which of course, is a judicial discretion and cannot be exercised arbitrarily.¹⁵ *Bona fide* inadvertent omission to raise alternative plea can in exceptional circumstances be rectified by inclusion of such plea even if a fresh suit on the amended plaint may have become barred by time,¹⁶ though normally the court would be loath to allow such a belated

13 *Ganga Bai v. Vijaykumar*, A 1974 SC 1126.

14 *In re Joti Mahalinga*, 12 IC 104, 10 MLT 881; *Mukandi v. Jogesh*, 20 CWN 1276, 35 IC 370, 1 Pat LJ 393; *Ghulam Haider v. Sardar Ali*, 73 IC 748; *Kastur Chand v. Maung Botha*, 11 IC 858, 4 Bur LT 188.

15 *Tapi Ram v. Sadu*, 21 B 570; *Satyees v. Monmohni*, 25 IC 567, 19 CLJ 518; *Kanda v. Wagh*, A 1950 PC 68 (amendment which altered the real matter in controversy could not be allowed).

16 *A.K. Gupta v. Damodar Valley Corporation*, A 1967 SC 96; *Ganga Prasad Sarraf v. Smt. Sakra*, A 1977 All 210.

amendment.¹⁷ It is open to correction, if necessary, by a court of appeal or revision in case it is exercised arbitrarily or perversely.¹⁸ It is the duty of the court (Appellate Court) to correct erroneous interlocutory orders, though not appealed against as such, at the time of the hearing of appeal against the order deciding the case.¹⁹ But, ordinarily, an Appellate Court will not interfere with this discretion of the lower court, unless it is satisfied that the lower court has come to an absolutely wrong conclusion²⁰ or unless its exercise of power is shown to be wrong or perverse,¹ or based on a wrong principle.² The order of the lower court will not be set aside, even if erroneous, when it has not caused prejudice to the other party,³ and a court of revision will not interfere unless the lower court has acted with such material irregularity as to justify interference.⁴

There is no specific provision in the Code providing for amendment of petitions and other applications moved under the Code, but even in the absence of any provision, the court may allow the amendment of the petitions and other applications in the exercise of powers under Sec. 151 CPC for the ends of justice or to prevent the abuse of the process of the court.⁵ The power to grant amendment is not fettered by any narrow or technical limitation.⁶ The High Court of Madras has however held that resort cannot be had to section 151, if a case is not covered by the specific provisions of O.6, R.17.⁷

17 *Laxman v. Nanabhoi*, A 1964 SC 11; *Charan Das v. Amir Khan*, A 1921 PC 50, 57 IC 606.

18 *Sheo Narain v. Ram Prasad*, 74 IC 317, A 1923 Nag 241.

19 *Seth Nanak Chand Shadiram v. Amin Chand Pyarélal*, A 1970 Cal 8; see also, *Satyadhyan Ghosal v. Deorajin Debi*, A 1960 SC 941.

20 *Raja Ram v. Salig Ram*, 11 IC 481, 14 CLJ 188; *Imdad Ali v. Sayed Ali*, 40 IC 65, 26 PR 1917.

1 *Hari Krishna v. Dinar*, 29 IC 535 Cal; *Syed Md. Mohsin Rizvi v. State of U.P.*, A 1979 All 234.

2 *Badri Prasad v. Jagannath*, 101 IC 569 Oudh.

3 *Inder Narayan v. Nanak Chand*, 51 PLR 1911, 9 IC 267.

4 *F.A Gregory v. Albert Pusach*, 49 IC 441, 21 PWR 1912; *Ratlam Electricity Supply Co. v. M.P. Electricity Board*, 1980 (Supp) SCC 598; *Kisan Co-operative Sugar Factory v. Rejendra Paper Mills*, 1984 UPLBEC 597.

5 *Kedar Prasad v. Raghunath Prasad*, A 1992 Pat 95.

6 *Sanatan Jena v. Babji Sahu*, A 1990 Orissa 186; *Kedar Prasad supra*.

7 *Meenakshisundaram v. Venkatachalam*, A 1980 Mad 105 (DB).

An amendment cannot be claimed as of right but is discretionary with the courts.⁸ For this reason, no hard and fast rule to guide the courts can be laid down. It would be granted or refused according to the circumstances of each case and with due regard to the interest of the other side.⁹ The facts differ from case to case and unless the facts are similar an earlier authority may not apply to a subsequent case.¹⁰

Normally, the court should be liberal in granting amendment unless, of course, the court is of the opinion that such amendment would cause serious injustice and irreparable loss to the other side. The provisions of O. 6 R. 17 are intended to do justice and not to shut out justice merely on technicality of pleadings.¹¹

General Principles of grant of leave to amend : The correct principles which should govern the grant or refusal of prayer for amendment of pleading were, as observed by the Supreme Court,¹² enunciated by Batchelor, J. in *Kishandas Rupchand v. Raichappa Vithoba*,¹³ in these words :

“All amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties...but I refrain from citing further authorities as in my opinion they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs.”

The aim of every court is to see that multiplicity of suits is avoided, and that the real matters in controversy between the parties are clearly brought out, and all amendments necessary for these purposes should be allowed provided the other party is not seriously prejudiced and the

8 *Santi v. Mulraj*, 39 PLR 769, A 1937 Lah 894, 175 IC 624, 11 RL 28.

9 *Gurdas v. Bhag*, 11 IC 231 Punj; *Venkatasubbiah v. Seshachalam*, 12 IC 173, 22 MLJ 136, 60 MLT 549, 2 MWN 257.

10 *Noor Khatoon v. Samana*, 31 IC 7, 9 SLR 61.

11 *Yunnam Ibohi Singh v. Yunnam Yaima Singh*, A 1993 Gau 42; *Ganesh Trading Co. v. Moji Ram*, A 1978 SC 484.

12 *P.H. Patil v. K.S. Patil*, A 1957 SC 363.

13 ILR 33 Bom 644.

character of the suit is not altered, and also, provided the object of the amendment is not to abuse the powers of the court and to work a clear injustice.¹⁴

The general principles on which the discretion vested in courts is to be exercised are: (1) the court should not allow a party to raise a new case; (2) it should strive to allow amendments in all cases where the opposite-party can be compensated in costs; (3) it should allow amendment where due to supervening factors, new circumstances have come into existence, or the changed circumstances may make the relief claimed inappropriate and so proper relief by way of amendment may be claimed;¹⁵ (4) The court should not permit an amendment by which a legal right acquired by the opposite party is taken away.¹⁶ This proposition is, however, qualified by the provisions of section 21, Limitation Act 1963 (old section 22) in so far as addition of a new defendant is concerned.¹⁷

Mere failure to set out even an essential fact does not by itself constitute a new cause of action. A different or additional approach to the same facts would be allowed by amendment even after the expiry of the statutory period of limitation.¹⁸ An amendment questioning the plaintiff's right to sue or to continue the suit should not be refused,¹⁹ as also any amendment affecting the jurisdiction of trial court.²⁰ The court can take into consideration subsequent events and grant relief in order to attain the ends of justice and shorten litigation.¹

14 *Nichhal Bhai Vallab Bhai v. Jaswant Lal Zinabhai*, A 1966 SC 997.

15 *Rajeshwar Dayal v. Padam Kumar Kothari*, A 1970 Raj 77.

16 *Mary Niemeyer v. Ebrahim*, A 1937 Rang 313; *The Bihar Co-operative Motor Vehicle Insurance Society Ltd. v. Rameshwar Rai*, A 1970 Pat 172; *Modi Spinning and Weaving Mills Co. Ltd. v. Ladha Ram*, A 1977 SC 680; *Bhagwanji Morarji Gokuldas v. Alembic Chemical Works*, A 1948 PC 100.

17 On this subject, see chapter XII, *post*.

18 *Charan Das v. Amir Khan*, A 1921 PC 50, 57 IC 606; *Ganesh Trading Co. v. Moji Ram*, A 1978 SC 484; *A.K. Gupta & Sons v. Damodar Valley Corporation*, A 1967 SC 96; *Jai Jai Ram Manohar Lal v. National Building Material Supply*, A 1959 SC 1267.

19 *South India Corporation (Agencies) Pvt. Ltd. v. State Trading Corporation of India*, A 1970 Ker 138.

20 *M. Allauddin v. P.S. Lakshmi-Narayan*, A 1970 Mad 247; see also *Abdul Kari v. Shursha Mudaliar*, ILR (1968) 2 Mad 57.

1 *H.K. Adhyaru v. Chumni Lal*, A 1956 SC 655; see also, Chapter VIII, *ante* under the heading "Subsequent Events".

Amendments should be allowed in suitable cases in order to overcome the effect of *bona fide* mistakes, whether of law or of fact,² to avoid multiplicity of suits.³ and an amendment which does not change the subject matter of the suit and is not otherwise unfair can be allowed even in appeal.⁴ It does not matter that the original omission arose from negligence or carelessness.⁵ “However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs”,⁶ for, as observed by Bowen, L.J.,⁷ and accepted in numerous Indian decisions, “there is one panacea which heals every sore in litigation, and that is costs”, that there is “no kind of error or mistake which, if not fraudulent or intended to over-reach, the court ought not to correct if it can be done without injustice to the other party” and that “courts do not exist for the sake of discipline but for the sake of deciding matters in controversy.” The object of the courts, according to the eminent judge, is “to decide the rights of the parties and not to punish them for their mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights”.

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- 2 *K.E.A.K.A. Sahib v. K.N. Adamsa*, 81 IC 465, A 1924 Rang 249; *Firm Bidhi Chand v. Basdev Pd.*, 1968 ALJ 235; *Jai Jai Ram v. National Building Material Supply*, (1969) 1 SCC 869 (Not obligatory to mention in application that error, omission or mis-description was caused by *bona fide* mistake); *Barnik Ray v. W.B. Housing Board*, A 1985 Cal 362; *Ram Avtar v. Jagdish*, A 1985 Pat 1; *Mohd. Shamim v. Delhi Waqf Board*, A 1985 Del 464 (amendment to withdraw wrong admission on law).
 - 3 *Sardar Hari Bachan Singh v. Major Har Bhajan Singh*, A 1975 Punj 205; *Nichhalbhai Vallabhai v. Jaswantilal*, A 1966 SC 997.
 - 4 *Ram Dhan v. Lachmi Narain*, 16 IC 648, A 1937 PC 42, 1937 AWR 184 (PC).
 - 5 *Gulabrao v. Manjoolbai*, A 1928 Nag 203, 109 IC 293; *Mahomed Husein v. Ko Maung*, 117 IC 563, A 1929 Rang 33.
 - 6 *Clarapede v. Commercial Union Association*, (1883) 32 WR 262; *Weldon v. Neal*, (1887) 19 QBD 394; *Manjidutta v. Klannad*, 16 IC 785 Cal; *Lummna Summana Malick v. Dharam Rao Chougule*, A 1971 Mys 284; *Sardar Hari Bachan Singh v. Major Har Bhajan Singh*, A 1975 Punj 205.
 - 7 *Cropper v. Smith*, (1884) 26 ChD 700, 711; *Ram Gopal v. Mam Chand*, A 1981 All 352; *Amiya Kumar v. Paichha*, (1984) 58 Cutt LT 507.

All amendments which do not throw any unnecessary or unreasonable burden on the other side should be allowed and only those which cannot be compensated by award of costs should be refused.⁸ Grant of amendment should, therefore, be the rule, and refusal the exception. The amendment ought to be allowed which satisfy the two conditions, (a) of not working injustice to the other side, and (b) of being necessary for the purposes of determining the real questions in controversy between the parties.⁹ Rules and procedures are intended to be the handmaid to the administration of justice and a party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of pleading of a party unless it is satisfied that the party applying was acting *mala fide* or that by his blunder he had caused injury to his opponent which may not be compensated for by an order for costs. However negligent or careless may have been the first omission and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side.¹⁰ In such cases the opponent should also be allowed to file additional pleading to meet the amended case.¹¹

But the word "however late the proposed amendment" must not be understood to mean that a counsel may unnecessarily delay an amendment. Indeed it is of the first importance that an amendment should be applied for immediately the pleader comes to the conclusion that an amendment is necessary. An amendment, though late, may be allowed, but the applicant must show why the application is made so late and must satisfy the court that the delay is not deliberate and the amendment has been prayed for

8 *Kovduru v. Jagani*, A 1946 Mad 324; *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil*, A 1957 SC 363.

9 *P.H. Patil v. K.S. Patil*, A 1957 SC 363.

10 *Jai Jai Ram Manohar v. National Building Material Supply Co.*, (1969) 1 SCC 869, A 1969 SC 1267; *Suraj Prakash v. Raj Rani*, (1981) 3 SCC 552 (amendment subject to heavy costs upheld); *Ganesh Trading Co. v. Moji Ram*, A 1978 SC 484; (1978) 2 SCC 91; *Har Charan v. State of Haryana*, (1982) 3 SCC 408, *Gulabrao v. Mt. Manjoolabi*, 109 IC 293, A 1928 Nag 203; compare, *Saradudu v. Jaharlal*, 46 CWN 33, 74 CLJ 61, A 1942 Cal 153; *Shanabhai Mangalabhai Patel v. Bhagavanbhai*, A 1990 Guj. 74.

11 *Tharayil Sarda v. Govindem*, (1983) 2 SCC 276; *Mulk Raj v. District Judge*, (1982) 3 SCC 237.

with reasonable promptitude. Application before the beginning of trial cannot be said to be belated.¹² An amendment though belated but if the claim is not barred by limitation would normally be allowed.¹³

Late applications for amendment are liable to be rejected, if *there has been unexplained delay in making the application*.¹⁴ An amendment should not normally be allowed after the conclusion of the trial and arguments.¹⁵ An amendment including a prayer for consequential relief in a declaratory suit should have been allowed by the High Court in first appeal even after the expiry of period of limitation for fresh suit for that relief as it did not raise a new case but only a different or additional approach to the pleaded facts and was necessary for a decision of the real dispute between the parties.¹⁶ An amendment seeking alternative relief, under O.6, R. 17, is permissible.¹⁷ If the rest of the plaint is not sought to be amended and only a relief inadvertently omitted is sought to be added such amendment is liberally allowed.¹⁸ Where the defendant in written statement specifically admitted that he had entered into an agreement for sale of the suit land with the plaintiff, an amendment seeking to modify the averments in written statement that the defendant entered into agreement with the plaintiff, for development of the suit land for mutual benefit of the parties was allowed.¹⁹

12 *Dharmalinga v. A.M. Krishnaswami*, A 1949 Mad 467, (1948) 2 MLJ 644, 1949 MWN 71.

13 *Ganpat Singh v. Sher Bahadur Singh*, A 1978 All 66; followed in, *Ramdes v. Ram Bahadur*, A 1984 All 206; *Jawarmal Ramkaran, v. P.K. Jamnadas*, A 1990 Guj 42.

14 *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393, 1974 SCD 682, A 1974 SC 1126; *Raj Kumar Mohan Singh v. Raj Kumar Pashupati Nath*, (1969) 2 SCC 258, (1970) 2 SCR 428, A 1970 SC 42.

15 *Shanmugha Rajeswara v. Chidambaram Chettiar*, 1938 MWN 471, 173 IC 772, A 1938 PC 123, 1938 ALJ 292 (PC); *Gobi Pillai v. Dr. Swamy*, (1980) 1 MLJ 387.

16 *A.K. Gupta & Sons v. Damodar Valley Corporation*, A 1967 SC 96; see also *Rukhma Bai v. Laxminarayan*, 1960 ALJ 45 SC; *Mahabir Pd. Singh v. Narmadeshwar Pd. Singh*, A 1967 Pat 326; *Suraj Prakesh Bhasin v. Raj Rani Bhasin*, A 1982 SC 485; *Tika v. Hiralal*, 195 IC 428, A 1941 Pat 276.

17 *G. Nagamma v. Siromanamma*, (1996), 2 SCC 25.

18 *Satyabhama v. Sailabala*, A 1984 Ori 181.

19 *Askhaya Restaurant v. P. Anjanappa*, A 1995 SC 1498.

An amendment applied for after three years to wriggle out of certain admissions made earlier in the plaint and to introduce an entirely new cause of action was thus disallowed.²⁰ A belated amendment to treat a suit for dissolution of partnership and accounts as one for remuneration as an agent of the partnership was rejected.¹ Where a plea of non-joinder had been raised in the written statement, the prayer of the plaintiff seeking to remove the defect at the Supreme Court stage was rejected.² In another case the Supreme Court rejected the request for amendment of pleading for introducing a family custom with regard to succession to a *non-taluqdari* estate mainly on the ground of delay. This contention was refused to be raised as it would give a "fresh lease of life".³ An amendment sought at the stage of arguments taking away an admission in pleadings was disallowed.⁴

A legal representative of a deceased plaintiff is not entitled to ask for an amendment which the deceased could not have asked for. The holder of an impartible estate in Madras sued for a declaration that a promissory note and a lease obtained from him by the defendant were void as they had been obtained by fraud and undue influence. After his death his legal representative who was brought on record applied for amendment of the plaint by raising the contention that the transactions are not binding on the estate as the deceased had only a life estate and was not competent to alienate it beyond his life time. It was held that as the deceased could not have himself challenged his own alienation and claimed this relief, the amendment could not be allowed.⁵ An amendment should not be allowed where the amendment is neither necessary for determining the real controversy in suit, nor bonafide,⁶ where valuable right has accrued in favour of the opposite party,⁷ at appellate stage where it will cause

20 *Modi Spinning & Weaving Mills v. M. Ladha Ram & Co.*, A 1977 SC 680; see also, *Ram Dev v. Ram*, A 1984 All 206; *Ganpat Singh v. Sher Bahadur*, A 1978 All 66.

1 *Brij Mohan v. Vallharia*, A 1965 Raj 172.

2 *Kanak Rathammal v. Lognath*, A 1965 SC 271.

3 *Raj Kumar Mohan Singh v. Raj Kumar Pashupati Nath*, A 1970 SC 42.

4 *Karanpura Development Co. Ltd. v. State of Bihar*, 68 CWN 965.

5 *V.T. Elaya Pilai v. Ramaswami*, A 1947 Mad 165, (1946) 2 MLJ 373, 1946 MWN 745.

6 *Padmini Mishra v. Ramesh Chandra Mishra*, A 1991 Orissa 263.

7 *Kartar Singh v. Kanhai Singh*, A 1989 MP 322.

irreparable loss to the opposite party⁸ or will result in mutually destructive pleadings.⁹

The true position appears to be that any delay in applying for amendment is a material factor to be considered by the court before exercise of its discretion. Depending on the facts and circumstances of the case, amendment may be allowed notwithstanding the delay or it may be rejected.

When Amendment should be Refused : The exceptional circumstances under which an amendment should be refused are the following:

1. Where amendment is not necessary for the purpose of determining the real question in controversy between the parties:

Where, after the close of the plaintiff's case, the defendant applies for amendment of his written statement for the purpose of taking a purely technical objection to the maintainability of the plaintiff's suit, the application may be rejected.¹⁰ The object being to enable the real questions in dispute to be raised in the pleadings, leave to amend cannot be granted to the plaintiff, where the proposed amendment would not help him in substantiating his claim, and to the defendant when the proposed amendment would not help him in supporting his defence. Thus in a case where A sues B and seeing that the claim against B would fail, he applies for impleading C as defendant, the application will be refused if the court finds that A would not be entitled to any relief against C also.

"The questions in controversy" mean questions which are in controversy between the parties when written statement is filed but not questions which parties neither wish nor intend to dispute till that stage but which at a later stage they may think of raising.¹¹

2. Where the amendment would cause to the opposite party such injury as cannot be compensated by costs :

Thus, leave to amend will be refused if it would prejudice a right

8 *Dewan Chand v. Kalyan Das*, A 1988 P&H 43.

9 *Gurdwara Committee v. Jaswant Singh*, 1996 (2) SCC 690.

10 *Collete v. Goode*, (1878) 7 Ch D 842, 47 LJ Ch 370, 150 LT 550; *South India Corporation v. State Trading Corporation*, A 1970 Ker 138.

11 *Beniprasad v. Narayan Glass Works*, A 1949 Ajmer 19; *Mohar Das v. Sarjoo*, (1972) 2 SLJ 146.

already accrued to the other party on the pleading as then standing.¹² A sued a Tramway Company for damages caused by negligence. The defendant merely denied the negligence. Six months later, an application was made for adding the plea that the liability to maintain the roads had been transferred to a local authority which, and not the defendant, was liable. As on the date of this application the suit had become barred against the local authority, leave to amend was refused, because, if amendment were allowed, the suit would fail.¹³ Similarly, the addition of a new cause of action after the period of limitation is generally refused.¹⁴

Where an amendment is refused by the trial court as very late, the Appellate Court is justified in not interfering, if its effect is to interfere with the rights of parties regarding the plea of limitation.¹⁵ Thus a suit for rent was not allowed to be converted into one for damages for use and occupation at a time when a suit for the latter relief would be barred by limitation,¹⁶ and suit for declaration was not allowed to be converted into one for possession when the relief for possession was barred.¹⁷ A plaintiff who had obtained a mortgage in his favour and afterwards a sale deed and sued for possession on the basis of the sale-deed was not allowed to amend the plaint so as to base his suit on the mortgage as a suit on the mortgage was barred by limitation on the date of the application for amendment.¹⁸ Where no special circumstances were shown an amendment sought by an agent in a suit for rendition of account against his principal by

12 *Karsondas v. Surujbhan*, 145 IC 630, 35 BLR 229, A 1933 Bom 450; *Sanatan Mohapatra v. Hakim Mohammad Kazim Mohammad*, (1977) 1 CWR 474, A 1977 Ori 194.

13 *Steward v. North M.T. Co.*, (1886) 16 QBD 556.

14 *McLeod & Co. v. Ivan Jones*, 87 IC 218 Cal; *Kulwant Singh v. Sher Singh*, 1971 Gur LJ 924; *L.J. Leach & Co. Ltd. v. Jardine*, A 1957 SC 337; see also, *Bisweswar v. Jineshwar*, A 1968 Cal 213; *Thommen Themm v. Vsuran Khan*, ILR (1967) 1 Ker 368, (where amendment was allowed beyond limitation).

15 *Sanathana Krishna v. Chellappa*, 101 IC 390, 38 MLT 345; *L.J. Lench & Co. v. Jardine*, A 1957 SC 357; *Charan Das v. Amir Khan*, A 1921 PC 50, 57 IC 606.

16 *Veerabhadra v. Vythanathsami*, 99 IC 977 Mad; *Muni Lal v. The Oriental Fire and General Insurance Co. Ltd.*, 1995 (4) OCC 375 (SC); see also, *Chinta v. Gunna*, 133 IC 497, A 1931 Mad 542, 61 MLJ 316.

17 *Damar v. Jagdip*, 165 IC 21, A 1936 Pat 535; see also, *Bhup Narain v. Hiralal*, A 1936 Pat 186.

18 *Chunilal v. Abdul Dawood*, A 1948 Bom 140.

introducing a prayer for recovery of a specified sum was not allowed.¹⁹

In special cases, however, amendments after the period of limitation have been allowed. For instance, where the cause of action is the same, but the plaintiff has made a mistake as to the appropriate remedy to which he would be entitled in law, amendment may be allowed even in second appeal, provided the error was *bona fide* (such as due to conflict in High Court rulings).²⁰ In another case, A, alleging that he had invested Rs. 4000/- as capital under a partnership agreement between him and the defendant, sued for dissolution of the partnership and for accounts, but it was clear from the proceedings of the trial court that A really intended to claim his Rs.4000/- and the defendant pleaded to the money claim, and that claim had been put in issue and evidence was adduced on it. The lower court found that the money was due, but dismissed the suit on the finding that the agreement set up did not constitute a partnership. The Appellate Court allowed the plaintiff to add a prayer for the recovery of Rs. 4,000/- though at the date of amendment the claim for money was barred by limitation.¹ In another case, plaintiff was allowed to convert a suit on a promissory note into one on original consideration after limitation on the ground that as the plaintiff could have originally made such an alternative claim he should not lose on a technical ground.² Similarly, in a suit for recovery of books of account against a servant, leave to add a prayer for recovery of money due from the defendant was allowed after the period of limitation.³

Similarly, a plaint may not be permitted to be amended so as to take away a valid defence of limitation.⁴ Thus, when a suit on a loan alleged to have been taken on a particular day was dismissed as barred by limitation, an application for amendment so as to change the date of loan, given in

19 *Choubey Sushil Chandra v. Raj Bhadur*, A 1977 All 259.

20 *Mullaveetil v. Achutan*, 21 MLJ 475, 10 IC 218, 9 MLT 499.

1 *Kishendas v. Rachappa*, 33 B 644.

2 *Krishna Pd. v. Ma Aye*, A 1936 Rang 508, 165 IC 810; *Ippili Satyanarayana v. Amadalavalasa Co-operative Agricultural & Industrial Society Ltd.*, A 1975 AP 22.

3 *Sevugan v. Krishna*, 36 M 378, 13 IC 268.

4 *Ruliam v. Ramchand*, 144 IC 822, A 1933 Lah 774; *Byash v. Ajodhiya*, A 1932 Rang 26, 10 R 74; *Parbhudas v. Lallubhai*, 137 IC 710, 34 BLR 35, A 1932 Bom 117; *Kesho Das v. Hari Kishan Das*, 17 Pat 268, A 1938 Pat 205, 1938 PWN 431,

second appeal was refused.⁵ Where, however, the plaintiff's conduct has been *bona fide* throughout, even an amendment which deprived the defendant of the benefit of the rule of limitation may be allowed. In a case, questioning the correctness of a particular portion of the boundary line between two villages, the amendment sought to question other portions of the boundary line was thus allowed.⁶ In another case, when defendant resisted the plaintiff's claim on the ground of limitation, an amendment by which plaintiff sought to plead an acknowledgment was allowed though applied for at a late stage, the court remarking that the delay may influence the court in deciding whether the acknowledgment was genuine or not, but the amendment should be allowed as it did not alter the nature of the case.⁷ Similarly, in suit which was claimed to be within limitation from the date of a part payment, an amendment to add an acknowledgment also as an additional ground for saving limitation was allowed.⁸ In another case the plaintiff claimed exclusion of a certain period from limitation but he was allowed to amend the plaint so as to claim extension from an acknowledgment contained in a letter produced and relied on by the defendant himself.⁹ In another case on the basis of a pronote which was found to be technically void, an amendment to enable the plaintiff to sue on the original consideration was allowed even after the expiry of limitation on the ground of justice.¹⁰ A suit based on an agreement recognising service was also allowed to be amended after limitation into a suit based upon service as the difference between the two kinds of suits was held to be only technical.¹¹

19 PLT 579, 175 IC 354, 10 RP 620; *Narayanamurti v. Surya Narayan*, 168 IC 980, A 1937 Mad 122.

5 *Addanki v. Madduri*, 96 IC 700, A 1926 Mad 827, 51 MLJ 414, 1926 MWN 392.

6 *Nagalingam v. Siva*, 140 IC 500, 63 MLJ 725, 1932 MWN 1116; see also, *A. K. Gupta & Sons v. Damodar Valley Corporation*, A 1967 SC 96.

7 *Kishenlal v. Ram Chandra*, 55 A 256, 145 IC 859, 1933 ALJ 268, A 1933 All 374.

8 *Muthammal v. Guruswami*, 97 MLJ 921; *Jogendra v. Debendra*, A 1937 Cal 485; *Satgur Nath v. Brahma Datta*, A 1937 Oudh 391, 168 IC 799.

9 *Fatehchand v. Vasudeo*, A 1948 Nag 334.

10 *Chellam Sakka v. Muthusamy*, 165 IC 503, A 1936 Mad 632; following, *Charan Das v. Ameer Khan*, 57 IC 606, 18 ALJ 1095, 25 CWN 289 (PC), A 1921 PC 50.

11 *Bai Kamala v. Shankar Rao*, A 1943 Bom 407.

For further discussion see heading “Amendment and Limitation”, *post*.

3. Where the application for amendment is not made in good faith :

It is one of the necessary conditions for the exercise of the discretion of the court in allowing an amendment that the applicant must have acted in good faith.¹² When there is no substantial ground for the case proposed to be set up by the amendment,¹³ or the object is to defeat or delay the plaintiff's claim,¹⁴ or merely to re-agitate the same questions and lead further evidence,¹⁵ the amendment was rejected as not being in good faith. Great delay in making the application has also been held to show it to be *mala fide*.¹⁶ But it is not always that good faith or absence of it can be determined at the stage at which application is presented. There are cases in which this can be known only after the evidence is let in. The truth or falsity of case put in the amendment application is normally not considered while deciding whether to permit an amendment or not.¹⁷ When the amendment proposed is likely to create and confer jurisdiction on the Court which patently was not available on the pleadings of the plaintiff, the amendment cannot be allowed.¹⁸

4. Where the amendment offends any provision of law :

It has been held that where the proposed amendment affronts a legal provision, it has to be rejected. In a suit for possession, the defendant took a plea that he was either the owner of the house in dispute or had become the owner thereof by having been in adverse possession for over

12 *Banta Singh v. Harbhajan Kaur*, A 1974 P&H 247 FB; *Muni Lal v. Niki Mamsa*, A 1977 HP 51; *Gopi Kishan v. Radha Kishan*, 1999 AIHC 908 Raj.

13 *Lawrence v. Norreys*, (1888) 39 Ch D 213, 38 WR 753.

14 *Mohomed Hussain v. Ko Maung*, 117 IC 563, A 1919 Rang 33; *Usha Sharma v. Bank of Baroda*, 1995 ARC 236, 1995 All CJ 140; 1995 RD 229 (All).

15 *Hoduun Ningal v. Khondrain Ningal*, A 1965 Manipur 14.

16 *Krishna v. Pachaiyppa*, 47 MLJ 540, 82 IC 492; *Beni Prasad v. Narayan Glass Works*, A 1949 Ajmer 19; *Aisha v State of J&K*, A 1978 J&K 34.

17 *Dharmalinga v. A.M. Krishnaswami*, A 1949 Mad 467, (1948) 2 MLJ 649, 1949 MWN 71; *Mangal Das v. Union of India*, A 1973 Delhi 96; *Dhirendra Kumar v. Rashmani Devi*, A 1986 Ori 133.

18 *Vikram Raitani v. Sangeeta Raitani*, 1995 AIHC 530 (All).

12 years. Subsequently he filed an application for amendment seeking to assert that he was the real owner of the house and that the plaintiff was a mere benamidar and the sale was effected in the name of the plaintiff with a view to avoid attachment and sale thereof at the instance of the creditors. The proposed amendment offended the provisions of Sec.53 of the Transfer of Property Act, and so was rejected.¹⁹

5. Where the plaint itself is not Maintainable :

A suit against a dead person is a nullity and cannot be amended by impleading his legal representatives.²⁰ Where the plaint is filed in contravention of the provisions of section 69(1) & (2) of the Indian Partnership Act, it has to be treated as a void plaint and no question of amendment of such plaint arises.²¹ In a suit for dissolution of a partnership constituted against the provisions of section 59 (1) of the Motor Vehicles Act, leave to amend the plaint seeking restitution of the contribution made by the plaintiff towards the capital of the partnership was refused.²²

6. Where the amendment would introduce a totally different, new and inconsistent case and the application is made at a very late stage of the proceedings :

An amendment of this character is not necessary for "determining the real question in controversy", it rather implies an abandonment of the real issue, and should not, therefore, ordinarily be allowed.¹ As a general rule, the court will not, in the exercise of such discretion, allow an amendment converting a suit of one character into a suit of another character in the absence of special circumstances.² The court cannot allow amendment involving the setting up of a new case or which altered the real matter in controversy.³ The court may, in very rare cases and under

19 *Ram Singh v. Sona Devi*, 1988 HP 27.

20 *Joginder Singh v. Krishan Lal*, A 1977 P&H 189.

21 In the matter of *Abani Kanta Lal*, A 1986 Cal 143.

22 *Alirajan v. Govindsamy*, 1966 (1) MLJ 158.

1 *Gobardhan v. Sita Ram*, 164 IC 1085, A 1936 Pat 491; *Ram Jiwan v. Mt. Maharani*, A 1936 Nag 295; *Badridas v. Raja Pratapgir*, A 1940 Nag 9; *Jaldu Anantha Raghuran v. Jaldu Bapannarav*, A 1959 AP 448; *Hem Rajendra Bahuguna v. District Judge Nainital*, 1995 (I) ARC 311 (All).

2 *Ramsaran v. Mandar V. Mahabir Sahu*, A 1927 PC 18.

3 *Mashwe Maya v. Maung*, A 1922 P.C. 249; *Kanda v. Wagha*, A 1950 PC 68.

exceptional circumstances, allow even such amendments,⁴ provided the application is made at a very early stage of the suit and long before the trial, and provided the change in the character of the suit is merely technical and not substantial. Amendment cannot ordinarily be allowed where it would convert the suit into one of a totally different character based on entirely different and wholly inconsistent allegations with the original plaint and would involve a fresh trial with fresh pleadings and fresh evidence.⁵ In a suit for specific performance of contract, an amendment seeking right of pre-emption being inconsistent and contradictory cannot be allowed.⁶ A suit for setting aside a decree on the ground of fraud was not allowed to be changed into one on the ground of *bona fide* mistake of the parties.⁷

In one case an amendment even introducing an inconsistent case was permitted on the ground that it met the ends of justice by allowing the whole question in dispute to be decided between the parties and in order to avoid unnecessary litigation.⁸ In another case, an amendment introducing a new case of fraud was allowed just before judgment on payment of entire costs.⁹ But the mere fact that an amendment seeks to state a case in the alternative is not by itself a sufficient ground for disallowing it.¹⁰

In a case¹¹ in which the plaintiff had sued for specific performance and compensation, an alternative plea (though raised about four years after the institution of the suit and just before trial), abandoning his claim for specific performance and claiming damages for breach of contract, maintaining all the allegations in the plaint as they formerly stood was allowed by the trial court whose decision was reversed by the High Court. Their Lordships of Privy Council while upholding the decision of the High Court held that the court technically had power to allow the plaintiff to change

4 *Sheonarain v. Ram Prasad*, 74 IC 317, A 1923 Nag 241; *Iqbal Begum v. Akhtar Ali*, A 1973 Punj 478.

5 *Badridus v. Raja Partaggir*, A 1940 Nag 9; *Aswath Rao v. Sushilabai*, A 1971 Mys 141; *Jagannath Sahoo v. Labanya Debi*, A 1981 Ori 12; *Gayatri Devi v. Om Prakash*, A 1985 All 356.

6 *Santosh Kumar Hui v. Prakash Kumar Palit*, A 1995 Cal 381.

7 *Shib Ram v. Md. Musaddar*, A 1947 Cal 17.

8 *Ghulam Haider v. Sardar Ali*, 73 IC 748 Pesh.

9 *Chartered Bank v. Imperial Bank*, A 1930 Cal 534, 57 C 398.

10 *Sobhanadri v. Venkataramayya*, 98 IC 458, A 1927 Mad 212.

11 *Ardeshir v. Flora*, A 1928 PC 208.

the character of his suit at that stage, but such amendments should not be allowed without proper appreciation of its serious effect upon the position of the parties in each individual case. Their Lordships further remarked : "Indeed, so serious in many cases is the exercise of this power that to their Lordships it would appear to be a wise precaution for a judge before allowing any such amendment in a contested case to require the plaint to be remodelled in a form appropriate to an action seeking compensation for breach of contract and nothing else. The extent and propriety of what is asked for will thus be made apparent and the amendment will be allowed or refused with a due appreciation of the position". In this case their Lordships were of the opinion that in the circumstances the plaintiff had lost his right to claim damages for breach of contract.

Amendment of a written statement may be refused on the ground that the applicant wanted, by the amendment, to take pleas inconsistent with those originally taken by him.¹² A defendant, who was sued for possession of *abadi* land on the ground that his transferor had a non-transferable licence therein and had admitted this fact in trial court, was not allowed to raise by amendment the new question that his transferor was proprietor of the land.¹³ In another case, permission to amend a written statement so as to set up a plea of *jus tertii* in answer to the plaintiff's claim for recovery of possession was refused by the Appellate Court.¹⁴ (For further discussion see heading "Stage at which Amendment may be allowed," *post.*)

An amendment, the effect of which is to change the cause of action on which the original suit was based or the specific legal relation alleged to exist between the parties, or the specific title on which the party bases his claim may not ordinarily be allowed. But there may be no objection to allowing an amendment which neither takes away the effect of any

12 *Fazal Nur v. Bibi Rani*, 120 IC 492 Lah; *Kundan Lal Verma v. Sushila Devi*, A 1972 Punj 283; *Chennai Vedantha Sangam v. Shanmugha Sundaram*, (1975) 1 MLJ 435; *Haji Md. Isaq v. Md. Iqbal*, A 1978 SC 798; *Bhuramal Agarwal v. Samla Dalurband Coal Co.*, 82 CWN 1; *Rajesh Vasudeo Pillai v. LIC.*, (1980) 1 AWR 265; *Bansilal Ganpatrai v. Bhoj Raj*, A 1980 HP 39; *Arun Kumar Biswas v. D.N. Majumdar*, (1985) 89 CWN 252.

13 *Chunnialal v. Decoram*, A 1948 Nag 119.

14 *Subhaya v. Chandrayya*, A 1941 Mad 811.

admission made in the original pleading, nor raises any inconsistent plea by changing the character of the pleading but merely elucidates and clarifies it.¹⁵ When a plea of fraud is set up for the first time by amendment¹⁶ or when one kind of fraud is alleged and another kind of it is sought to be substituted.¹⁷ Where the plaintiff sued for redemption alleging title under a purchase and the defendant set up title under another sale-deed, and in appeal it was contended for the first time that the plaintiff's vendor had no title as he was not the nearest reversioner to the deceased, and thereupon the appellate court allowed the plaintiff to amend his plaint so as to trace his title from certain persons from whom his vendor got the properties, it was held that the amendment should not have been allowed as its effect was to allow the plaintiff to set up a new case in contradiction to that set out in the plaint.¹⁸ Where the plaintiff had set out in the plaint a particular interpretation of the document which was the basis of the suit, an amendment whereby he wanted to set out a different interpretation was held not to change the character of the suit.¹⁹

Even where an alternative case which is not covered by the pleading were permissible it cannot, however, be entertained without a proper amendment of the pleadings. For in the absence of a formal amendment the other party may be denied the advantage he would have obtained from particulars and proper discovery and, in addition, he may not have come prepared with evidence to meet the new case.²⁰ Where the plaintiff changes the basis of his claim consequential amendment of defendant's pleading should not be refused.²¹

15 *Satya v. Chudamani*, (1984) 58 Cutt LT 287; see also, *Zafullah Khan v. Additional Dist. Judge*, 1984 All WC 600 (case law); *Maitreyee Banerji v. P.K. Mukherji*, A 1982 SC 17; see however, *Mohd. Shamin v. Delhi Waqf Board*, A 1985 Del 464 (wrong admission of law may be permitted to be withdrawn); *Panchdeo Narain v. Jyoti Sahai*, A 1983 SC 462, 1984 supp SCC 594 (even admission of fact may be permitted to be withdrawn).

16 *Mt. Kanta v. Kalawati*, A 1946 Lah 419 DB.

17 *Abdool Hasan v. Turner*, 11 B 620, 14 IA 111; *Municipal Corporation of Greater Bombay v. Lala Pancham*, A 1965 SC 1008.

18 *Ibramsa v. Mahomed Esuf*, 30 LW 557.

19 *Subramanian v. Vasudevan*, 160 IC 989, A 1936 Mad 151.

20 *Leavey & Co. v. Hirst & Co.*, (1943) 2 All ER 581, CA.

21 *G.L. Baker Ltd. v. Midway Bldg. Ltd.*, (1958) 3 All ER 540 CA.

In order to afford some help in the determination of this question it is proposed to set down here, with reference to rulings, some examples of amendments which amount to a change of character of the suit and of those which do not.

Examples of cases of amendments refused as amounting to a change in the character of the suit :

Claim for hire of cargo boats on the ground that defendant hired them from plaintiff; amended claim for agency account on the allegation that defendant was plaintiff's agent for procuring hirers.¹ Claim for dower on written agreement; amended claim for dower on custom.² Claim for money paid by the defendant on behalf of the plaintiff to X on the ground that the payment was unauthorised; amended claim for damages for defendant's negligence in selecting X as agent for the plaintiff.³ Claim for declaration of title; amended claim for specific performance.⁴ Suit for declaration of plaintiff's one-third share and joint possession on the ground that plaintiff had purchased a widow's right in one-third share and redeemed it from mortgagee in 1910; amended claim (after the defendant's plea of adverse possession) that the widow had herself redeemed in 1910 and plaintiff succeeded her in 1916.⁵ Claim that land in suit was ancestral and hence the widow had no right to make the gift; amended claim that though land was non-ancestral, yet under a custom the widow would still be incompetent to dispose of it.⁶ Claim that father made the sale to pay immoral debts; amended claim that the father could alienate his share only⁷ (for in the former case joint family was alleged, in the latter the contrary). Claim based on gift by will; amended claim based on inheritance.⁸ Claim for share of produce of property left undivided at partition; amended claim for partition of that property.⁹ Claim for setting aside a decree for partition

1 *Shib Kristo Sircar v. Abdul Hakim*, 5 C 603.

2 *Khaja Md. v. Maiya Begum*, 14 C 420.

3 *Hamilton v. Land Mortgage Bank*, 5 A 456.

4 *Jiwanlal v. Allah Jawaya*, 133 IC 646, A 1931 Lah 595.

5 *Chandradat v. Ghulam Mohammad*, 93 IC 871 Lah.

6 *Kanda v. Waghu*, A 1950 PC 68.

7 *Sheonarayan v. Bhagwan Dutt*, 11 WR 10; *Narayan v. Javher*, 12 B 431.

8 *Jankee v. Jhajhoo*, 2 NWHCR 407.

9 *Gauri Shanker v. Atma Ram*, 18 B 611.

detailed in compromise into one based on recognition of the validity of that decree and for a relief arising from that decree.¹⁰

Claim for specific performance; amended claim to cancel the contract and retain the deposit.¹¹ Claim to redeem one mortgage; amended claim to redeem another.¹² Claim for ejectment; amended claim for declaration of reversionary rights.¹³ Claim for property as *devisee* under a will; amended claim for the same on the ground of want of title in testator to devise.¹⁴ Claim for possession as full owner; amended claim for defendant's ejectment by plaintiff as manager of *waqf* property.¹⁵ Claim for redemption as mortgagor; amended claim to enforce a right as owner.¹⁶ Claim for declaration that properties are trust property; amended claim that plaintiff has a life interest or charge for maintenance in them.¹⁷ Claim based on custom of pre-emption; amended claim on contract, set up in the Appellate Court.¹⁸ Claim of pre-emption on the ground that plaintiff is a co-sharer; amended claim on the ground of relationship.¹⁹ Claim for possession; amended claim for redemption (in second appeal).²⁰

Claim on account stated in a particular year; amended claim on account stated in a previous year after the former account stated was found to be a forgery.¹ Claim for dissolution and rendition of account of partnership; amended claim for remuneration as agent or servant of defendant.² Claim against the Secretary of State based on negligence; amended claim based

10 *Chiranjilal v. Ram Kanwar*, 1948 East Punjab 26.

11 *Stone v. Smith*, (1887) 35 Ch D 188.

12 *Govindrav v. Ragho*, 8 B 543; *Pratap v. Ram Sewak*, 96 IC 304 (where amendment was applied for in second appeal); contra, *Parashor v. Gama*, 5 BLR 643, (where alternative case was set up by the amendment).

13 *Ramanandan v. Pulikutti*, 21 M 288; contra, *Gurdit Singh v. Mt. Parmeshri*, 19 IC 928, 1913 PLR 238, 1913 FWR 142.

14 *Mylapore v. Yeo Kay*, 14 C 801, 14 IA 168.

15 *Ramdas v. Daulat Ram*, 1913 PLR 225, 18 IC 807, 1913 PWR 114.

16 *Nank To v. Ma Hanin*, 36 IC 5, 9 Bur LT 150; *U. Naing v. Ko Sein*, A 1938 Rang 125, 176 IC 631.

17 *Nazir Ahmad v. Taj Mahal Begum*, A 1940 Lah 63, 186 IC 828.

18 *Ram Garib v. Shanker*, 20 ALJ 15, 66 IC 242.

19 *Bajjnath v. Ram Pyari*, A 1947 All 221.

20 *Munna Lal v. Makiulal*, 24 IC 723 All; *Kalane v. Virupak Shapa*, 7 B 146.

1 *Bhairon Prasad v. Gajadhar Prasad*, 23 IC 587, 19 CWN 170.

2 *Mclverny v. Secretary of State*, 13 IC 370, 38 C 797.

upon nuisance.³ Claim for ejectment; amended claim for partition.⁴ Claim for redemption; amended claim by the representative of the plaintiff who died *pendente lite* that the mortgage was not binding on him.⁵ Claim for rent; amended claim for damages for breach of an agreement to take on lease.⁶ Suit based on allegation setting out grounds for non-performance of a contract; amended claim denying the contract.⁷ Claim for redemption; amended claim for avoidance of a sale on payment of a portion of the consideration money.⁸ Claim for possession after declaration that the defendant's mortgage was fictitious; amended claim for redemption of that mortgage.⁹ Claim for redemption; amended claim for possession on the ground that the mortgage is not binding on the plaintiff as it was without consideration and without necessity.¹⁰ Suit by A against his partner B, after dissolution of partnership, for price of articles supplied by A to B during partnership; amended claim for accounts of partnership.¹¹ Claim by unregistered partnership; amended claim by a partner as proprietor thereof.¹²

Claim on the footing that defendant was carrier; amended claim based on his liability as bailee.¹³ Claim for annuity by sale of mortgaged property; amended claim for 12 years' annuity.¹⁴ Claim as *krittima* son; amended claim as *appabhita* son.¹⁵ Claim as owner; amended claim in second appeal as *benamidar* when plaintiff had from the beginning repudiated that character.¹⁶ A suit for specific performance and damages against a Hindu father and his joint sons; after the death of father, specific

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- 3 *Valthilinga v. Minigan*, 37 M 529, 23 MLJ 189, 15 IC 299, 1912 MWN 1127.
 - 4 *Ram Sahai v. Alopri Prasad*, 148 IC 243, A 1934 Lah 38; *Divi Sheshacharyulu v. Divi Lakshmi Narayan*, A 1946 Mad 105.
 - 5 *Inaganti v. Venkataligama*, 68 IC 703.
 - 6 *Karam Chand v. Hardyal*, 11 IC 849, 4 Bur LT 181.
 - 7 *Krishnamachariar v. Arunachala*, 105 IC 563, A 1927 Mad 793, 1926 MWN 668.
 - 8 *Ram Bilas v. Brij Narain*, 14 IC 743, 11 MLJ 424.
 - 9 *Laxmi Shanker v. Haujab Bhai*, 44 B 515, 57 IC 426, 22 BLR 735.
 - 10 *Tohlu v. Buta*, 67 IC 132, 3 LLJ 184.
 - 11 *Beragi v. Raja Ram*, 10 IC 250, 163 PLR 1911.
 - 12 *S. Krishnan v. Aruna*, (1979) 2 MLJ 1.
 - 13 *Louis Dreyfus & Co. v. Secretary of State*, 45 IC 173, 11 SLR 103.
 - 14 *Masuma v. Tahira*, 11 ALJ 580, 19 IC 661.
 - 15 *Maung Ba v. Ma Than*, A 1926 Rang 49, 3 R 83, 92 IC 253.
 - 16 *Kulsambai v. Mandwivalia Firm*, A 1939 Sind 281.

performance given up and suit for earnest money as money had and received by the father.¹⁷ Suit against manager of idol personally, suit against the idol.¹⁸ Suit for accounts of partnership started in 1921; suit on partnership started in 1919.¹⁹ Suit for price of goods sold, amended claim (in second appeal) for damages for wrongful sale of goods by purchaser.¹ Suit for partition; amended for administration.² Claim that certain transactions were vitiated by fraud and undue influence; amended claim that though the transactions were valid they would not bind the estate or plaintiff's successor.³ In a matrimonial suit, change of defence at appellate stage when it was inconsistent with original factual plea.⁴ Change of ground of exemption from limitation from one of payment under section 20 to one of acknowledgment under section 19 of the old Limitation Act of 1908.⁵ Claim that the sales made by guardian were void *ab initio* and were liable to be ignored, amendment after expiry of period of limitation for setting aside the sale deed.⁶

In a suit plaintiff claimed a sum to be ascertained on taking account and afterwards added new defendants against whom no relief was claimed. On the suit being dismissed on a technical ground, the plaintiff on appeal wanted to amend the plaint so as to claim a declaration of his title to a specific portion of the amount held in deposit by the original defendants and also claimed a relief against the added defendants. The court disallowed such an amendment.⁷ In a suit *for* account amendment to convert the suit into one *on* account was refused on the ground that the plaint would require amendment in many particulars and a second suit would not be barred by limitation.⁸ A suit for redemption on ground of

17 *Ramasaran v. Mahabir*, A 1926 PC 187, 100 IC 56, 25 ALJ 74, 1927 MWN 69.

18 *Avadh Behari v. Parmeshur*, 6 OWN 1036.

19 *Haji Adam v. Nihal*, A 1933 Sind 131, 144 IC 25.

1 *Baijnath v. Joharchand*, A 1933 All 404, 144 IC 82, 1933 ALJ 1000.

2 *Ma Waung Ma Gyi v. Ma Bu Gyi*, 174 IC 39, A 1937 Rang 525.

3 *V. T. Elaya Pillai v. Ramasami*, A 1947 Mad. 165, (1946) 2 MLJ 373, 1946 MWN 745.

4 *Saroj Rani v. Sudarshan Kumar*, (1985) 1 CCC 127 (SC).

5 *Thakurdas v. Sant Ram*, A 1949 East Punjab 219.

6 *Vishwambhar v. Laxminarayana*, A 2001 SC 2607.

7 *Mohd. Ara Husain v. Nawab Bagar*, 171 IC 33, A 1937 Oudh 484.

8 *Mulomal v. Tarachand*, A 161 IC 505, 1936 Sind 9.

satisfaction filed nearly 60 years after the mortgage without an offer to pay whatever might be found due was not allowed to be amended by addition of such offer.⁹ To a suit for dissolution of partnership defendant made a counter claim based on a term of partnership restraining the plaintiff from engaging in rival business; the plaintiff contended that it was agreed that this clause would not be enforced and prayed for amendment of plaint by including a prayer for rectification. The Bombay High Court held that this would change the character of the suit.¹⁰

In a case which was remitted by the Full Bench, the plaintiff sought amendment of the plaint in order to negative the decision of the High Court. The amendment was refused as it would have nullified the earlier decision of the High Court.¹¹ In a partition suit, on the death of the defendant, the plaintiff sought amendment to claim the entire property as heir of the defendant. The amendment was refused on the ground that it would change the cause of action by converting the partition suit into a suit for title and possession.¹² In a suit for declaration that a document in question was a deed of mortgage and not a deed of sale, an application for amendment to the effect that the document was void and seeking a consequential prayer for a declaration to that effect was not allowed.¹³

Examples of cases of amendments not amounting to a change in the character of the suit.

Claim for declaration; amended claim for consequential relief.¹⁴ Claim for declaration of title and possession of alluvial land; amended claim to include title by local usage not originally alleged.¹⁵ Claim for declaration that defendant had no title or possession and claim that the property had been purchased *benami* in defendant's name.¹⁶ Claim for declaration that

9 *Purshottam v. Vasant*, A 1943 Bom 259, 45 BLR 489.

10 *Ram Jahn v. Yahyabhai*, A 1947 Bom 149.

11 *Mohd. Jaffar Ali v. Rajeshwar Rao*, A 1971 AP 156 (FB).

12 *Ashwath Rao v. Sushila Bai*, A 1971 Mys 141.

13 *Muthupandian v. Ramasamy Thevar*, A 1995 Mad 277.

14 *Limba v. Rama*, 13 B 548; *Chomu v. Umma*, 14 M 46; *Purna Chandra v. Sabru*, 35 CWN 620; *Bal Mukund v. Madan*, A 1935 Lah 91; contra, *Sriram v. Khwaja*, A 1934 Lah 235, (plaintiff had persisted and prayed for amendment in appeal).

15 *Shahabuddin Sarcar v. Kafiluddin Tapadar*, ILR (1938) 1 Cal 361.

16 *S.K. Wajid Ali v. Mst. Jiga Bai*, A 1968 Ori 163.

plaintiff and defendant are joint owners of money in the hands of the deceased as they were both his heirs; claim for administration of the estate of the deceased.¹⁷ Claim for direct possession; amended claim for possession conditional on the defendant's failure to redeem.¹⁸ Claim for injunction restraining defendant from tying cattle on plaintiff's land; amended claim for possession.¹⁹ Claim for injunction to restrain certain constructions by neighbour, so that plaintiff's building may not be damaged; amendment to claim compensation for damage already caused and for continuing damages.²⁰ Claim for injunction in respect of immoveable property, the title to which was in issue; amendment to claim possession over same.¹

Claim based on *hundi* or promissory note; amended claim based on original consideration independent of the *hundi* or promissory note,² even though the suit may be barred by limitation on the date of the amendment.³ Claim based on acknowledgment, amended claim based on previous original transaction allowed after limitation on the ground that though new, the amended claim was not inconsistent.⁴ Suit on pronote executed on the basis of the amount outstanding in the books of account of the plaintiff; amended claim on the original loan in the alternative.⁵ Claim for exclusive

17 *Mt. Latifanbai v. Mt. Sakinabai*, 181 IC 770, A 1939 Sind 107.

18 *Nilkanth v. Suresh Chandra*, 12 C 414 (422), 12 IA 17; *Dullabh Das v. Lakshmandas*, 10 B 88.

19 *Syed Waris Ali v. Syed Abbas Ali*, 85 IC 344 Oudh.

20 *Gopal Chandra v. Life Insurance Corp.*, (1984) 58 Cutt LT 352.

1 *Nabi Baksh v. Angney*, 105 IC 784, 4 CWN 975; *Dindappa Laxmappa v. Malappa Bhimappa*, (1975) 2 Kam LJ 239.

2 *Sundar v. Puran*, 10 PWR 1906, A 1922 Lah 394; *Indubala v. Lakshminarayan*, 60 CLJ 91, 38 CWN 1146; *Kamakshi v. Subbaraya*, 52 IC 758 Mad, (in this case it was further held that no written application for amendment was necessary); *Varadaraja v. Venkatarama*, 99 IC 625, A 1927 Mad 378; *Ramchandra v. Keshab*, 61 C 433, 38 CWN 488, 150 IC 982, A 1934 Cal 554; *Puranmal v. Kapilmani*, 334 ALJ 989; *Abdul Wahab v. Arjarna*, 42 LW 574, A 1935 Mad 888; (but such amendment was not allowed in, *Anantaramayya v. Narasomy*, 67 ALJ 918, as it was applied for after the conclusion of trial when suit had become time-barred), contra, *Burjorji v. Harmusji*, A 1932 Bom 394, 34 BLR 643, 137 IC 783; *Chellam v. Muthusamy*, 165 IC 503, A 1936 Mad 632; *Official Assignee v. Kuppuswami*, 165 IC 301, A 1936 Mad 785.

3 *Krishna Prasad v. Ma Aye*, A 1936 Rang 508, 165 IC 810.

4 *Seth Mangilal v. Zan Singh*, 196 IC 190, A 1941 Nag 289.

5 *Rajaranka Pulp Paper Mill v. Central Bank of India*, 1974 MLJ 985.

possession; amended claim for joint possession.⁶ Claim for possession as transferee from owner; amended claim as heir of the owner who died *pendente lite*.⁷ Claim on a mortgage; amended alternative claim that money was advanced on defendant's fraudulent representation that he was major.⁸ Claim on a registered mortgage-deed; amended claim on equitable mortgage for a personal decree.⁹ Claim for unpaid purchase money on the ground of Vendor's lien; amended claim for the same money as damages for breach of contract.¹⁰

Claim on a mortgage bond executed by defendant's guardian; amended claim for old debts which were the consideration of the mortgage.¹¹ Claim for money borrowed from plaintiff; amended case that loan was advanced by plaintiff's father.¹² Claim on pronote against the brother of the deceased executant on the ground that defendant had acknowledged the debt; amended claim on the ground that the executant being elder brother, executed it for the benefit of the joint family.¹³ A executed a pronote in favour of B in 1923, afterwards he transferred all his property to his son C who renewed the pronote in 1926. B sued on the later pronote and on finding it inadmissible in evidence sought to amend the plaint so as to base his suit on the pronote of 1923 and to implead A also, held that the amendment did not introduce any new or inconsistent claim and could be allowed.¹⁴ Similarly, when plaintiff based his suit on two mortgages of 1927 and 1932, the former having been incorporated in the latter, and on defendants pleading invalidity of the latter, sought to base the claim on the former alone, it was held that there was no new case.¹⁵ Claim for money due on taking accounts of a dissolved partnership;

6 In re, *Purvala*, 12 MLT 159, 15 IC 665, 1012 MW 1116.

7 *Inder Deo v. Ramcharitter*, 74 IC 971, LR 5 A 28, A 1923 All 560.

8 *Saral Chang v. Mohan Bibi*, 25 C 371, 2 CWN 201.

9 *P.M. Chettyar v. Ma Shwe*, 101 IC 628, 6 Bur LJ 49, 5 R 115.

10 *H.B. Morton v. Woodfall*, 28 PLR 15, 9 LLJ 2599, 8 Lah 257, A 1927 Lah 103 DB.

11 *S.V. Nallaperumal v. R. Ponnayya*, 97 IC 936, A 1926 Mad 1124; *Eusoo v. Niemeyer*, 1940 Rang LR 603.

12 *Ghulam v. Mst. Fateh*, A 1934 Lah 974.

13 *Sampat v. Subhakaran*, 196 IC 511, 1941 OWN 112, A 1942 Oudh 161.

14 *Ayar Husain v. Ram Sarup*, 130 IC 347, 7 CWN 1195, A 1931 Oudh 54; *Abdul Wahab v. Anjone*, A 1935 Mad 888, 42 LW 574.

15 *Kannalal v. Bhagwandas*, A 1949 Nag 5.

amended claim for share of plaintiff out of the balance which was found on the settlement of account between the parties after dissolution.¹⁶ Claim for specific sums as profits on account of rent of land and hire of furniture and fittings used by the defendant as a partner; amended claim for damages for use and occupation and in the alternative for mesne profits.¹⁷

Claim based on title as heir to husband who got the property on partition with his brothers; amended claim based on adverse possession against the defendant,¹⁸ and claim for possession on the basis of will; amended claim as owner by adverse possession.¹⁹ Claim by employee against employer for damages for negligence or breach of statutory duty in regard to safety of work; amended claim adding negligence on the part of fellow employee thus raising an issue of vicarious liability, which was held to constitute a mere extension of the original claim and not a new cause of action.²⁰ Claim on money due under time-barred agreement; amendment pleading acknowledgment saving limitation; as acknowledgment merely saves an existing cause of action from the bar of limitation.¹ Defence of denial of negligence; amendment pleading in the alternative that plaintiff was himself negligent.² In a suit for partition, the defendants raised a plea that the suit was bad for partial partition as certain items of joint property had been left out, amendment to include joint properties.³ Claim for partition; amended claim for possession of plaintiff's share if defendant's story of previous partition is proved.⁴

Claim for general account added to a claim for partition of joint family property; amended claim for specific sum of Rs. 10,000 said to have been collected for the family but kept with himself.⁵ Claim for possession by reversioner against widow and daughter; amended claim

16 *Radha Kishen v. Motilal*, A 1933 Nag 82.

17 *Irgan Ahmad v. W.A. Khan*, A 1972 All 15.

18 *Mangammal v. Rangappa*, A 1935 Mad 137.

19 *Prakash Chandra v. Raja*, 1975 Rev. LR 170; *Gulwant Kaur v. Mohinder Singh*, A 1972 Punj 260.

20 *Dorman v. J.W. Ellis & Co.*, (1962) 1 All ER 303 CA.

1 *Busch v. Stevens*, (1962) 1 All ER 412.

2 *Turner v. Ford Motor Co.*, (1965) 2 All ER 583 CA.

3 *Mohd. Mustaffa v. Abubaker*, A 1971 SC 361, (1970) 3 SCC 891.

4 *Gulzari v. Dumman*, 97 IC 796, A 1926 Lah 460, 27 PLR 161.

5 *Kunhilakshmi v. Krishna*, A 1948 Mad 460, 1948 (1) MLJ 274, 1948 MW 245.

for declaration of plaintiff's right to succeed after widow's death.⁶ Claim by one co-obligee of a bond for his share of the money; amended claim for the whole money.⁷ Suit based on acknowledgment said to be of a cash advance, amended suit based on previous original transactions (after the defendant had himself summoned plaintiff's account books to show that there were previous dealings and no cash was received as alleged by plaintiff at the time of acknowledgment).⁸ Claim based on custom; amended claim that plaintiff is entitled even if custom is not proved.⁹ Claim based on estoppel by judgment; amended claim based on a plea of estoppel in *pais*.¹⁰ Claim for rent against three persons in respect of land alleged to have been held at a particular *Jama*; amended claim that the rental had been split up as a result of transfer by one defendant to others.¹¹ While in a suit described in the cause title of the plaint as one for malicious prosecution, the words "malicious prosecution", were omitted in one para of the plaint and the word "malicious" was omitted in another, held the amendment supplying those words did not change the character of the suit.¹² Where a suit for partition was brought by a residuary legatee before the administration was complete and residue was ascertained and the ascertainment of residue was only a formal matter, amendment by adding a prayer for administration was allowed.¹³

Different Kinds of Amendment : Amendment may be in respect of the form, or the substance of the pleading, or in respect of the relief claimed, or of the parties to the suit.

1. Formal Amendment : A formal amendment should generally be allowed. For example, any defect in signature or verification in a pleading,¹⁴ omission of an averment in plaint that notice under section 80, C.P.C. had been delivered,¹⁵ mis-description of the property in

6 *Gurditi v. Parmeshri*, 19 IC 928, 208 PLR 1914.

7 *Raghunath v. Mt. Prana*, 166 IC 992, A 1937 Oudh 290.

8 *Sitaram v. Nand Ram*, 78 IC 234 Nag.

9 *Md. Ghafor v. Mehdi*, 17 IC 326, 12 CLL 253.

10 *Zingu v. Mehadeo*, A 1948 Nag 358.

11 *Kameshwar v. Mohd. Nasam*, 21 PLT 440.

12 *Rohini Kumar v. Niaz Mohommad*, A 1944 Cal 4.

13 *Jiban Krishna v. Jatindranath*, A 1949 FC 64.

14 Vide Chapter V ante.

15 *Governor General v. Kasi Ram*, A 1949 Pat 268.

dispute,¹⁶ mistake in the name or addresses of the parties,¹⁷ mistake of calculation,¹⁸ given in the plaint, slips of pen and other errors of a purely formal nature not affecting the merits of the pleadings are treated as mere irregularities and can always be rectified. Thus amendment should be allowed when there is no change in the cause of action but merely a change in the date when the cause of action arose.¹⁹ A much wider power has been conferred on the court by section 153, C.P.C. than by O.6, R. 17, in this respect. While the powers under O.6, R. 17 cannot be exercised after the final determination of the proceeding in the case, those under section 153, can be exercised "at any time", even years after the final disposal of a case, when any mistake in the plaint (such as wrong description of property) is detected, e.g. at the time of execution of the decree.²⁰

2. Amendments as to Substance : The circumstances under which an amendment in the substance of the pleading can, and those under which it cannot be allowed, have already been discussed above.

3. Amendments as to Relief : If the amendment in, or addition to, the original relief is such as to change the character of the suit, it shall not be allowed, nor will the court, in its discretion, generally allow it if the application for amendment is made at such a late stage of the suit that it would create a necessity of trying the case *de novo*,¹ or would be unfair to the other party, as when a suit for possession contested by defendant was decreed on defendant's withdrawing the contest and confessing judgment and the plaintiff wanted to amend the relief in appeal by claiming mesne profits, the court observed that had mesne profits been claimed in the beginning the defendant might not have withdrawn the contest about title.² In other cases, it may be allowed. Thus, a mortgagee suing for sale may amend his plaint by asking merely for a money decree,³ but not in

16 *C.M. Vereekuty v. C.M. Mathukuty*, A 1981 SC 1533; *Puna v. Dinbandhu*, (1984) 58 Cutt LT 295.

17 *Md. Yusuf v. Himalayan Bank*, 18 A 198 (*Gulam Muhammad v. Himalaya Bank*, 17 A 292 overruled); *Dayamavi v. Sanker Nath*, A 1926 Cal 417, 42 CLJ 30 DB.

18 *Punjab National Bank v. Lalji Tandon*, A 1984 All 381.

19 *Alapati v. Dasari*, 49 MLJ 664, 91 IC 98, A 1926 Mad 128 (2).

20 *Satya Narayan v. Purnayya*, 131 IC 6, A 1931 Mad 260, 61 MLJ 805.

1 *Narayana v. Sankuni*, 15 M 255; *Ramananda v. Pulkutti*, 21 M 288.

2 *Mahalaxmi Bank v. Province of Bengal*, A 1942 Cal 371.

3 *Kashinath v. Sadasiv*, 20 C 805; *Sukhdeo v. Lachman*, 24 A 456.

second appeal,⁴ or a vendor suing for recovery of unpaid purchase money may claim it by enforcement of a charge to bring the suit within 12 years' limitation⁵, or a purchaser suing for specific performance may add a prayer for refund of the earnest money in the alternative,⁶ or a plaintiff suing for possession of land sold may be allowed to claim refund of the price on the sale being found to be legally defective,⁷ or a plaintiff suing for declaration may add a prayer for consequential relief.⁸

In a suit for cancellation of the sale deed, the alternative relief of possession, was allowed at the appellate stage.⁹ In fact, if on the facts alleged in the plaint, a plaintiff can seek several reliefs together or in the alternative, and he has sought only some of them, he can amend his plaint by adding a prayer for the others at any stage of the suit,¹⁰ and a suit would not be dismissed simply because the plaintiff had misconceived the appropriate relief to which he was entitled.¹¹ So, in a suit by one of several co-obligees of a bond for his share only, the plaintiff should be given permission to include the whole claim.¹² Similarly, in an appeal against the whole decree by one of the two defendants, the appellant was allowed to amend the memorandum of appeal by increasing the valuation.¹³ In a suit for wrongful dismissal plaintiff who claimed the pay for a certain period as damages was allowed to amend the plaint so as to claim the amount as pay and not as damages.¹⁴ In another suit for a declaration that plaintiff

4 *Gajadhar v. Ambika Prasad*, 41 CLJ 540, A 1925 PC 167.

5 *Daw Maya v. U Po Maya*, A 1934 Rang 266, 151 IC 125 (under Limitation Act 1908).

6 *Ibrahim Bhai v. Fletcher*, 21 B 827.

7 *Chaudhri Hakam Ali v. Hashu*, A 1938 Lah 244.

8 *Ragho v. Vishun*, 5 BLR 329; *Limba v. Rama*, 13 B 548; *Chomu v. Umma*, 14 M 46; *Bikram Singh v. Ram Babu*, A 1981 SC 2036.

9 *Shyam Dulari v. Bhagwan Das*, A 1979 All 192.

10 *Nararanam v. Ramasabapathy*, 28 IC 828, 22 MLJ 464; following, *A.R.R.M.S. v. Sevngan Chetty v. Krishna Aiyangar*, 36 M 378; *E.K.S. Chettayor v. Maung Min*, A 1933 Rang 247; *Satyabhama v. Sailabala*, A 1984 Ori 181.

11 *Abdul Kadir v. Bangaru*, 10 IC 260, 1 MWN 270, 9 MLJ 429.

12 *Raghunath Prasad v. Prana*, 13 Luck 157, 1937 OWN 163, 166 IC 992, A 1937 Oudh 190.

13 *Sarat Chand Patnaik v. Baidyanath Patnaik*, 1938 PWN 525.

14 *Krishna v. Gomathi*, A 1945 Mad 33; *Jatindranath v. Corporation of Calcutta*, A 1945 Cal 144.

had never been dismissed or that he still remained in service, when it was held that this relief could not be given, the Federal Court allowed time to amend the plaint so as to claim damages for wrongful dismissal.¹⁵ Where a minor filed a suit for accounts of a partnership alleging that the release given by his mother was not legally binding as she was not his legal guardian, he was allowed to add a definite prayer for a declaration that the deed of release was not valid and binding.¹⁶

A plaintiff can always reduce the amount claimed by him,¹⁷ or amend the relief so as to bring it within the court-fee paid by him.¹⁸ But the Oudh Chief Court in a case refused to allow a plaintiff in appeal after the arguments had been heard to reduce the valuation in order to save the payment of deficiency in court-fee.¹⁹ Where the value of the suit is beyond the pecuniary jurisdiction of the trial court, it cannot entertain an application for cutting down of reliefs so as to bring the suit within its jurisdiction, but should return the plaint for presentation to the proper court. The plaintiff may then present the plaint to the same court again after striking out any relief or reducing the valuation.²⁰ The view of the Allahabad High Court is that even when a court has no jurisdiction to try the suit, it has jurisdiction to pass an order allowing an amendment of the plaint.¹ A plaintiff can also be allowed to increase the valuation if he makes an application at the beginning of the trial,² and within limitation. Amendment cannot be disallowed merely on the ground that it will result in ousting the jurisdiction of the court; after such amendment is allowed, the plaint can be returned for presentation to proper court.³ Where in a suit to declare the mortgage of *Tarwad* property by the manager invalid, a part of the consideration is found to be binding.

15. *Secretary of State v. I.M. Lall*, 1945 FC 47.

16. *Mutha Krishna v. Sankara*, A 1934 Mad 317, 148 IC 869, 193 MWN 478.

17. *Sayyidunnissa Khatun v. Gaibandha Loan Co.*, 172 IC 987, 19 C 21, 562, 65 C 11, 199, 10 RC 471.

18. *Gaidarmal v. Madanlal*, A 1948 East Punjab 30.

19. *Ibn-ul-Hasan v. Usman Ahmad*, 1938 AWR 131, 1938 OWN 1108, 178 IC 635.

20. *Mani v. Paimlu*, A 1928 Mad 559, 111 IC 737; *Zohara Khatoun v. Md. Zameer Alam*, A 1978 Cal 1133.

1. *Kundan Lal v. Navain Lal*, 1957 ALJ 738; *Capt. S.V. Daniels v. Gregory Warden, Friendly Trust*, 1958 ALJ 437.

2. *Vinayaga v. Parthasarathy*, 45 IC 566, 32 MLJ 31.

3. *Bensham v. Mahadco*, A 1985 Bom 462.

the plaintiff can add a relief for redemption of the mortgage on payment of the binding portion of the debt.⁴ But a relief struck out cannot be reintroduced by amendment in appeal.⁵

Where, owing to altered circumstances, the relief becomes inappropriate, court may permit any suitable amendment to the relief. Therefore, in a suit for recovery of possession and mesne profits when receiver was appointed, a prayer for damages for the period after the receiver's appointment could be joined with a prayer for mesne profits for the preceding period.⁶ If during the pendency of suit for injunction, plaintiff is dispossessed he can be allowed to add relief of possession by amendment,⁷ and if during such pendency he has suffered damage, to add the relief of compensation.⁸ But where specific performance could not be granted as the land had been acquired by government under Land Acquisition Act, application made in appeal for adding the alternative relief of damages was rejected on the ground that Land Acquisition proceedings were pending when the suit was filed yet plaintiff elected to pursue his remedy of specific performance.⁹

Where, by virtue of the extension of statute to the area in question, the defendant became entitled to new ground of relief, the amendment of the written statement adding such other grounds was allowed.¹⁰ An amendment which does not prejudice the defendant or takes him by surprise or does not revive time-barred claim can be allowed.¹¹ An amendment of plaint by substituting appropriate reliefs necessitated by subsequent Privy Council decision was allowed.¹²

4 *Mani v. Momalan*, 26 IC 443 Mad; following, *Limba bin Krishna v. Rama bin Pimplu*, 15 M 15.

5 *Rām Chandra Ganga Bux v. Sunder Lal Singh*, 1930 PWN 455, A 1938 Pat 556, 176 IC 862, 11 RP 120, 19 PLT 916.

6 *P. Manga Rao v. C. Kishan Rai*, ILR 1963 AP 931.

7 *Piara Lal v. Baghu*, 1976 Rev LR 597.

8 *Gopal Chandra v. Life Insurance Corp.*, (1984) 58 Cutt LT 352.

9 *Mohammad Abdul Jubhar v. Lalmia*, A 1947 Nag 254.

10 *Sukya v. Mohd. Ishaque*, A 1950 Bom 236; compare, *Rajendra Prasad v. Kayastha Pathshala*, 1981 (Supp) SCC 56(1); *Noorulla Ghazmfarulla v. Muol. Bd.*, (1982) 1 SSC 484 (plea about constitutionality of new Act permitted).

11 *Akhi Ramayan Das Gupta v. B.N. Biswas*, A 1950 Cal 472.

12 *Someshwar Banerji v. Union of India*, 85 CLJ 364.

4. Amendment as to Parties. The question of amendment as to parties will be more conveniently discussed in Chapter XII.

Stage at which Amendment may be Allowed: O.6, R.17, permits amendment "at any stage of the proceedings" (see also, discussion under headings "Amendment and Limitation", *post*, and "Delay", *ante*).

Mere delay in moving amendment is no ground for rejecting the same where the amendment is *bonafide* and necessary for determining the real controversy involved in the suit.¹³ It may be granted after the close of the case but before judgment,¹⁴ or in the first appeal,¹⁵ or in second appeal,¹⁶ though only in exceptional circumstances,¹⁷ even when it was not asked for in the trial court,¹⁸ and even when it was allowed by the original court but the opportunity was not availed of.¹⁹ Where, however, a defect was pointed out by the defendant in two courts, but the plaintiff did not apply for amendment, his application in the second appeal was rejected.¹ Where in the trial court the defendant objected that plaintiff could not sue in his personal capacity but must sue in a representative capacity but the plaintiff persisted in the course he had adopted, permission to amend the plaint was refused by the Appellate Court.² In a case when it was found that the previous suit was framed in the *bonafide* belief that consequential relief was not open, amendment to include a consequential relief was allowed in spite of the fact that the defendant had taken the objection at the earliest stage that the suit offended against section 42, (old) Specific Relief Act.³

13 *Evelyn J. Disney v. Rajeshwar Nath Gupta*, A 1996 Delhi 86 (DB).

14 *Lontfi v. Czarnilov Ltd.*, (1952) 2 All ER 823.

15 Section 107 (2), C.P.C.

16 Section 108, C.P.C.

17 *Mahadei v. Bhau*, 50 IC 180, 6 OJLJ 55 DB.

18 But see, *Rameshwar v. Lateshwar*, 36 C 481 FB; and *Mehtab Ali v. Imdad Ali*, 1916 PLR 596, 30 IC 387, 1915 PWR 91, in which it was refused by Appellate Court because it was not applied for in the original court.

19 *Kishandas v. Rachhapa*, 33 B 644.

1 *Radhabinode v. Naba Kishore*, 94 IC 244, 30 CWN 4153, A 1926 Cal 578 DB; *Parvathi v. Sundaram*, 97 IC 127, A 1926 Mad 988; *Tejral v. Godubai*, A 1944 Bom 158.

2 *Madina v. Ismail*, A 1940 Mad 789; *Sri Raja v. The Borrea Coal Co.*, A 1946 Cal 123.

3 *Gurbugappa v. Sahu Rammappa*, 131 IC 886, 33 BLR 141, A 1931 Bom 218.

Where a claim was grossly overvalued and this was not *bona fide*, amendment in appeal was refused.⁴ In one case amendment was allowed in appeal before the Privy Council.⁵ In another case of damages by a principal against his agent for acting contrary to instructions and fraudulently, the case of fraud was given up but plaintiff was allowed in appeal to introduce a new ground of relief under section 214, Contract Act by way of amendment.⁶

Amendment after close of case may be allowed (i) where the matter involved has been raised in the course of the trial and arguments addressed on it, since it will be merely incorporating in the pleadings that which has already emerged in the course of the case as an issue between the parties; or (ii) where evidence has already been led about it; but where leave is given at such a late stage the other party may be allowed to recall a witness and/or amend his pleadings.⁷ But it must not be forgotten that the power is discretionary and therefore such application should generally be made with reasonable promptitude, and if possible, before the case is set down for hearing, for otherwise, it may be refused. Amendments have been refused by Appellate Courts when they changed the character of the suit and involved trial of new issues on new evidence, and the case could not be decided on the material on record,⁸ and when the plaintiff had argued in the lower court that the case was properly framed and presented.⁹

An amendment at a late stage may not be allowed, when the amendment is not *bonafide* and not necessary for determining the real controversy involved in the suit.¹⁰ When the nature of the suit is sought to

4 *Achhuta v. Krishna*, A 1935 Mad 879.

5 *Mohammad Zahoor Ali v. Ratta Koer*, 11 MIA 4 (486), *Gajadhar Mahton v. Ambika Prasad*, A 1925 PC 167.

6 *Philips v. Barnes*, 1938 MWN 156, 10 RPC 114, A 1937 PC 314, 171 IC 487 PC.

7 *Lontfi v. Czarnilov Ltd.*, (1952) 2 All ER 823.

8 *Mehtab Ali v. Imdad Ali*, 30 IC 387, 1916 PLR 596, 1916 PWR 91; *Nag Tun v. Nag Kna*, 12 IC 200, 4 Bur LT 244; *Bajrang v. Brahmaddatt*, 52 IC 849, A 1923 Lah 675; *Maung Ba v. Ma Than*, A 1926 Rang 49, 3 Rang 383; *Dhannulal v. Kuldip Narain*, A 1940 Pat 88, 186 IC 852; *Fazal Bibi v. Abdul Rahim*, 42 PLR 479.

9 *Chhatrapat Singh v. Maharaja Bahadur Sindha*, 39 IC 861 Cal.

10 *Evelyn J. Disney v. Rajeswar Nath Gupta*, A 1996 Delhi 86 (DB).

be altered,¹¹ or when the amendment seems to be entirely an after thought, or when the case originally set up appears to fail, in which case prejudice to the defendant is clear or when it is open to the plaintiff to bring a fresh suit for obtaining the relief sought by the amendment,¹² or when it will enlarge the scope of the suit after it has come up by remand from the Appellate Court.¹³ In a suit for redemption which was ready for judgment, the plaintiff applied stating that he had filed it in ignorance of the facts and asked to be allowed to amend the plaint so as to claim possession on the allegation that the mortgage was invalid, being without consideration and necessity. It was held that the application should in this case have been refused.¹⁴ Similarly, in a suit contesting an adoption, plaintiff applied, after a considerable evidence had been taken, to amend the plaint so as to allege that the parties did not recognise the custom of adoption. The application was refused.¹⁵ But where on the facts appearing from the plaintiff's evidence a new defence of law arose, the defendant was allowed to take such a defence by amending his written statement even after the close of plaintiff's evidence.¹⁶ In a suit for specific performance of a contract defendant was not allowed, after the case had remained pending for over a year, to raise the new defence that the contract of sale was induced by misrepresentation of the plaintiff.¹⁷

In a suit for possession on the allegation that defendant took wrongful possession two years ago, the court found that defendant had been in long possession. The plaintiff was not allowed to amend the plaint in second appeal so as to allege that the defendant's possession before two years was permissive as that would have changed the onus from plaintiff to defendant.¹⁸ In another case plaintiff was not allowed to amend his plaint in second appeal so as to include a prayer based on a new cause of action

11 *Askari v. Ratan Lal*, A 1934 Oudh 178, 148 IC 1044, 11 CWN 453; *Tipan v. Secretary of State*, 154 IC 103, A 1935 Pat 86.

12 *Daw Pan v. Ma Shwe*, A 1935 Rang 88.

13 *Mira Rani v. Durgabala*, (1985) 89 CWN 444.

14 *Tohlu Mal v. Buta*, 67 IC 132, 3 LLJ 184.

15 *Shah Deo Narayan v. Kusum Kumari*, 46 IC 929, 5 Pat LJ 164.

16 *Sulaiman v. Tan Hwi*, 7 R 800, 121 IC 803, A 1930 Rang 140.

17 *Parshottam v. Taimur Ali*, A 1945 All 29.

18 *Rahella v. Wazira*, 109 IC 320, 9 LLJ 334, A 1928 Lah 32.

which on that date had become barred by limitation.¹⁹ In a case plaintiff based his suit on the allegation that the defendant was licensee, defendant pleaded title by adverse possession and the suit was dismissed, the court holding that the defendant was not a licensee; the plaintiff was not allowed to amend his plaint in appeal so as to base the suit on the ground that the defendant was trespasser.²⁰ The court disallowed an amendment asked for in Letters Patent Appeal for conversion of a suit for specific performance into one for compensation or damages.¹ In another case in which a suit for sale on the allegation that the plaintiff was usufructuary mortgagee and had been dispossessed was dismissed on the ground that the mortgage was against statue, the same High Court disallowed in second appeal an amendment to enable plaintiff to claim ownership by prescriptive right.² Where the plaintiff filed the suit only for an injunction restraining the defendant from alienating the property agreed to be sold to him, the plaintiff was held not entitled to ask for the relief of specific performance by way of amending the plaint after a lapse of seven years.³ Amendment was refused in second appeal⁴ when it was found that the plaintiff had made deliberately false allegations in the plaint and the suit in amended form would be barred by limitation at that stage.

In a Madras case, a sister of the deceased had challenged the adoption by the widow but compromised the case on taking a portion of the property. Several years later the sister's son brought a suit for a declaration of the invalidity of the adoption, stating that the compromise by his mother was not binding on him as it was brought about by fraud. The plaintiff's application for including a prayer for setting aside the compromise and order based on it was allowed in appeal by the High Court even after limitation on the ground that the plaintiff had mentioned all necessary facts constituting the cause of action in the plaint and therefore no new case was set up.⁵ In another case the plaintiff sued his uncle for

19 *Vedagiri v. Oveti*, 110 IC 775, A 1928 Mad 828.

20 *Khanu v. Panjal*, A 1933 Sind 279, 146 IC 777.

1 *Kubad Bai v. Guhi*, A 1940 Pat 92, 187 IC 198.

2 *Maksudanlal v. Niranjani*, A 1940 Pat 494, 187 IC 266.

3 *Raheja Constructions v. Alliance Ministries*, A 1995 SC 1768.

4 *Prahlad Mohanti v. Prahlad Chandra Nath*, A 1944 Pat 276.

5 *Krishna Ayyar v. Gamathi Ammal*, A 1945 Mad 33.

partition on the allegation that the latter had adopted him and on defendant's death his widow and daughter who were substituted set up a will executed by him. The plaintiff was allowed to amend the relief by claiming possession on the ground that the will was not genuine.⁶ In suit for declaration plaintiff was allowed in second appeal to add a prayer for possession.⁷

In a suit for damages for libel the defendant traversed all the plaintiff allegations specifically except the publication which was considered to have been admitted by implication. After the issues, the defendant wanted to amend the written statement by denying the publication, but the application was disallowed, as a defendant who deliberately and under no mistake or misapprehension, admitted a fact, "cannot be allowed to change front".⁸ In a similar suit for libel, the plea of privilege was not allowed to be added at the commencement of the trial, as being unfair to the plaintiff.⁹ But where in a libel suit the defendant originally pleaded that the words did not bear and were not capable of bearing a meaning defamatory of the plaintiff amendment to plead truth and justification was allowed.¹⁰

Amendment due to Subsequent Event : Though ordinarily suits are decided with reference to the dates on which they are instituted, if events happen after the institution of the suit with reference to which the rights of parties are to be determined, amendments are allowed to enable the court to take such events into account to bring their decisions in conformity with the events as they stand on the date of the decree.¹¹ The court can always take notice of subsequent events to render justice and allow amendment of pleadings necessitated by subsequent events.¹² There is nothing to prevent amendment so as to base a claim on a cause of action arising after institution of the suit,¹³ and where the original relief has, by

6 *Methi v. Bhimuder*, A 1946 Mad 497.

7 *Shankar v. Püttu*, A 1932 Bom 175, 34 BLR 125, 139 IC 678.

8 *L.A. Subramania v. R.H. Hitchcock*, 85 IC 900 Mad.

9 *Lala Lajpat Rai v. Englishman*, 13 CWN 895, 36 C 883.

10 *Cadam v. Beaverbrook Newspapers*, (1959) 1 All ER 453 CA.

11 *Shikhar Chand v. D.J.P. Karini Sabha*, A 1974 SC 1178; *P. Venkateswarlu v. Motor & General Traders*, A 1975 SC 1409; *M. Laxmi & Co. v. Dr. Anant Deshpande*, A 1973 SC 171.

12 *Annoo Shetty v. Aishabai Hamid Khan*, 1995 AIHC 1893 (Bom.); *M.C. Mehta v. Union of India*, A 1987 SC 1086.

13 *Nur Khatun v. Sumar Sawayo*, 31 IC 7, 9 SLR 61; *Mumtaz v. Naurang*, 3 LLJ 227;

change of circumstances, become inappropriate, or it is necessary to have a decision of the court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, a plaint may be allowed to be amended so as to base a claim on events happening after the institution of the suit.¹⁴ For example, if pending a suit for declaration the defendant takes possession,¹⁵ or plaintiff becomes entitled to possession, by death of one of the defendants,¹⁶ a plaintiff may amend the plaint by adding a prayer for possession instead of bringing another suit, or if, pending a suit for partition by a plaintiff against his two brothers, one of the brothers dies, the plaintiff can amend his plaint and claim a half share instead of one-third. So, where a suit for declaration of invalidity of a widow's transfer was dismissed on the ground of limitation and the widow died pending appeal, the Appellate Court allowed the plaintiff to convert his suit into one for possession.¹⁷ So, where money became payable immediately after the suit and the defence was that the suit was premature, a decree was passed without amendment.¹⁸

In a case it was found that the plaintiff had no title on the date of suit, but one accrued to him during the pendency of the suit, he was allowed to amend the plaint.¹⁹ So, when a plaintiff sued for redemption of a mortgage made by a Hindu widow on the allegation that he was her adopted son, and when the adoption was questioned by the mortgagee, he obtained a conveyance of the equity of redemption from the reversionary heir, he was allowed to amend the plaint by setting up this new title, as the suit was still within time and there was no prejudice to the defendant.²⁰ Similarly,

Ghulam Fatima v. Rahman, 50 IC 270, 127 PR 1919; *Tara Chand v. Abdul Ahad*, 67 IC 894 Lah; *Allahabad Theatres v. Kustom*, 1974 ALJ 196, A 1974 All 73.

14 *Nurman v. Ambica*, 44 C 97; *Ramshivar Dayal v. Pacham Kumar*, A 1970 Raj 77; *Ayesha Khatom v. Durga Sahaya*, A 1977 Cal 108.

15 *Hamid Mirza v. Ahmad Mirza*, 9 OJ 359, A 1922 Oudh 266 DB.

16 *Roshana Singh v. Durag Singh*, 124 IC 244 Nag.

17 *Sreeramulu v. Hanumanayya*, A 1930 Mad 47.

18 *Subbaraya v. Nachtar*, 1918 MWN 199, 44 IC 863, 71 W 403; *Kanshiram v. Jaimai*, 75 IC 562; *S.K. Nagoor v. Haji*, 4 Bur LJ 110, A 1925 Rang 264; *Vaddach v. Doddi*, 93 IC 955, A 1926 Mad 377, 1926 MWN 9; contra *Jugal Kishore v. Chari & Co.*, 101 IC 643, 25 ALJ 385.

19 *Pendekallu v. Pendekallu*, 75 IC 112 Mad; A 1977 Cal 409.

20 *Dorasami v. Chimia*, 22 MLT 538, 1918 MWN 89, 34 MLJ 258, 43 IC 560, 71 W 335.

when plaintiff sued for a declaration that he was entitled to an office of a temple according to turns, and the year for which he was entitled to possession expired during the pendency of the suit and another year for which he became entitled ensued, the plaintiff was allowed amendment so as to get possession during such latter year.¹ Suit for possession of leased property on eviction of tenant on the ground of forfeiture can be amended by adding a new ground for determination of lease by efflux of time.² Ejectment suit on ground of default in payment of rent can be got amended by introducing an allegation of sub-letting which took place during the pendency of suit.³ But an amendment of this nature cannot be allowed where it may amount to a change of jurisdiction, or there is great delay in making the application, or if a fresh inquiry into other facts becomes necessary,⁴ nor can an amendment be allowed to introduce a cause of action which arose during the pendency of the suit when the effect will be to alter the nature of the suit.⁵

A cause of action cannot, however, in any case arise from the suit itself, e.g. in a suit for ejectment, a disclaimer of the landlord's title in the defendant's pleading cannot give a cause of action for that suit.⁶ In a Hindu husband's petition for restitution of conjugal rights, which was filed within two years of the date of marriage, the wife counter with a plea for judicial separation. Three years thereafter the plaintiff applied for leave to amend the petition with a view to praying for divorce on the ground for continuous desertion for over two years including the duration of the petition. The trial court allowed it on the ground that the wife herself had asked for judicial separation. The High Court on revision reversed the order and held that as an amendment related back to the date of institution of the petition or suit, the petition if amended into one for divorce will be barred as premature;

1 *Lakshmiah v. Krishnaswami*, 1935 MWN 56, A 1935 Mad 286, 41 LW 429.

2 *Tinkan Das v. Jamuna Das*, A 1973 Cal 448.

3 *Lakhmichand Kasliwal v. Gopaldas Nikhera*, A 1978 MP 171; *Pronati Mitra v. Sachindra Nath Chatterji*, A 1977 Cal 409; *Bhanu Prakash Agarwal v. Munna Lal*, A 1979 MP 157.

4 *Valluru v. Sasapu*, A 1926 Mad 6, 90 IC 881 DB; *Roshan Singh v. Durag Singh*, 124 IC 244 Nag.

5 *Sobhraj v. F.O. Variomati*, A 1942 Sind 4.

6 *Balkaran v. Gangadin*, 36 A 370; *Gulranmal v. Panna Mal*, 8 SLR 69; *Bishesar v. Gobind*, 12 ALJ 833; *Mir Haidar v. Jai Karan*, 122 IC 271.

in case of a cause of action arising subsequent to the suit a fresh suit should be filed.⁷ Also see discussion under heading "Subsequent Events" in Chapter VIII, *ante* Variance between Pleading and Proof.

Amendment and Limitation : An application for amendment of pleading is not governed by any law of limitation. When an amendment is allowed, the suit cannot be considered to have been brought on the date of the amendment and the date of institution will be the determining factor for the purpose of limitation. In other words, such amendment relates back to the date of the suit as originally instituted. The courts are therefore reluctant to allow amendments which will take away a valid defence acquired under the Law of Limitation. It would annihilate the defendant's legal right which has accrued to him by lapse of time.⁸ As a general rule, amendments ought not to be allowed when they would prejudice the rights of the other parties as existing on the date of such amendments.⁹ The plaintiff will not be allowed to amend his plaint by introducing a new cause of action which, since the date of plaint, had become barred by limitation.¹⁰ Thus, when the plaintiff in a suit for possession as reversioner of the last male owner, after limitation sought to claim the property as the nearest heir of the widow stating that the property was her stridhana, the amendment was not allowed.¹¹ Where in a suit for pre-emption the plaintiff deliberately omitted to include some properties, he was not allowed to include those properties, after limitation.¹² An amendment to introduce

7 *Vidya v. Subhash Reddy*, (1984) 2 An WR 426, relying on *A. K. Gupta & Sons v. Damodar Valley Corporation*, A 1967 SC 96; distinguished, *Subramaniam v. Sundaram*, A 1963 Mad 217 (FB).

8 *Sarandas v. Ameer*, 47 IA 255, A 1921 PC 50.

9 *Veldon v. Neal*, A 1887 (19) QBD 394.

10 *L.A. Leach & Co v. Jeordine Skinner & Co.*, A 1957 SC 357; *Ganpat Singh v. Sher Bahadur*, A 1978 All 66; *Ram Dev v. Ram Bahadur*, A 1984 All 206; *Parannath v. Madhu*, 13 C 96; *Vithu v. Dhondi*, 15 B 407; *Ambabai v. Bhau*, 20 B 759; *Gulzar v. Kalyan*, 15 A 399; *Macleod & Co. v. Ivan Jones*, A 1926 Cal 189, 87 IC 218; *Ram Karan v. Baldeo*, A 1938 Pat 44, 173 IC 292; *Harish Chandra Bajpai v. Triloki Singh* A 1957 SC 444; *Ram Dayal v. Brij Raj Singh*, A 1970 SC 110; *Dr. Sarojini Pradhan v. Karrode Chandra Pradhan*, (1973) 39 CLT 330, A 1973 Ori 214; *Harrier v. Ashford*, (1950) 1 All ER 427 CA; *Sant Ram v. Civil Judge*, A 1994 All 99.

11 *Vridhilingam v. Kandaswami*, 132 IC 311, A 1931 Mad 1, 60 MLJ 713.

12 *Sheo Narayan v. Ram Khilarawan*, A 1945 Oudh 135; *Bande Singh Ganga Singh v. Harbhajan Kaur*, A 1974 P & H 247.

a new cause of action inconsistent to the original case cannot be allowed after the expiry of limitation.¹³

But it is only if the lapse of time barred remedy on a newly constituted cause of action or a newly claimed relief that courts should ordinarily refuse to permit amendment of pleadings.¹⁴ The rule that leave to amend should ordinarily be refused when its effect is to take away from a party a legal right accrued to him can apply only when either fresh allegations are added or fresh reliefs are sought. When an amendment merely clarifies an existing pleading and does not add to or alter it, the bar of limitation is not to be considered in allowing it.¹⁵ Similarly, where the amendment does not constitute the addition of a new cause of action or raise a different case but amounts merely to a different or additional approach to the same facts, the amendment has to be allowed even after the expiry of the statutory period of limitation.¹⁶

In some cases, it has been held that the amendment stating a new cause of action or claiming a new relief takes effect not from the date of the suit as originally filed but from the date when the claim for amendment was made; where a suit for possession of certain plots of land is subsequently amended by the inclusion of certain other plots, it is not a case of amendment properly so called, but a case of addition of entirely new lands and as regards such lands the suit will date only from the day when the claim was made in respect thereof.¹⁷ Where the relief was amended to a claim for new properties, the date of application for amendment was held to be taken from the date on which the new relief was claimed.¹⁸ It may also be pointed out that it is always open to the defendants to raise a plea of limitation even after a plaint is amended and such a plea cannot be ignored merely because the amendment has been

13 *Hall v. Marick*, 1957 (2) All Eng.Rep 722(CA); *Mohd. Ishaq v. Mohd. Iqbal*, A 1978 SC 798; *Haridas Thadani v. Godrej* A 1983 SC 319; *Ishwar Deo v. State of Madhya Pradesh*, 1979 (4) SCC 163; *Babulal v. Hazarilal*, A 1982 SC 818; *Radhika Devi v. Bajrangi Singh*, A 1996 SC 2358.

14 *Ganesh Trading Co. v. Modhiram*, A 1978 SC 484.

15 *Laxmidas v. Nanabhai*, A 1964 SC 11.

16 *A.K. Gupta & Sons Ltd. v. Damodar Valley Corporation*, A 1967 SC 96; *Vineet Kumar v. Mangal Sain*, A 1985. SC 817.

17 *Gram Panchayat Deh Manzil v. Kesho Narain*, A 1964 Punj 462.

18 *Ramachandran v. Lakshminarayanawami*, 1976 (2) MLJ 107.

allowed.¹⁹ But the rule that the amendment, which takes away the right, accrued to the defendant by efflux of time should not be allowed is not an invariable or imperative rule. This is a factor to be taken into account by the court in the exercise of its discretion and does not affect the power of the court to order amendment, if that is required in the interest of justice.²⁰ The Court's power is not circumscribed by the law of limitation, if in its opinion the amendment should otherwise be allowed.²¹ Lord Buckmaster, observed 'that there was full power to make the amendment cannot be disputed and then such a power should not, as a rule, be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by special circumstances of the case'.¹

A plaintiff filed a suit for declaration of his right of pre-emption without asking for the consequential relief of pre-emption and possession. It was held that the plaintiff was attempting to assert the right which he undoubtedly possessed but through some clumsy blundering in a form which the statute did not permit and the plaint should in similar circumstances be allowed to be amended by adding the relief of pre-emption and possession even though at the time of the amendment a fresh suit would be barred by time. In exceptional cases, therefore, an amendment may be allowed even if the effect is to take away from the defendant a legal right accrued to him by the lapse of time.²

Formal amendments by correcting the description of the property or of the defendants or correcting any defect in signature or verification or furnishing particulars, can however, be always made even after the period of limitation has expired.³ Thus, a suit in a firm's name was allowed to be

19 *Gordhandas v. Gokal Khatoo*, 96 IC 79, A 1926 Sind 246.

20 *Leach & Co v. Jordan Skinner & Co.* A 1957 SC 357; *Pirgonda v. Kalgonda*, A 1957 SC 363.

21 *Bishweswar v. Jaileshan*, A 1968 Cal 213.

1 *Charandas v. Amir Khan*, A 1921 PC 50.

2 *Shanti v. Holmes*, A 1974 SC 1719; *Laxmidas v. Nanabhai*, A 1964 SC 11; *Corporation of Calcutta v. Radre*, A 1952 Cal 222; *Rajendra v. Saraswathi Press Ltd.* A 1952 Cal 78; *Leach & Co v. Jordan Skinner & Co.*, A 1957 SC 357; *Anandibhai v. Surendara Bai*, A 1965 MP 86; *Pirgonda v. Kalgonda*, A 1957 SC 363; *Shik Murugunu v. Yaala*, 1956 Andhra WR 93.

3 *Jothiraj v. Bas deo*, 8 ALJ 817; *Nanabhai v. Popat Lal*, 34 VLR 628, 138 IC 797, A 1932 Bom 367; *Ramnath v. Mohan Lal*, 181 IC 106.

changed in the Manager's personal name beyond limitation.⁴ Amendment by adding the name of the defendant, describing him as a shebait of the deity as a real necessary party was allowed.⁵

(See also discussion under the heading "delay" and "Stage at which amendment may be allowed" ante).

How is Amendment Made : In cases in which the court orders an amendment either on the application of the opposite party, or of its own motion, either under O.6, R. 16, or under the second sentence of O.6, R. 17, it ordinarily causes the amendment to be made in the pleading by one of its officers, under the signature of the presiding judge. When a party obtains leave to amend his own pleading under O.6, R. 17, he should, after leave has been granted, generally make the amendment himself in court, but, in proper cases, e.g. when the party is a *pardanashin* lady and the amendment requires her signature or verification, the court may return the pleading to her pleader for amendment within a fixed time.

When a plaint is amended, the court should normally give an opportunity to the defendant to file an additional written statement, and if new issues arise, an opportunity to the parties to adduce evidence on those new issues. Similarly, when a written statement is allowed to be amended and a new plea is added, the plaintiff should have opportunity to meet the new plea.⁶ But if the amendment is of a purely formal nature it should not give the other party an opportunity to reopen his case by introducing new pleas.⁷ When an amendment is ordered by the Appellate Court, necessitating new issues and new evidence, the Appellate Court will generally remand the case⁸ to the lower court for carrying out the amendment and re-trying the case, though it can have the amendment made in its own court, if it so chooses.⁹

Terms on which Amendment is Allowed : Amendment is allowed on "such terms as may be just". Payment of costs is generally one

4 *Jai Jai Ram Manohar Lal v. National Building Material Supply*, A 1969 SC 1267.

5 *Sri Gowri Shankar v. Mangal Maheton*, A 1940 Pat 440.

6 *Tadiparti v. Maddukuri*, 24 IC 822; *Prasapathi v. Raja Vachavaji*, 29 MLJ 53.

7 *Ganba v. Ganpatrao*, A 1937 Nag 376.

8 *Uzir v. Saivai* 20 CWN 54.

9 *Nipendranath v. Hemanta*, 63 IC 701 Cal.

condition on which amendment is allowed, which means costs of the application and of any adjournment caused thereby, or on account of the amendment, and also the costs of any evidence or pleading rendered nugatory by the amendment.¹⁰ Costs incurred by the opponents upto the date of amendment may in proper cases be ordered to be paid.¹¹ A party accepting the costs without demur, but not if he accepts under protest,¹² is estopped from challenging the order of amendment.¹³

The principal of estoppel which precludes a party from assailing an order allowing amendment subject to payment of costs where the other party has accepted the costs in pursuance of the said order applies only in those cases where the order is in the nature of a conditional order and payment of costs is a condition precedent to the amendment being allowed. In such a case it is open to the party not to accept the benefit of cost and thus avoid the consequence of being deprived of the right to challenge the order on merits. The said principal would not apply to a case where the direction for payment of costs is not a condition on which the amendment is allowed and costs have been awarded independently in exercise of the discretionary power of the court to award costs because in such a case the party who has been awarded costs has no opportunity to waive his right to question the validity or correctness of the order.¹⁴ Other terms, besides or instead of costs, can also be imposed as a condition of grant of leave to amend the pleading; such as that the opponent will also have the opportunity of applying for consequential amendment of his pleading and to lead additional evidence to meet the new plea or to support his own amended pleading.

Failure to Amend After Leave : When a party obtains leave to amend his pleading, he must amend it within such time as is allowed by the court when giving leave to amend. The court has, however, power to

¹⁰ In re *Truefort*, 53 LT 498.

¹¹ *Jacobs v. Schmalz*, (1890) 62 LT 121.

¹² *Shri Ram Sundermal v. Gouri Shanker*, A 1961 Bom 137.

¹³ *District Council of Wardha v. Anna*, 197 IC 76, A 1941 Nag 273; *Kannalal v. Bhagwandas*, A 1949 Nag 5; *Korvati Subbamma v. Pinna Pureddy*, A 1958 AP 483; *Ramcharan Mahto v. Custodian*, A 1964 Pat 275.

¹⁴ *Brijendra Nath Srivastava v. Mayank Srivastava*, A 1994 SC 2562; See also *Cudise Trinath Rao v. Sudhansu Prasad*, A 1992 Orissa 168.

extend the time. If the party obtaining leave to amend his pleading fails to amend it within such time, he shall not be permitted to amend it afterwards, unless he can obtain an extension of time from the court.¹⁵

The consequence of failure to amend the pleading, thus is that the case will go to trial on the original pleading, but the suit cannot be dismissed, nor can such original pleading be rejected or struck out simply on the ground of failure of a party to amend it within the time allowed to him.¹⁶ A court has no power to compel a plaintiff to amend his plaint. If a plaintiff does not ask for leave to amend a defective plaint, and if the court finds that the suit cannot proceed on the plaint, it can dismiss the suit.¹⁷ In a case the application for amendment was read as part of the plaint and as the defendant did not raise any objection to this in the beginning, the objection was considered as waived.¹⁸

15 O. 6, R. 18.

16 *Rahmatulla v. Karimu*, 20 Lah LT 145; *Murlidhar v. Narain Das*, 19 IC 472, 1913 PLR 169, 1912 PWR 107; *Feroz Shah v. Kalu Ram*, 164 IC 181, A 1936 Pesh 155.

17 *Ujagar v. Ram Ditta*, 111 IC 787 Lah; *In Re Langton*, (1960) 1 All ER 657 CA.

18 *Gaj Kumar Chand v. Lachman Ram*, 10 IC 503, 14 CLR 627.

Chapter XI

FRAME OF SUIT

Before drafting a plaint, a pleader should carefully consider how he should frame his suit. The first thing which he has particularly to consider is the cause of action for the suit which he is going to institute. If there is a single cause of action and more than one relief can be prayed for, he should pray for all of them, and, if he relinquishes any, he must be prepared to do that once for all. If there are several causes of action, he must apply his mind to consider whether he can bring a joint suit in respect of all of them or must bring separate suits. He has also to consider how best he can frame his suit, so that it may not offend against the rules contained in O.1 and O.2, and may at the same time save his client from unnecessary future litigation. Then, he has to consider what persons he must implead as defendants and whom he cannot legally implead. If there are several plaintiffs, he has to consider whether they can all sue jointly or not. He should not leave out any person who is a necessary or a proper defendant. If he does so, the suit would not be properly framed.

First Principle : The first principle to be remembered in framing a suit is that, as far as practicable, it should be so framed as to afford ground for final decision of the "subjects in dispute" and to prevent further litigation concerning them.¹ This is done by bringing forward the whole case as to the matter of litigation or the question of right involved in the suit, as the words "*Subjects in dispute*" in O.2, R.1, do not mean the *corpus* or subject matter of the claim, but they mean the "jural relation between the parties to the suit for the determination of which the suit is brought".² It is not, therefore, intended that a plaintiff should necessarily unite all the causes of action which he may have against the defendant in respect of the *corpus* of the suit, though, of course, he is at liberty to do so, if he likes.³ If a plaintiff can claim a property on more than one separate ground, he should allege all those grounds in the plaint, and, if he does not, the dismissal of his suit on the ground or grounds urged will bar a separate suit on the

1 O.2, R.1.

2 *Ramaswami v. Vythinatha*, 26 M 760 (766); *Shanker Lal v. Ganga Bisan*, A 1972 Bom 326.

3 *U. Po Ko v. U. Po Thein*, 161 IC 820, A 1936 Rang 167.

other grounds (section 11, explanation IV, C.P.C.) Thus, where a suit for possession as reversioner on the ground of a certain relationship was dismissed, a subsequent suit for possession as reversioner on the ground of another relationship was held barred⁴ as the plaintiff was bound to include in the former suit all the different grounds on which he claimed to be a reversionary heir.

Second Principle: The second principle embodied in O.2, R.2, is directed against splitting up of a cause of action. The object of this rule is that a defendant should not be dragged to court unnecessarily and that there may not be multiplicity of suits. It requires that every suit shall include the whole of the claim which a plaintiff is entitled to make in respect of an action⁵ but it is not necessary that he should include in one suit every claim or every cause of action which a plaintiff might have against the defendant⁶ even where more claims than one arise in respect of the same subject matter.⁷ O.2, R.2 requires that a party who comes to the Court, must plead all the grounds available to it and seek all the reliefs which it can seek in the first case itself, so that the Court may decide the case once for all. The principle is based on public policy and cannot be taken exception otherwise.⁸ O.2, R.2 requires the plaintiff to claim all reliefs emanating from the same cause of action.⁹ Though a suit not so framed is not liable to be dismissed but the plaintiff shall not be at liberty to bring another suit for the portion so omitted or relinquished in the first suit. Thus the omission will bar only the remedy of the plaintiff and not his right.¹⁰ It is immaterial for the application of this penalty whether the omission was intentional or accidental,¹¹ or that after having omitted to include it by

4 *Masilamania v. Thiruvengadam*, 31 M 485.

5 O.2, R.2.

6 *Kulada Pd. v. Khudiram*, 70 IC 187, 27 CWN 678, 37 CLJ 545; *Manmathanath v. Jagat Ram*, 59 IC 517 Cal; *Parashram v. Sadasheo*, A 1936 Nag 268; *Gulzar Khan v. Gram Panchayat Bora Kalan*, 1989 Punj LJ 176 (P&H) (DB).

7 *Rengier v. Ramia*, A 1930 Mad 264; *Shanker Lal v. Ganga Bisani*, A 1972 Bom 326; *Nav Samaj Ltd. v. Shamrao*, A 1984 Bom 23.

8 *Swatantra Kumar Agarwal v. Managing Director, U.P.F.C. Kanpur*, A 1994 All 187.

9 *Inacio Martins v. Narayan Hari Nain*, A 1993 SC 1756; *H. Basha v. Urdu Primary School Bangalore*, 1995 (2) Kar LJ 495 (Kant).

10 *Punjab National Bank v. Official Receiver*, 188 IC 833, A 1940 Lah 166; *Ahmad Jaman Khan v. Baldeo Das*, A 1933 All 228.

11 *Buzloor Ruheem v. Shumsoonnissa*, 11 MIA 551; *Syed Abdulla v. Harkishore*

seeking amendment of the plaint.¹² The omission will not bar second suit when the plaintiff was not, at the time of the former suit, aware of his right to the claim omitted by him,¹³ or where the cause of action for the subsequent suit has arisen subsequently.¹⁴ Nor will the rule be attracted when the cause of action has been split by agreement between the parties.¹⁵ A subsequent suit in respect of a claim, which was barred by time, when the earlier suit was filed, but became within time later on by an Act, will not be hit by O.2, R.2.¹⁶ It is, therefore, necessary for a pleader to carefully consider the whole claim which his client can make in respect of a cause of action before drafting the plaint, and unless the plaintiff elects to relinquish any portion of it, to advance whole of it in his plaint. For this purpose it is necessary to understand what the term "cause of action" exactly means. The mere fact that the buildings let out to tenants are under a roof, which covers a number of rooms under it, does not justify a joint trial.¹⁷

Thus, where a person unauthorisedly occupies different khasra numbers, the owner may file several suits on the same day or on different dates within the limitation period. He may file one suit also.¹⁸ The provisions of O.2, R.2, do not bar a subsequent suit when the earlier suit has been dismissed on technical ground.¹⁹ O.2, R.2 is based on the rule of law that a man shall not be twice vexed for one and the same cause.²⁰ Where the

Singh, 2 CLR 490; *Ram Prasad v. Radha Pande*, 21 PLT 790; *Shukla Verma v. Prem Shanker*, 1976 ALJ 652.

- 12 *Mohammad Khalil v. Mahbubali*, A 1949 PC 78, 1948 ALJ 574.
- 13 *Amanat Bibi v. Imdad Husain*, 15 C 800 (PC); *Batual Kuwar v. Munni Lal*, 32 A 625, 7 ALJ 734; *Gora Chand v. Basanta*, 15 CLJ 238; *Dasarthy v. Palala*, 45 IC 969, 24 MLT 311; 7 LW 557, 1918 MW 427; *Yarlagada v. Pulgadda*, 103 IC 74 (Mad); *Venkatachandikamba v. Viswanadhammaya*, 164 IC 717, A 1936 Mad 699; *Bhagwan Das v. Tajunnisa*, A 1941 All 217, 194 IC 586; *State of Madhya Pradesh v. State of Maharashtra*, (1977) 2 SCC 288, (1977) 2 SCR 555, A 1977 SC 1466; *Nav Samaj Ltd. v. Shamrao*, A 1984 Bom 23.
- 14 *Geeta Bose v. Machine Tools of India Ltd.*, A 1992 Cal 116 (DB); *State of M.P. v. State of Maharashtra*, A 1977 SC 1466.
- 15 *Phool Chand v. Kamta Pd.*, 1963 All WR 619.
- 16 *National Security Assurance Co. v. S.N. Jaggi*, A 1971 All 421.
- 17 *Ebrahim Ismail Kunju v. Phasila Beevi*, A 1991 Ker 385 (DB).
- 18 *Gulzar Khan v. Gram Panchayat, Bora Kalan*, 1989 Punj LJ 176 (P & H) (DB).
- 19 *Inacio Martins v. Narayan Hari Naik*, A 1993 SC 1756.
- 20 *Balmukund v. Sangari*, 19 All 379 (FB); *Mangaraju v. Venugopala*, A 1964 AP 412.

earlier suit was for enforcement of bank guarantee while the second suit was for recovery of damages for the breach of the underlying contract, the subsequent suit was held not barred by the provisions of O.2, R.2.¹

What is Cause of Action : The Privy Council summarised the law on the point as follows:

" (1) The correct test in case falling under O.2, R.2, is Whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

(2) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment.

(3) If the evidence to support the two claims is different, then the causes of action are also different.

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(5) The cause of action has no relation whatsoever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the *media* upon which the plaintiff asks the court to arrive at a conclusion in his favour."²

Every such fact or circumstance which entitle the plaintiff to the relief claimed is a part of the "cause of action",³ but the term does not include every piece of evidence which is necessary to prove such fact.⁴ It must be carefully distinguished from the transaction which gave rise to it, for the same transaction may give rise to several causes of action and the law does not require that *all* such causes of action must be joined in one suit.⁵

1 *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735.

2 *Mohammad Khalil v. Mahbub Ali*, A 1949 PC 78; see also, *Sidramppa v. Rajashetty*, A 1970 SC 1059; *Haridas v. Anath Nath*, A 1961 SC 1419; *Pratap Chand v. Ram Narayan*, (1961) 3 SCR 913, (1962) 1 SCJ 158; *Gurbux Singh v. Bhooralal*, A 1964 SC 1810; *Shankar Sita Ram v. Balkrishna*, A 1954 SC 352; *State of M.P. v. State of Maharashtra*, A 1977 SC 1466, (1977) 2 SCR 555; *Oskar Louis v. K.V. Saradha*, A 1991 Ker 137; *Jokhi Ram v. Sardar Singh*, 1955 ALJ 579.

3 *Beni Madho v. Sarat Chandra*, A 1937 Cal 643.

4 *Sheokumar v. Bechan Singh*, A 1940 Pat 76.

5 *Shridhar v. Godulal*, 41 BLR 1223, A 1940 Bom 20, 186 IC 609; *Amar Singh v. Tulsi Ram*, A 1949 Nag 195; *Arunachalam Pilai v. Vellamma*, (1967) 2 MLJ 490.

For example, by a collision with the defendant's van, the plaintiff's cab is damaged and the plaintiff also receives bodily injuries. Though the transaction (viz., the collision) is one, two causes of action have accrued to the plaintiff, viz., (1) damage to his cab, and (2) injury to his body. He is not bound to join both of them in one suit (though he is at liberty to do so, if he likes) and the suit for compensation for damage to the cab will not bar a second suit for damage for bodily injury. But the plaintiff cannot be permitted to bring one suit in respect of damage to the wheels of his cab and another in respect of damage to the axle, or one suit for injury to hands and another suit for injury to legs. One and the same transaction may give rise to several distinct causes of action and plaintiff may bring as many separate suits as there are causes of action, but not more than one suit can be brought in respect of a single cause of action. The test is to inquire, after setting out the facts constituting the cause of action for the particular claim, whether on those facts it is open to the plaintiff to make any other claim, and whether the facts which would be required to establish the claim to be preferred would as well substantiate another claim.⁶ If the answer is in the affirmative, the pleader should warn the plaintiff of his right and of the consequence of the omission.

Illustrations : (1) Of the Same Cause of Action : *The following claims have been held to arise from the same cause of action :* The plaintiff sent one consignment of *bidies* through Railways. A part of the consignment was not delivered, while a part was delivered in damaged condition. A suit was brought for damaged goods. Subsequent suit for non-delivery was held barred by O.2, R.2. It was treated as intentional relinquishment of claim.⁷ Suit for specific performance, subsequent suit for recovery of deposit money.⁸ Suit for specific performance of contract, subsequent suit for compensation or for even *mesne* profits.⁹ Previous suit for termination of agency, second suit for rendition of accounts.¹⁰ Suit

6 *Mohammad Khalil v. Mahbub Ali*, A 1949 PC 78; *Sardar Balbir Singh v. Atma Ram Srivastava*, A 1977 All 211 (FB); *Aziz Fatima v. Munshi Khan*, A 1980 All 277.

7 *Chotabhai Jethabhai & Co. v. Union of India*, A 1971 Cal 221.

8 *Chindamabaro v. Sri Niwas*, 8 MLJ 6.

9 *Pratap Chandra v. Kalicharan*, A 1963 Cal 468.

10 *State v. Algarisubramanian*, A 1988 Mad 248.

for specific performance, suit for money paid on a consideration which has failed.¹¹ Suit for partition basing title to half share, subsequent suit for possession of entire property.¹² Where in a claim petition arising out of termination of contract, certain issues are not raised, a second claim petition founded on those very issues.¹³ Suit for partition of joint family property and subsequent suit for partition of an item omitted in the former suit.¹⁴

Upon settlement of accounts between the parties the defendants gave the plaintiff an order from their agents for payment of Rs. 2,500 and promised to pay the balance within a month. Claims of both arise out of the same cause of action and only one suit should be brought.¹⁵ Where a contract of sale of goods was broken by the defendant, in part by refusal to take delivery, and in part by refusing to pay the price of goods delivered, it was held that there was only one cause of action for both.¹⁶ Claim for interest on the date the principal has also become due, subsequent claim for principal.¹⁷ However, where the earlier and subsequent suits would lie in different courts e.g., Small Cause Court and Civil Court,¹⁸ or Civil Court and Revenue Court,¹⁹ then separate suits for mesne profits, declaration and possession would not be barred.

Suit for maintenance, and subsequent suit for the same by enforcement of a charge on property even though the court deciding the first suit could not give relief claimed in the second suit.²⁰ Where a sale-deed was executed by the defendant in favour of the plaintiff and the consideration was made

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- 11 *Parangodan v. Perumtoduka*, 27 M 380; *Venkatarama v. Vemkata*, 24 M 27.
 - 12 *Ma Pwa Shin v. U. Po Sin*, A 1937 Rang 324, 170 IC 946.
 - 13 *G. V. George v. Secy. to Government, Water and Power Deptt. Trivandrum*, A 1990 SC 53.
 - 14 *Nageshwar Tewari v. Dwarka Prasad*, A 1953 All 541.
 - 15 *Appaswami v. Ramaswami*, 9 Mad 279.
 - 16 *Duncan Brothers v. Jeet Mal*, 19 C 372.
 - 17 *Muhammad Hafiz v. Mirza Mohammad Zakarya*, 20 ALJ 17, 44 A 121, 65 IC 79, 49 IA 9, 42 MLJ 248, 35 CLJ 126, 1 PWR 1922 (PC); *Chunilal v. Amir Ahamad*, A 1958 AP 608; *Thirumalai Nambi v. Maharaja Pillai*, (1976) 2 MLJ 55.
 - 18 *Aziz Fatima v. Munshi Khan*, A 1980 All 270.
 - 19 *Maharaj Singh v. Board of Revenue*, 1981 All CJ 191.
 - 20 *Manubothula Rama Rao v. Manubothula Venkayamma*, A 1931 Mad 705, 134 IC 803, 1931 MWN 893; *Jawala Prasad v. Padmavati*, 167 IC 123, 1936 AWR 1096, A 1937 All 56.

up of two old mortgage deeds and some cash, and the plaintiff on the cancellation of the sale-deed, brought a suit for refund of the cash only, his subsequent suit on the basis of one of the mortgage deeds was held barred by O. 2, R. 21.¹ One transaction of mortgage and lease, suit for rent, subsequent suit for mortgage is barred.² Suit for whole amount as heir of plaintiff's father decreed for half as other half held to be of mother, subsequent suit for other half on ground that mother had life interest only held barred.³ Suit against order of dismissal from service, subsequent suit for arrears of salary was not maintainable.⁴ First suit for declaration that sale deed is invalid without claiming reliefs of possession and mesne profits and without obtaining leave of court for the omission would debar the plaintiff from filing a subsequent suit for possession and mesne profits.⁵ Where in the earlier suit, the plaintiff claimed recovery of possession on the ground that the defendant was licensee, the second suit on the ground that the defendant was a trespasser was held barred.⁶ Where the bank to which a property is hypothecated filed a suit for a simple money decree, any later claim on the security or sale proceeds thereof was barred.⁷

(2) Of Distinct Causes of Action : *The following are instances of claims having been held to arise from distinct cause of action:* Claim on a promissory note; claim on the basis of original consideration after the promissory note was held to be unenforceable on account of material alterations,⁸ or the promissory note was not proved.⁹ Claim by a reversioner to challenge the validity of one alienation by a Hindu widow; similar suit in respect of another alienation.¹⁰ Suit for a specific sum of

1 *Kamaruddinshah v. Sheikh Diljan*, 166 IC 996, A 1937 Cal 57.

2 *Md. Ahsanul Tuadid v. Akhtar Hasan*, A 1960 Pat 106; contra, *Venkappa v. Gangadhar Dharn*, A 1959 JK 112.

3 *Dip Chand v. Ramlal*, A 1961 Punjab 322.

4 *P.J. Saitins v. Superintendent Printing and Stationery*, 1965 ALJ 292; *Angal v. State of Maharashtra*, A 1968 Bom 304; *Union of India v. P.V. Jagannath*, A 1968 MP 204.

5 *Gnanaprakasam v. Sabasthi*, (1980) 1 MLJ 182.

6 *Indubai v. Jawaharalal*, A 1990 MP 80.

7 *Syndicate Bank v. Official Liquidator*, A 1995 Del 256.

8 *Saninath v. Palanaiapa*, 25 IC 228, 18 CWN 617.

9 *M.K.M.V. Chetty v. Ma Mya*, 94 IC 628, 1925 Rang 304, 4 Bur LJ 130.

10 *Bahadur Singh v. Sultan*, 8 OLJ 535, 66 IC 455, 3 UPLR (PC) 83.

money as money had and received for plaintiff's use; suit for account and payment of sum found due.¹¹ Suit for damages for failure to do repairs to a car; suit for its price on account of defendant's refusal to return.¹² Suit for account upon a mortgage; suit for redemption.¹³ Suit for dissolution of partnership; suit for account.¹⁴ Suit for ejectment on the ground of sub-letting subsequent suit on the ground of bonafide requirement.¹⁵ Suit on two bonds, though they have been executed in lieu of one original consideration,¹⁶ but in a case in which the defendant, in consideration of his liability for Rs. 1,300, passed a promissory note for Rs. 700 and agreed to do certain legal work for the balance of Rs. 600, but died before doing the legal work, it was held that there was a single cause of action for money due on the promissory note as well as for recovery of Rs. 600 and separate suits could not be brought.¹⁷ Suit for rent against a mortgagor, who had along with the usufructuary mortgage, also executed a lease agreeing to pay the rent, suit for the mortgage money.¹⁸ Suit for money charged on property; suit to enforce the charge.¹⁹ Suit for possession ignoring a mortgage; subsequent suit for redemption of that mortgage.²⁰ Suit for declaration and injunction (after dismissal under proviso to section 42, of old Specific Relief Act), suit for declaration and possession.¹

Earlier suit for injunction, subsequent suit for declaration of title and possession.² Earlier suit by the adopted son for possession of some

11 *Shib Singh v. Jograj*, A 1930 All 116.

12 *Harichand v. Cheragdin*, 122 IC 733 Lah.

13 *Laluchand v. Girjappa*, 20 B 469; *Rajmohan v. Sardacharan*, A 1936 Cal 200, 162 IC 709.

14 *Jhandomal v. Ruliamal*, A 1937 Lah 633, 169 IC 692.

15 *Geeta Bose v. Machine Tools India Ltd.*, A 1992 Cal 116 (DB).

16 *Inacio Martins v. Narayan Hari Naik*, A 1993 SC 1756. *Umed Dholchand v. Prisaheb*, 7 B 134; *Anantanarayan v. Savitri*, 36 M 151.

17 *Preonath v. Bishnath*, 29 A 256.

18 *Ralia Ram v. Amin Chand*, 74 IC 122, 4 Lah 52, 5 LLJ 259; *Bhagwan Das v. Jalaldin*, 69 IC 54 Lah; also see *Md. Ahsanul Tuadid v. Akhtar Hasan*, A 1960 Pat 106.

19 *Bank of Bihar Ltd. v. Omitave Chatterji*, 186 IC 221 Pat.

20 *Jaimal v. Ganeshi*, 4 Lah 187, 5 LLJ 296, 75 IC 528; *Kalinath v. Manindra Nath*, A 1940 Cal 550.

1 *Mahomed Khan v. Shafi*, 120 IC 509, A 1930 Sindh 87; *Bondey Ali v. Gokul Misir*, 34 A 172.

2 *Inacio Martins v. Narain Hari Naik*, A 1993 SC 1756.

properties on the ground that he was the sole surviving coparcener subsequent suit by him for general partition of all the properties.³ Earlier suit by the mortgagor assailing defendant- mortgagor's right to auction mortgaged property instituted before the auction took place, subsequent suit for the declaration that the auction sale was void.⁴ The prior suit for recovery of consideration by a usufructuary mortgagee would not bar a subsequent suit for possession.⁵ Earlier suit for declaration and injunction on the basis of possession, subsequent suit for possession on the ground that the defendant has trespassed on the suit property.⁶ Previous suit for specific performance of agreement relating to re-conveyance of the suit property, subsequent suit for redemption of the mortgage relating to the suit property.⁷

Suit for ejectment on ground of default in payment of rent; and suit for arrears of rent.⁸ Suits for partition of different properties among tenants in common.⁹ Suit for rent¹⁰ or mesne profits for different years.¹¹ Previous suit for possession and mesne profits, subsequent suit for recovery of arrears of rent.¹² Suit by one co-sharer against the other in exclusive possession for share of profits, suit for partition, joint possession and profits for subsequent year.¹³ Suit for rent at old rate when proceedings for enhancement were pending, after decree in enhancement suit for additional rent (as enhanced) for the same years.¹⁴ Suit by a co-sharer against *lamberdar* for account of one year, similar suit about subsequent year.¹⁵ Suit for declaration of title to property purchased by plaintiff and

3 *Sangappa Sadappa Bhavari v. Gourvva*, A 1993 Kant 1.

4 *Satyapal v. Rukayyabai*, A 1993 Bom 203.

5 *Rangasami Goundan v. K. R. Rangai*, A 1955 Mad 545.

6 *K. Palaniappa v. Valliammal*, A 1988 Mad 156.

7 *Mahammad Sanoowar v. Asman Ali*, A 1989 Gau 71.

8 *Khushi Ram v. Abdul Ghafir*, 63 IC 978; *K. Varalakshamma v. T. Raghulu*, (1987) 2 Andh LT 75 (AP).

9 *Khetro Mohan v. Mohim Chandra*, 17 CWN 521; *Amar Nath v. Ganesh*, A 1971 P & H 241; *Shambhudutt v. Srinarain*, A 1954 Raj 269.

10 *Narbadeshari Pd. v. Saheb Singh*, A 1951 All 561.

11 *Bhumanna Poshatty v. Narayan Sadashiv Kilapure*, ILR 1961 Bom 234.

12 *Shivaram T. v. T. Chinnanna*, 1987 (1) Kant LJ 296, ILR (1987) 1 Kant 1827.

13 *Dunichand v. Jagdish*, A 1949 East Punjab 243.

14 *Deb Narain v. Jagdish Chandra*, 110 IC 395, A 1928 Cal 684, 32 CWN 870 (DB).

15 *Sheoshankar Dyal v. Sheo Shankar Sahai*, A 1947 Nag 176.

pre-empted by another person; suit for refund of consideration.¹⁶ Suit for refund of earnest money and suit for specific performance.¹⁷ Suit for declaration of title; suit for pre-emption.¹⁸ Suit by assignee of part of a debt assigned; suit for the remainder.¹⁹

A suit for interest against the mortgagor personally is no bar to a suit to recover principal and subsequent interest from the mortgaged property.²⁰ In purchase of goods each purchase gives a distinct cause of action unless the items are connected as to form a continuous demand in which case the whole forms one cause of action.¹ First suit for injunction and declaration that business run by defendant was joint family business without including all joint family property. Subsequent suit for partition of all joint family property and business is not barred.²

The plea of a bar under O.2, R.2, requires proof of the precise cause of action in the earlier suit and for this the plaint of the earlier suit must be placed before the court. The cause of action cannot be inferentially presumed in this technical bar.³

Several Cause of Action Treated as One Although an obligation and a collateral security for its performance furnish two causes of action, it has been provided that they should be regarded as one cause of action for the purpose of O.2, R.2.⁴ And, similarly, successive claims arising under the obligation, although furnishing so many different causes of action, are also deemed to constitute but one cause of action.⁵ Therefore, if rent

16 *Alum Khaton v. Hayat Khan*, A 1938 Lah 492, 40 PLR 794.

17 *Sumer Chand v. Hukam Chand*, A 1965 MP 177.

18 *Ram Krishna v. Gurdial*, A 1941 Lah 337.

19 *Sundar Singh v. Kuber Singh*, A 1933 Lah 1017.

20 *Lalta Prasad v. Puranmal*, 51 A 974; *Sultan v. Joti Sarup*, A 1928 Lah 269, 109 IC 613 (DB); *Nidhan Singh v. Prem Singh*, A 1940 Lah 498.

1 *Augustus Bros v. M.A. Fernandex*, 31 IC 59, 29 MLJ 574, 2 LW 890, 18 MLJ 377, 1915 MWN 765; *Kedar Nath v. Dinbandhu*, 47 C 1043.

2 *Lajwant Kaur v. Abnashi Singh*, A 1979 Punj 268.

3 *Gurbux Singh v. Bhoora Lal*, A 1964 SC 1810 (on power to grant a decree for mesene profits in the absence of prayer); *Tibhu Ram v. Pyare Pasi*, A 1967 Pat 423 (FB); *Parimal Sen v. P.K. Sen*, A 1985 Ori 286; *Indian Cable Co. v. Sumitra*, A 1985 Cal 248.

4 *Narbadeshwar Pd. v. Saheb Singh*, A 1951 All 561.

5 O.2, R.2, Explanation.

for four years has become due, and a suit is brought only for two years, a separate suit for the remaining two years would be barred⁶ and if a suit is brought on an instalment bond for some of the instalments due up to a date, a fresh suit for the remaining instalments would not lie.⁷

Joinder of Causes of Action : While a plaintiff is not compelled to include in his suit all the causes of action he may have against a defendant, he is certainly at liberty to unite, in one suit as many causes of action against a defendant as he likes.⁸ For instance, he may institute a single suit to recover money due on several bonds executed by the defendant at different times.

If there are several plaintiffs, they can unite in one suit, against a defendant, as many causes of action as they like, provided that all the plaintiffs are *jointly interested* in all the causes of action.⁹ For instance, if X executes several bonds at different times in favour of A, B and C jointly, the latter three persons can sue X on all the bonds in a single suit. Similarly, a plaintiff can sue several defendants on several causes of action,¹⁰ provided all the defendants are *jointly interested* in all the causes of action.¹¹ For instance, if A, B and C execute several bonds in favour of X, the latter can sue them jointly on all the bonds in a single suit.

The reason of these rules is obvious. The object of permitting joinder of causes of action in a suit between two individuals is to avoid multiplicity of suits, and when the plaintiffs or defendants are more than one, but are jointly interested in the causes of action, they can safely be regarded as single individual. But joint interest in the main questions raised by the litigation is a condition precedent of joinder of several causes of action in a suit by, or against, several persons. Therefore, it is most important to find out whether there is or there is not, a *joint interest* in the causes of action. The test is whether there is community of interest in the case to be determined.¹² A mere similarity of the claims is no ground for joining in

6 Illustration to O.2, R.2.

7 *Abdul Karim v. Md. Jan*, 44 All 663.

8 O.2, R.3.

9 *Tima Mali v. Kartika Mehar*, A 1981 Ori 216.

10 O.2, R.3.

11 O.2, R.3.

12 *Bhagwati v. Bindeshari*, 6 A 106; see also, *Shukur Hasan Mutwalli v. Malkappa*, A 1980 Bom 213.

one suit several claims, which are several and distinct against several persons. For instance, if A and B execute one bond in favour of X, and B and C jointly execute another bond in favour of the same X, X cannot bring a single suit against A, B and C on the two bonds, claiming a certain amount against A and B and a certain amount against B and C. A suit for possession by redemption against one set of defendants and for possession, by ejectment against other defendants, cannot be allowed.¹³

But in one case several causes of action can be joined in one suit by or against several persons even when they are not jointly interested in all the causes of action, that is, when the causes of action arise from the same act or transaction, and there is common question of law or fact.¹⁴ For instance, if A and B are jointly prosecuted by X for an offence and are acquitted, though the causes of action for suits for malicious prosecution by A and B are different, yet they can bring a joint suit, as the causes of action arise from a single act of X and as common questions of fact and law would arise. O. 1, R. 3 and O. 2, R. 3, if read together, indicate that the question of joinder of parties also involves the joinder of causes of action. The plaintiff could file an appeal against the person against whom the suit was dismissed notwithstanding that it was decreed against the other.¹⁵

Exceptions : To these rules permitting joinder of causes of action there are the following two exceptions :

1. No other claim can, unless with the leave of the court, be joined with a suit for the recovery of immovable property, except—

(a) Claim for mesne profits or arrears of rent in respect of the property claimed or any part thereof ;

(b) Claim for damages for breach of any contract under which the property or any part thereof is held ;

(c) Claim in which the relief sought is based on the same cause of action.¹⁶

13 *Anand Sarup v. Asad Ali*, 14 ALJ 342, 28 IC 602; *Brunda Bali v. Hari Biswal*, 1971 (1) CWR 699; *Kalicharan v. Ganesh Prasad*, A 1971 All 507.

14 O. 1, R. 1 and 3.

15 *Iswar Bhai C Patel v. Harihar Behera*, A 1999 SC 1341.

16 O. 2, R. 4.

It must be noted that this exception relates only to suits "for the recovery of" immovable property, and not to suits merely relating to such property, such as suits for declaration of title,¹⁷ or specific performance of a contract,¹⁸ or sale of immovable property in enforcement of mortgage.¹⁹

The "leave" required by this rule should generally be obtained before filing a suit.²⁰ It may be convenient to present an application for leave with the plaint. But there is nothing to prevent leave being given after the institution of the suit.¹

When a Mohammedan M, died leaving two heirs, A and B, and one C purchased immovable property inherited by A from M, and movables inherited by B from M, and both were in possession of one D, C was allowed to bring a joint suit against D for both the properties, as his cause of action was one, viz., dispossession and defendant's refusal to deliver up the property.² For the same reason, a claim for injunction, for appointment of receiver or for a declaration of title may be added to a claim for possession, provided such claims do not relate to different cause of action. A Hindu widow may in the same suit ask for recovery of immovable as well as movable properties from her husband's coparceners on the basis of a partition which had not been completed during his life time.³

2. No claim by or against an executor, administrator or heir *as such* shall be joined with claims by or against him *personally*, unless the last mentioned claim (a) is alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or (b) is such as he was entitled to, or liable for, jointly with the deceased person whom he represents.⁴

17 *Gledhill v. Hunter*, (1880) 14 Ch D 492.

18 *Cutts v. Brown*, 6 C 328.

19 *Gora Chand v. Basanta*, 12 IC 684, 15 CLJ 285.

20 *Pilcher v. Hinds*, 11 Ch D 905; *Canning Mitra Phoenix Ltd. v. Popular Constructions*, A 1993 Bom 67 (relied on *Krishna Ramchandra v. Raghunath Shanker*, A 1954 Bom 125, dissented from *Edra Venkayya v. Edara Venkata Rao*, A 1938 Mad 979).

1 *Llyod v. Great Western Dairies Co. Ltd.*, (1907) 23 Times LR 570, 2 KB 727; *Union Bank of India v. Logic Systems Pvt. Ltd.*, A 1992 Delhi 153.

2 *Ganesh Dutt v. Tewach*, (1904) 31C 262 PC, 31 IA 10.

3 *Ganesh Dutt*, *supra*.

4 O.2, R.5.

In this rule the words “*as such*” are to be specially noted, for if an heir brings suit in respect of property inherited by him and which has thus become his own property, the suit cannot be said to have been brought by him as such heir, but it is a personal suit to which he can join any other personal cause of action. Thus a Mohammedan widow’s suit against other heirs for her dower debt and for her share in the inheritance of her husband is maintainable, as the latter claim is not as representing the estate of her husband but in her personal capacity and for her own benefit.⁵ Similarly, a Hindu widow’s suit against the executors of her husband’s estate for recovery of her *stridhan* and her share in her husband’s estate is maintainable.⁶ In a Madras case, plaintiff’s father had carried on a business in partnership with the defendant, and after his death, plaintiff and defendant, carried on business with the old partnership assets, the plaintiff then obtained letters of administration in respect of his father’s estate and sued for the accounts of partnership of the time of his father. He also joined a claim for his share in partnership after the death of his father. The High Court held that the claim was maintainable, as both the claims “arise with reference to the estate in respect of which he is suing as administrator”.⁷

Order of Separate Trials : Even when joinder of causes of action is permissible or when a plea as to misjoinder is deemed to be waived,⁸ under the above rules, the court always has power to order separate trials of the different causes of action or to make such other order as may be expedient, in case it thinks that all the causes of action so united cannot conveniently be tried or disposed of in one suit.⁹ But the privilege of ordering the trial to be split up into two or more trials can be exercised by the court alone. The defendant cannot claim it as of right. If the court does not find it inconvenient to try the suit as brought, the plaintiff is certainly entitled to continue the suit in the form in which he has instituted it.¹⁰ But the court has no power to dismiss a part of the suit and to try the rest or,

5 *Ahmad-ud-din v. Sikandar*, 18 A 256; *Hafiza Boo v. Md.*, 31 Bom 105.

6 *Hafiza Boo*, supra.

7 *Arunachellam v. Arunachellam*, 43 MLJ 218, 16 LW 175, 69 IC 966, 1922 MWN 453.

8 *Ahmadbhai v. Dinshaw*, (1911) 12 IC 813 Bom.

9 O.2, R.6.

10 *Mohd. Ishaq v. Abdul Majid*, 1954 ALJ 34.

except in very rare cases; to order the plaintiff to withdraw one part of the suit with liberty to bring a fresh suit. The power is discretionary, and, if the trial court does not think it necessary to exercise it, the Appellate Court will ordinarily not interfere.¹¹ This rule, it must be noted, applies only when the joinder of causes of action is inconvenient or embarrassing but is otherwise legal and proper. It has no application to cases in which the joinder of causes of action is not permitted by law, and the judge should not overlook a misjoinder of causes of action simply because he thinks he can conveniently try them in one suit.¹² When the court passes an order under O. 2, R. 6, the plaintiff should not be required to file separate plaints, but he may be given an opportunity to amend the plaint so that the allegations against each set of defendants in respect of the subject-matter of the cause of action against each are separately set out so as to enable the court to try the suit in sections.¹³

A suit which offends against the rules relating to the joinder of causes of action is said to be bad for misjoinder, which may be of one of the following three kinds :

(1) **Misjoinder of Causes of Action** : Where a suit for damages for an alleged tort is joined with one for recovery of immovable property and the leave of the court is not obtained, or where a suit against a trustee relating to trust property is joined with a claim against the trustee in his personal capacity.

(2) **Misjoinder of Plaintiffs and Causes of Action** : This arises when there are several plaintiffs and they are not jointly interested in all the causes of action, nor do the causes of action in which they are severally interested arise from the same transaction, or, when they do arise from the same transaction, they present no common question of law or fact.¹⁴ A suit by one of the two widows and an adopted son of a deceased, claiming to recover either the whole family estate for the latter, or in case adoption is not held valid, one-half of the estate for the former, was held bad for

11 *Paira Ram v. Kesho Naih*, 73 IC 892, A 1924 Lah 156; see also, *Swami Khat Khata Nandy. Surajpal*, A 1941 Oudh 56.

12 *Ram Pd. v. Sachi Dass*, 6 CWN 585.

13 *Inder Bahadur v. Sitaram*, A 1941 All 209, 195 IC 145; *Hardwari Lal v. Ngrain Das*, A 1951 Simla 233.

14 *Chethru v. Md. Karim*, 50 IC 328, 4 Pat LJ 297.

misjoinder of plaintiffs and causes of action.¹⁵ It has, however, been held that a widow and adopted son, if there is no dispute between them can bring a joint suit against the brother of the deceased to recover property which they claim as belonging to the deceased but which the brother alleges belongs to himself.¹⁶ A suit by a Hindu widow with her two daughters as co-plaintiffs against her step-son for maintenance and for marriage expenses of her daughters was held to be not bad for misjoinder.¹⁷

Where several plaintiffs each claiming title by adverse possession to different parcels of land, filed one suit for eviction, it was held that the suit was bad for misjoinder and that plaintiffs should be put to election.¹⁸ A suit by several plaintiffs jointly for damages for libel against the defendants is bad for misjoinder of the plaintiffs and causes of action.¹⁹ Similarly, several creditors to each of whom separate debts are owed by the same debtor cannot jointly sue for the avoidance of a deed of gift alleged to have been fraudulently executed by the debtor.²⁰ A suit principally for partition and eviction of tenants is bad for misjoinder of causes of action and is not maintainable.¹

But if the cause of action is one, the fact that the several plaintiffs derive their right to the property under separate titles will not affect the right to bring a joint suit. Thus several plaintiffs acquiring shares in the same property differently may bring one suit for possession of the property against persons dispossessing them.²

(3) Misjoinder of Defendants and Causes of Action : This defect is technically called "*multifariousness*", and arises when neither all the defendants are jointly interested in the causes of action nor do the causes of action arise from the same transaction, or, when they do arise from the same transaction, they do not present any common question of law or

15 *Lingam Mal v. Chinna*, 6 M 239.

16 *Fakirapa v. Rudrapa*, 16 B 119; *Ningawa v. Ramappa*, 28 B 94; *Haramani v. Hari Churn*, 22 C 833.

17 *Tulsa v. Gopal Rai*, 6 A 632.

18 *Hadu Sahu v. State of Orissa*, A 1964 Ori 159.

19 *Aldridge v. Barrow*, 34 Cal 662.

20 *Rajjo v. Debi*, 18 A 432.

1 *Dwarka Prasad v. Kishan Lal*, A 1986 Ali 174.

2 *Girja Nath v. Surendra*, 16 IC 84, 16 CLJ 1.

fact. The following are a few instances of multifarious suits :— B agrees to sell land to A. A sues B for specific performance of the contract and joins C on the allegation that B was willing to execute the sale deed, but that C was in possession of the title deeds and was holding out a false claim of having an equitable lien, and that the plaintiff wants a declaration that C has no such lien.³ A suit by one of the partners claiming dissolution of partnership against the other partners and damages for breach of contract against another person, who is described as the plaintiff's agent in collusion with the partners.⁴ A suit by a plaintiff, to whom a member of a joint Hindu family had agreed to transfer his share, for specific performance of the contract against him, and for partition of that share against the other members.⁵ A landlord may file one suit against the same tenant in respect of two portions of the same premises and the suit is not bad for multifariousness.⁶ But a single suit to eject different tenants holding different parcels of land has been held to be bad for misjoinder.

Where, as a matter of fact, the plaintiff has but one cause of action against several defendants there can be no multifariousness and he can bring one suit, although the defendants might claim under different titles, or might have different defences.⁸ For instance, in a suit by a reversionary heir for a share in the estate, all the persons in possession of different portions of the estate under separate sale-deeds executed by the widow can be joined. Similarly, a member of a joint family wishing to set aside various alienations made by his father in favour of different persons can bring a single suit against all.⁷ Similarly, when A claims possession of land under a lease from B, and subsequently B lets the land in different parcels to C, D and E, who dispossess A, A can sue C, D and E in one suit, because they derive their title from a common trespasser B. But if the several persons in possession do not claim under the same trespasser, and have separately trespassed on different portions of the land, or have entered

3 *Luckumsey v. Fazulla*, 5 B 177.

4 *Muthappa v. Muthu*, 27 M 80.

5 *Ramjaya v. Subramania*, 40 M 365 (FB).

6 *Kishan Lal Singhania v. District Judge, Kanpur*, A 1991 All 13.

7 *Sethuratnam v. Venkata*, ILR 43 Mad 567 (PC).

8 *Purshotam v. Bhagwanrao*, 1938 NLJ 210, A 1938 Nag 461, 178 IC 215, 11 RN 211.

9 *Inder Bahadur v. Sita Ram*, A 1941 All 209, 195 IC 145.

into possession under different titles derived from different persons, they cannot be sued jointly.¹⁰ When different defendants commit separate wrongs against the plaintiff, but as the result of a conspiracy between them, the conspiracy will be the common cause of action, and a joint suit will be maintainable.¹¹

Where A, alleging that his brother B mortgaged his (A's) share to C and that C is in possession, sues B and C for a declaration of his title and for possession, the suit is not bad.¹² A sells three properties to B. After the sale, they are attached in execution of a decree against A and purchased by D, E and F respectively. A suit by B against A, the decree-holder, and the purchasers to set aside the execution sales is not bad.¹³ Where the defendant has infringed copyright and trade mark of the plaintiff, a single suit relating to two different causes of action viz., trade mark and copyright is maintainable.¹⁴ One suit for the recovery of consolidated amount advanced to defendant on different promissory notes may be filed.¹⁵ A plaintiff may in a suit filed against the Railways claim damages in respect of several consignments booked through one railway receipt lost in transit.¹⁶

Where the first defendant has borrowed loan from the bank and had been supplying the goods produced by it to various parties who drew hundies and made payments directly to the bank, a suit by the bank against the first defendant and all such parties is not bad.¹⁷ In a suit by an assignee of a mortgage, the plaintiff also added the assignor praying in the alternative for a decree against the assignor. It was held that in the interest of saving unnecessary litigation the suit should not be objected to and the court

10 *W. Dhar v. Htoon May*, 52 IC 927, 12 Bur LJ 106; *Afzal Shah v. Lachmi Narain*, 40 A 7 (11); *Dwa Hla Gyi v. Maung Po Thaugu*, A 1938 Rang 420.

11 *Varajlal v. Ramdat*, 26 B 259; *Reddi v. Madava*, 20 M 260; *Lockenath v. Keshab*, 13 C 147.

12 *Indar Kr. v. Gur Pd.*, 11 A 33; *Mazhar v. Sajjad*, 24 A 358; *Kubra v. Ram Bali*, 30 A 560.

13 *Harnand v. Prosuno Chandra*, 19 C 703; *Gumani v. Ram Charan*, 1 A 555.

14 *Jay Industries v. Nakson Industries*, A 1992 Delhi 338.

15 *Brojkishore Jain v. H. Adil. Dist Judge, Aligarh*, 1985 ALJ 1256, 1985 All W.C. 742 (All).

16 *Union of India v. Ashok Kumar Rasik Lal & Co.*, A 1987 Orissa 264 (DB); *E.I. Railway Co. v. Ahmadi Khan*, A 1924 Pat 596 (DB).

17 *State Bank of Patiala v. Hypine Carbons Ltd.*, A 1990 HP 10.

applied section 99 C.P.C. in appeal when an objection of multifariousness was pressed.¹⁸

Where one of the two defendants is joined merely *pro forma*, and the real causes of action are against the other only, there is no defect of multifariousness. For instance, a single suit for pre-emption under several sale-deeds, all in favour of one defendant, can be brought, though the vendors, who are several, are added as *pro forma* defendants.¹⁹

Procedure in Case of Misjoinder: All objections by defendant on the ground of any of the different kinds of misjoinder of causes of action must be taken by him at the earliest opportunity, and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen (as by a subsequent amendment of the plaint by the plaintiff).

When such an objection is taken or when the defect is otherwise brought to the notice of the court, the court may order or permit the plaintiff to amend the plaint by withdrawing a portion of the claim with liberty to bring it again, and if the plaintiff fails to amend the plaint, the suit may be dismissed, but it should not be dismissed without giving the plaintiff an opportunity to amend the plaint, nor has the court power to dismiss one portion of the suit and to try the other in order to remove the defect of misjoinder.²⁰

If a defendant does not, however, raise a plea of misjoinder, at or before the settlement of issues, the plea shall be deemed to have been waived, and cannot be taken, at a later stage, certainly not in appeal.² If the plea is raised and decided by the trial court, the decision will not be interfered with in appeal, even if it is erroneous, if it does not affect the merits of the case or the jurisdiction of the court.³

18 *Chandra Kant v. Basmatia*, 22 Pat LT 196.

19 *Paivaram v. Kesho Nath*, 73 IC 892, A 1924 Lah 156.

20 *Singa v. Madava*, 20 M 360.

1 O.2. R.7.

2 *Damodar Pd. v. Rupal*, 1966 AWR (HC) 195.

3 See section 99, C.P.C.; *Mohamed Husain v. Kishva Nandan*, A 1937 PC 233, 169 IC 1, 41 CWN 1029, 1937 AWR 631; *Ram Dhan v. Lachminarain*, 166 IC 649.

A 1937 PC 42; 1937 AWR 184, 41 CWN 418.

Chapter XII PARTIES TO SUIT

The next question which has to be considered before drafting a plaint is as to who can join in a suit as plaintiff, and who can, and should, be impleaded as defendant. For, though a suit may not necessarily fail on account of any error in this respect, the plaintiff may have to amend his plaint, paying heavy costs to the other party, or if he has failed to implead the right person as a defendant he might find it impossible to implead him later as limitation may have run out by the time the omission is detected.

General : Order I, C.P.C. carries the heading 'parties to suits'. Rule 1 relates to joinder of plaintiffs, while Rule 3 is in respect of joinder of defendants. In case of plaintiffs, a right to relief must be alleged to exist in their favour whether jointly, severally or in the alternative. It must further be shown that such a right arises out of the same act or transaction, or series of acts and transactions, *i.e.* the same cause of action. For joinder of defendants the relief should be claimable against all of them jointly, severally or in the alternative and it should be the outcome of the same cause of action. It is also necessary that the matter is so connected as to give rise to a common question of fact and law. Out of the above proposition of law crops up the question of misjoinder or non-joinder of plaintiffs on the one hand and of defendants on the other, in relation to the cause of action, *see* O.1, R.9.

1. Necessary Parties and

2. Proper Parties

A necessary party means a party whose impleadment in the suit is absolutely necessary for determining the controversy between the parties and in whose absence no decree can be passed.¹ They are parties who ought to have been joined² within O.1, R.10(2). A proper party, on the other hand, connotes a party whose presence in the suit helps the court in passing an effective decree and in completely deciding the rights and liabilities of the parties. No relief may be claimed against a party, but if the

¹ *Sarwinder Singh v. Dalit Singh*, 1996 (6) SCC 59; *Ramesh Hirachand Kundaammal v. Municipal Corporation of Greater Bombay*, 1992 (2) SCR 1.

presence of such a party before the Court is necessary for proper adjudication of the subject matter of the dispute, he is a proper party though not a necessary party to the suit.²

The test in every case is whether there is a breach of any provision in law or rules which requires any one to be joined in the array of parties, and whether that provision is mandatory or merely directory. If it is the former, nonjoinder is fatal.³ It is the duty of the Court to see that the parties are properly arrayed. Even mistake committed by a party in arraying parties may be rectified by the Court.⁴ The court has to see whether in the absence of a particular party it can or cannot proceed to determine the rights of the parties. If it cannot it should refuse to give any relief.⁵

Joinder of Plaintiffs : The question as to who may join as plaintiff should first be considered. Whenever a suit relates to a joint right, all the co-sharers not only may join but as far as possible must join as plaintiff⁶ as they represent a single and indivisible right, and if any co-sharer in the joint right does not join as a plaintiff, or there are other substantial grounds for allowing one co-sharer to sue, the latter should join the other co-sharers as *pro forma* defendants.⁷ It is not, however, necessary to prove that such person had refused to join as a plaintiff.⁸ For instance all the partners must be joined in any suit concerning partnership business,⁹ all

2 *Gunendra Kumar v. Dura Steamship Ltd.*, A 1989 Cal 398; *Janak Yadav v. Sarahjit Rai*, A 1984 Pat 307; *Udit Narain Singh v. Additional Member, Board of Revenue, Bihar*, 1963 SC 786; *U.P. Awam Vikas Parshanth v. Gayan Devi* A 1995 SC 724 (para 22).

3 *Jagannath v. Jaswant Singh*, A 1954 SC 210; *Maqsood Ali v. Zahid Ali*, A 1954 All 385.

4 *State of Assam v. Basanta Burman*, A 1985 Gauh 13 (DB).

5 *State of Punjab v. Nathu Ram*, A 1962 SC 89; *Sardar Nogendra Singh v. Jaidev*, 1968 MPLJ 176; *Hardev v. Ismail*, A 1970 Raj 167.

6 *S.A. Siluvai Muttin v. D. Sahul*, 98 IC 549, 51 MLJ 648; *Aswani Kumar Roy v. Kshetish Chandra Sen Gupta*, A 1971 Cal 252; *Md. Hasan v. Nazar Md.*, A 1916 Pat 44 (DB) (suit by some members of committee bad).

7 *Deoshi v. Bhikkam Chand*, 100 IC 993, 29 BLR 147; *Munshi Sahu v. Bhuppal Mahton*, 163 IC 405, A 1936 Pat 274; *Ponnusamy v. Ram*, A 1979 Mad 130; *Jagadish v. Ramlal*, A 1988 All 112.

8 *Tarini Kant v. Nand Kishore*, 12 CLR 588; *Pyari v. Kedarnath*, 26 C 409 (FB), 3 CWN 371; *Biri Singh v. Nawal*, 24 A 226; *Peria v. Velayutham*, 29 M 302; *Balkrishna v. More*, 21 B 154; *Ramchand v. Shadi*, 153 IC 871, A 1931 Lah 445.

9 *Rajchander v. Ramgati*, 31 C 487.

the co-sharers must (except where the contract of tenancy was entered into by one or more only who are plaintiffs¹⁰) join in a suit for the ejectment of a tenant,¹¹ or for enhancement of rent,¹² or for arrears of rent.¹³ In all such cases when some of the partners are added as proforma defendants the court should grant the appropriate relief and decree may be passed in favour of the plaintiffs and such defendants.¹⁴ After the death of one partner the surviving partners may sue to recover the debts of the partnership without joining the heir of the deceased partner.¹⁵ Even if one co-sharer has to sue for rent, making the others proforma defendants, he must sue for the whole rent and not for his share only,¹⁶ nor in a suit for enhancement, in respect of his share only¹⁷ unless a special arrangement is proved.¹⁸ This rule is applicable to suits arising out of contracts only.

It is not necessary that all the co-sharers should join in a suit against a trespasser,¹ but any one co-sharer can sue a trespasser. The reason is, that every co-sharer is independently interested in saving the property from the invasion of a trespasser and the cause of action in such cases does not accrue to all jointly. A co-owner can file suit against a trespasser.

10 *K. Vasudeva v. Jadunandan*, A 1977 Cal 142; *Durga Pd v. Debidutt*, A 1962 Assam 27; *Vagha v. Manilal*, A 1935 Bom 262; *Ram Baksh v. Chanda*, 2 IC 306 All; *Gopal v. Dhakeshwar*, 35 C 807; *Rama v. Tupoo Rama*, A 1956 Bom 264.

11 *Balkrishna v. Moro*, 21 B 154; *K. P. Kanna Pisharody v. Narayanan*, 3 M 234; *Ghulam Mohiuddin v. Khairan*, 31 IC 786.

12 *Baidyanath v. Illim*, 25 C 917; *Bhola v. Balchamber*, 10 IC 891, 14 CLJ 373.

13 *Pramada v. Ramani*, 35 C 331; *Shashi v. Sitanath*, 35 C 744, 7 CLJ 425, 12 CWN 835.

14 *Monghibai v. Cooverji*, A 1939 PC 170, 182 IC 1.

15 *Maung Shwe v. Ma Lonma*, 7 R 558, A 1929 Rang 310.

16 *Biharilal v. Wasundarabai*, A 1956 MB 35; *Radhabindu v. Naba Kishore*, 94 IC 244, 30 CWN 415, A 1929 Cal 568; *Gopaldas v. Lokamal*, 182 IC 718, A 1939 Sind 173.

17 *Jatindra v. Prosanna*, 38 Cal 270 PC.

18 *Pramada Nath v. Rani Kant*, 38 Cal 331 PC.

1 *Shivji v. Hiralal*, A 1984 MP 131; *Shivangokda v. Gangawwa*, A 1967 Mys 143; *M. Palaniswamy v. Nachimuthu*, (1977) 2 MLJ 131; *Mannu v. Nasratullah Khan*, 21 AWN 36; *Gangaram v. Relu*, A 1933 Lah 999; *Ambika v. Rameshwar*, A 1946 Oudh 221; *Moti Lal v. Basant Lal*, A 1956 All 175; *Sundarammal v. Sadashiv Reddiar*, A 1959 Mad 349; *Ram Narain Das v. Loknath Mandal*, A 1970 Pat 1 (FB) over ruling, *Abdul Kabir v. Mt. Jamila Khatoon*, A 1951 Pat 315; *Gyanendra Nath v. Anam Bhor*, (1972) 38 CLT 819.

all other co-sharers are not necessary parties.³ In a suit by a co-owner against the trespassers, all other co-owners are not necessary parties where the plaintiff co-owner has not refuted the rights of the other co-owners.³

A tenant continuing in possession without the consent of the lessor after the expiry of his lease is tenant on sufferance and his position is akin to that of a trespasser. He can, therefore, be sued by one of the co-sharers alone.⁴ It has however, been held that a suit by a member of a joint Hindu family, to recover joint family property must be instituted by or on behalf of all the members of the family.⁵ But the Manager of the joint family need not add other members as a party in a suit to recover possession of the property belonging to the joint family.⁶ A suit may be brought by the Manager of the joint Hindu family on behalf of the family business and all the members need not be impleaded.⁷ In a suit for the recovery of rent due to joint property, all the co-owners are necessary parties to the suit.⁸

Where, however, the suit does not relate to a joint right, every person who has a cause of action for the suit can bring a separate suit. But in certain cases several persons can, if they choose, join in one suit, even though their causes of action may be separate and distinct. They can do so when (i) the right to relief alleged to exist in them (whether jointly, severally or in the alternative) arises out of the same act or transaction, or series of acts or transactions, and (ii) the case is of such a character that if such persons brought separate suits, any common question of law or fact would arise.⁹ Both these conditions must be satisfied before any two or more persons can join one suit. For instance, several persons jointly prosecuted by the defendant may bring a joint suit for malicious

2 *B. Visala v. Sundaram Bhaskaran*, A 1994 Ker 164; *Deban Kumbhar v. Sribhasta Patna*, A 1994 Ori 86; *Murti Shri Durga Bhawani v. Habhajan Singh*, 1988 Rev I.R. 105, 1987 Pun LJ 555 (P&H).

3 *Nachal v. C. Arjunan*, (1996) 1 MLJ 338 (Mad).

4 *Maganlal v. Budhar*, 101 IC 35, 51 B 149, 29 B.L.R. 230.

5 *Jugal Kishore v. Hulasi*, 8 All 264.

6 *Allam v. Gollapalli*, A 1968 AP 219.

7 *Gendalal v. Namalal*, A 1965 MP 58; *Hirji Bhai v. Balaram Bhai*, A 1956 Nag 125; *Sarajmal v. Union*, A 1956 Pat 478.

8 *Abdul Ajeju v. L. Somulu*, 1988 (2) APLJ 216 (AP).

9 *Allam Ganga Dhar v. Gollapelli*, A 1968 AP 291; *Gulzar Khan v. Gram Panchayat Bora Kalan*, 1989 Punj LJ 176 (P&H) (DB).

prosecution.¹⁰ Where plaintiffs 1 and 2 claimed the entire money and plaintiffs 3 and 4 claimed a portion in a certain contingency, a joint suit against the person who was withholding that money unlawfully was permitted as the causes of action arose from the same act (viz. unlawful detention of money by the defendant), and there was a common question of fact involved.¹¹ The expression 'common question of law or fact' does not mean same or similar question of law or fact.¹² Hence a single suit for eviction against two defendants in distinct portions of the house with separate tenancy is not maintainable.¹³

All persons may join as plaintiffs when both the conditions laid down by O.1, R.1, are satisfied. Such plaintiffs can file separate suits, but they have been given additional right to join in one suit.¹⁴ A co-owner can maintain a suit. The absence of other co-owners cannot disentitle landlord from suing for eviction. Any co-owner can file a suit for eviction even in the absence of the other co-owners.¹⁵

In a suit for recovery of money on the basis of promissory note by assignee, assignor-original payee is to be arrayed as defendant and not as a plaintiff.¹⁶ Persons claiming right of pre-emption as owners of contiguous plots where common questions of law and fact arise can be joined as plaintiffs in one suit.¹⁷ It is not necessary that every plaintiff should be interested in the entire subject matter of the suit.¹⁸ So, 30 plaintiffs though not interested in all the properties, may bring one suit to have their occupancy right declared as that issue is common to all.¹⁹

Joinder of Defendants : The same rule is applicable to joinder of defendants. Several persons against whom a right to relief is alleged to exist (whether jointly, severally or in the alternative), can, if a plaintiff so

10 O.1, R.1.

11 *Vclappa v. Chidambaram*, 43 MLJ 277, 70 IC 684, 1922 MWN 216, A 1922 Mad 174; *Kamlabai v. Shentirai*, 1983 Mah LJ 221.

12 *Kanhayalal v. Keshodas*, A 1961 MP 46.

13 *Kali Charan v. Ganesh*, A 1971 All 501.

14 *Gulzar Khan v. Gram Panchayat Bora Kalan*, 1989 Punj LJ 176 (P&H) (DB).

15 *Laxmi Shankar Hari Shankar Bhatt v. Yashram Vasta*, 1995 (1) ARC 52 (SC).

16 *Vijalatha Chit Fund (P) Ltd. v. K. L. Krishna Shetty*, (1988) 1 Kant LJ 143 (DB).

17 *Sadhan Ch. Samanta v. Jalada Bala Dasai*, (1986) 90 CWN 809 (DB).

18 *Md. Khalil v. Mahboob*, A 1942 All 122.

19 *Cherukur v. Kardadi*, A 1950 Mad 12 (DB).

chooses, be joined in one suit, even though the causes of action against them are different, provided they have arisen from the same act or transaction, or series of acts or transactions, and, the case is of such a nature that, if separate suits were brought against such persons, any common question of law or fact would arise. Both the conditions must be satisfied.²⁰ If the causes of action do not arise from the same transaction defendants cannot be joined even though a common question may arise.²¹ Such common question may, however, be only one out of a number of questions at issue.²² For instance, a suit to set aside an auction sale of plaintiff's property purchased in different lots by A, B and C may be brought jointly against all the three purchasers.¹ A reversioner can jointly sue all the alienees of a widow for recovery of the property transferred by her separately to them.²

A purchaser of property dispossessed by a third person who asserts title in himself may bring a joint suit against that person for possession and against the seller for refund of purchase money in the alternative.³ Similarly, in a suit against a debtor for money lent by plaintiff's agent, the agent may be joined with an alternative prayer that, if it be found that he had not lent the money to the defendant as he had represented, a decree for the money may be passed against the agent.⁴ In a suit by a landlord against his agent for rents realised by the latter, when the agent pleaded that he had not realised a part of the rent, plaintiff was allowed to implead the tenant with the alternative prayer for recovery of rent from him.⁵ O.1, R.3 and O.2, R.3, if read together, indicate that the question of joinder of parties involves joinder of causes of action.⁶

20 O.1, R.3; *Kanhaiyalal v. Keshodas*, 1961 MP 46.

21 *Ram Avtar v. Brij Kishore*, A 1933 Pat 653.

22 *Soun v. Bahinbai*, 40 B 351, 33 IC 950

1 *Dorasami v. Muthusami*, 27 M 94.

2 *Balakrishna v. Hiralal*, 36 A 406, 94 IC 95, 12 All J 509; *Jivan v. Garbah*, 25 PWR 1924, 59 IC 522; *Ralia Ram v. Mulk Raj*, 54 IC 512, 2 UPLR 1918; *Lal Chand v. Manohri*, 44 IC 549, 64 PWR 1918.

3 *Serajulhaq v. Abdul Rahman*, 29 C 257.

4 *Heyappa v. Perinnan*, 29 M 50.

5 *Bhagoti v. Chandra*, A 1933 All 177.

6 *Iswar Bhai C. Patel v. Harihar Behera*, A 1999 SC 1341.

In a suit against the legal representatives of a deceased debtor, plaintiff must be diligent to find out and implead *all* the legal representatives, though if he omits anyone by a *bona fide* mistake, the estate will still be liable.⁷ Where a Muhammedan died leaving several heirs, a suit for rent against some of them was held to be bad.⁸

Suits on Contract : If several persons join in making a contract, their liability may be joint or several or joint and several. If the liability is several, the several persons may be sued separately to the extent of the several liabilities of each, or they may all be sued jointly.⁹ But if the liability is joint, or is joint and several, as in the case of liability for rent of a holding held by several tenants,¹⁰ the suit shall be for the enforcement of the whole liability, but the plaintiff is entitled to join all such persons or only some of them.¹¹ If, however, he sues some only and the decree is not satisfied by execution against them, he cannot, according to the Calcutta and Bombay High Courts,¹² bring another suit against the person left out, but the Allahabad, Patna and Madras High Courts have taken a contrary view¹³ and have held that the English rule¹⁴ on which the Calcutta and Bombay High Court's views are based is not applicable in India. Where a plaintiff could sue *either* of two persons, e.g. a contracting agent and his undisclosed principal, and he sues only one, he cannot afterwards sue other even if his decree is not satisfied.¹⁵ A suit brought by a co-sharer of a deceased Muslim against another co-sharer for possession of his share cannot be dismissed for non-joinder of one of the several co-sharers.¹⁶

7 *Mt. Karam v. Matwal*, A 1933 Lah 380, 141 IC 580; *Mt. Chandri v. Hiralal*, A 1933 Nag 73.

8 *Narash v. Hayder*, 49 CLJ 83, A 1929 Cal 28.

9 O. I. R. 6.

10 *Inderjit Nath v. Maharaja Pratap Udi Nath*, 182 IC 821, A 1939 Pat 230.

11 O. I. P. 6, read with section 43, Contract Act; *Kailash Chandra v. Brajendra*, A 1925 Cal 1056 (DB), 42 CLJ 232, 29 CWN 1000.

12 *Hemendra v. Rajendra*, 3 C 353; *Dick v. Dhanji*, 25 B 378, 3 BLR 243; *National Petroleum Co. Ltd v. Popatlal*, 165 IC 338, A 1936 Bom 344.

13 *Md. Askar v. Radhe Ram*, 22 A 307; *Ramanjulu v. Aravamudu*, 33 M 317; *Traders Co-operative Bank v. Mullick*, A 1934 Pat 702.

14 *King v. Hoare*, 13 M & W 494; *Kendall v. Hamilton*, 41 LT 418.

15 *Somasundaram v. Subramanian*, 99 IC 742, 1926 MWN 832, A 1926 PC 136.

16 *Zaibaishi v. Naziruddin*, 152 IC 1008, 1934 ALJ 1006.

The allegations regarding non-joinder should be clear and not vague.¹⁷ A party is not entitled to take objection for the first time in the appellate court that the suit is bad for non-joinder of parties.¹⁸

Suits for specific performance of contract : In a suit for specific performance of contract, a purchaser of the property, who wants to safeguard his interest¹⁹ the subsequent vendee who is in possession of the property,²⁰ is a necessary party to the suit. A person who set up title adverse to that of the parties to the suit is not a necessary party.¹ A transferee *pendente lite* though not a necessary party, is a proper party.² The subsequent purchaser is a necessary party.³ The promisees who are no more interested in the execution of the sale-deed may be arrayed as defendants in the suit.⁴ In a suit for specific performance of contract in respect of co-parcenary property, the co-parceners resisting the specific performance of the contract are necessary parties.⁵ Where the property is mortgaged during the pendency of the suit, the mortgagee is not a necessary party.⁶ In a suit against the *karta* of the Joint Hindu Family, the coparceners are not necessary parties to the suit.⁷ Where in a suit for specific performance of contract, the property in suit has become *wakf* property, and *mutwalli* has been appointed, both the mutwali and the wakf Board are necessary parties to the suit.⁸ The vendor and on his death, his legal representatives are necessary party;⁹ a person who purchases the property under subsequent agreement for sale is not a necessary party.¹⁰ A person

17 *Laxmi Sankar v. Yashram*, A 1993 SC 1587.

18 *Addipalli Venkata Laxmi v. Ayinampudi Narasimha Rao*, A 1994 AP 72.

19 *Adapa Venkateswra Rao v. Mohammad Saleman*, A 1994 AP 50.

20 *Narayana Pillai Chandrasekharan v. Kunju Amma Thankamma*, A 1990 Ker 177.

1 *Kishan Lal v. Tek Chand*, A 1987 P&H 197; *Sadhu Behera v. Krishna Chandra*, A 1985 Ori 93 (may be co-owner of the property).

2 *Gurmanj Saran v. Joyce C. Salim*, A 1990 Delhi 13 (DB).

3 *Vimala Ammal v. C. Suswela*, A 1991 Mad 209.

4 *Jagdish Singh v. Ram Lal*, A 1988 All 12.

5 *Atul Sharma v. Gurinder Singh*, 1985 Punj LJ 143 (P&H).

6 *Raizan v. Dhara*, 1988 Punj LJ 36 (P&H).

7 *Aman Behal v. Aruna Kansal*, A 1987 P&H 52 (DB).

8 *Abdul Jaleel v. Aishabi*, A 1992 Kant 380.

9 *Maqmi Devi v. Ramayan Singh*, A 1985 Pat 35.

10 *Mohammadbhai Sk. Mohsinbhoj v. Trustees Calcutta Improvement*, A 1984 Cal 219.

setting up earlier agreement for sale in his favour and in possession of the property is necessary and proper party.¹¹

Landlord's suits for ejectment: In a suit for ejectment, ordinarily all the co-landlords are necessary parties.¹² But in eviction suit against a trespasser, one of the co-landlords can file such a suit.¹³ In suit for ejectment on the ground of default in payment of rent, a person setting up an oral gift-deed alleged to be executed by the landlord refuted by the latter is not a necessary party.¹⁴ In a collusive suit for ejectment on the ground of default in payment of rent, and sub-letting, the sub-lessee is a necessary and proper party.¹⁵ In an eviction suit filed against a tenant who is missing, the wife and children of the tenant are necessary party.¹⁶ In proceedings for release of the accommodation the sub-lessees in possession of the property on the basis of the lease-deed are necessary parties.¹⁷ In a suit for possession by a tenant who has been ousted from possession, the tenant who has been inducted into premises subsequently is not a necessary party.¹⁸ In a suit for the recovery of arrears of rent all the landlords are not necessary party, as payment of rent to one of the landlords is a valid discharge of the liabilities of the tenant.¹⁹ In a suit for ejectment on the ground of sub-letting the sub-tenant is a necessary party.²⁰ In a suit for ejectment against wife, husband alleging that he is the real tenant is not a necessary party,¹ in the undermentioned case,² however contrary view has been taken.

Suits for partition: In a partition suit brought by sons against their father, a lady manifesting herself as the daughter of the defendant father is

11 *B. Narasimha v. Gangaputra Co-op. Housing Society*, A 1984 AP 166.

12 *Jagdish Prasad v. Sumitrabai*, 1986 Jab LJ 765.

13 *Jagdish Prasad v. Sumitrabai*, 1986 Jab LJ 765, 1986 MPLJ 289.

14 *Shafiq Ahmad v. Vih Adil. District Judge, Varanasi*, 1988 (2) ARC 329 (All).

15 *Benmadhab Michotra v. Howrah Flour Mills Ltd.*, A 1985 Cal 172 (DB).

16 *Bimla Devi v. Dharan Chand*, A 1994 NOC 158 (Delhi.).

17 *Kanhaya Lal v. Procribed Authority Agra*, 1988 (I) ARC 438 (All).

18 *Chandra Bhan Prasad v. Mohan Lal*, A 1987 Cal 322.

19 *Devidutta Agarwalla v. Mohanlal Tebrival*, A 1994 Ori 176; *Sukumari Devi v. Ramdas Agarwala*, A 1994 Cal 85.

20 *S. Asia Industries v. Sarup Singh*, A 1966 SC 346; *Satish Chand v. Bhojrilal*, A 1992 Raj, 75; *Howrah Flour Mills Ltd.*, A 1985 Cal 172.

1 *B. K. Dutta v. Nita Madan*, A 1984 Cal 228.

2 *Charan Lal v. Sham Lal Gupta*, 1988 Srinagar Law Journal 114 (J&K).

a necessary party.³ In a suit for partition, persons who are neither entitled to any share nor interested in the suit property are not necessary party.⁴ In a suit for partition under the Mahomedan Law all the co-sharers and the residuary who are entitled to succeed are necessary party, others who under the Mahomedan Law have no right or interest in the suit property are not necessary party.⁵ In partition suits all the parties are plaintiffs and defendants and without even one the suit cannot proceed nor the matter be settled.⁶ In a suit for partition the purchaser of the property sought to be partitioned unless the sale is challenged is not a necessary party.⁷ A transferee can file suit for partition and enforce his right against other coparceners even without joining the transferor coparcener as a party to the suit.⁸

Suits for injunction: In a suit for injunction, only those persons who interfere with the plaintiff's possession are necessary parties.⁹

Suit for Tort : When several persons jointly commit a tort, the party injured may bring a suit against all or any of them, as he likes,¹⁰ and may claim the whole relief from the person sued,¹¹ but he is not entitled subsequently to bring a separate suit against those whom he had omitted to join.¹² Release of one joint tort-feasor will, however, operate as discharge of all, but if one is exempted on his paying money in full discharge of his liability, the others are not discharged.¹³ In a suit for ejection, against trespasser, however, all persons in possession must be made defendants and there is no distinction in principle in this respect between the cases of trespasser and of tenants. Where the heirs of a deceased defendant in such a suit were not brought on record, it was held that the suit could not

3 *M. Shanmugha Udayar v. Sivanandam*, A 1994 Mad 123 (DB).

4 *Monomoyee Barmani v. Upeswari Barmani*, A 1994 Gauh 18.

5 *Shaikh Dawood v. Mahamoda Begum*, A 1985 AP 321.

6 *Ram Mehar v. Surat Singh*, 1989 (1) HLR 628 (P&H).

7 *Parvathamma B.N. v. B.M. Nagaraja Setty*, 1988 (2) Karn LJ 387 (Kant).

8 *Indrachand v. Pukhraj*, 1989 (1) RLR 497 (Raj).

9 *Om Prakash v. Dy. Director of Consolidation, Meerut*, 1986 A LJ 399, 1986 All CJ 103 (All).

10 *Meyappa v. Maung*, 12 IC 866, 4 Bur LT 145.

11 *A. Subhayya v. Verayya*, 42 LW 17, A 1935 Mad 750.

12 *Brinsmead v. Harrison*, ILR 7 CP 547; *Rahimbhoy v. Turner*, 14 B 416.

13 *Basharat v. Hiralal*, 138 IC 77, A 1932 All 401, 1932 ALJ 497.

proceed unless it was shown that the heirs were not in possession.¹⁴ Similarly, where two of the trespassers were minors and no guardian having been appointed for them, the suit against them was dismissed, and was held that the suit could not be decreed against the remaining defendants.¹⁵

Mis-joinder and Non-joinder : When a necessary party is omitted, the defect is called *non-joinder of plaintiffs* or *non-joinder of defendants*, as the case may be. When a person is joined who should not have been joined, i.e., his joinder violates against the rules given above, the defect is called *misjoinder of plaintiffs* or *misjoinder of defendants*, as the case may be. Any objection on the ground of non-joinder or misjoinder must be taken at the earliest opportunity, and, in all cases where issues are settled, at or before such settlement, and any objection not so taken is deemed to be waived.¹⁶ If a defendant is allowed to file an additional written statement, he may take the objection then.¹⁷ A plea as to non-joinder of necessary party can legitimately be taken in written statement, cannot be raised and decided in an application for grant of temporary injunction.¹⁸ If, however, the objection arises for the first time after settlement of issues, e.g., when a defendant dies and the plaintiff has substituted only two out of his three heirs, it can be raised when it arises.

Consequence of Such Defect: The result of such defect is not always fatal, and a suit cannot be dismissed merely on the ground of mis-joinder or non-joinder of parties, unless there is anything to the contrary in any substantive law or rules. The court may deal with the matter in controversy so far as regards the rights and interests of the parties actually before it,¹⁹ unless it is not possible for the court to determine the suit, e.g., if in a suit for ejection of several persons jointly in wrongful possession, one of the persons is not impleaded as a

14 *Arunadoya v. Muhammad Ali*, 106 IC 260, 46 CLJ 433; *Shyam Sunder Bhartiya v. Gouri Shanker Bhartiya*, A 1980 Cal 230.

15 *Mokshud v. Khedu*, 33 CWN 742, A 1929 Cal 669, 124 IC 75.

16 O.1. R.13; *Abdul Cader v. S.L. Ahamado*, 160 IC 711, A 1936 PC 51.

17 *Shri Raja v. Shri Raja*, 62 MLJ 154, 1932 MWN 494, A 1932 Mad 583, 137 IC 274.

18 *Mahaveer Dasa v. Ganeshmal Jeevraj*, A 1992 Raj 29.

19 O.1, R.9; *Abdul Cader v. S.L. Ahamado*, 160 IC 711, A 1936 PC 51; *Taseruddin v. Salimuddin*, A 1972 Gau 71.

defendant or in an administration suit a personal representative of the deceased is omitted,²⁰ or in a partnership accounts suit, a partner is omitted,¹ or all trustees are not impleaded as required by O.31, R.2.² The court is also entitled to take notice of events happening after the filing of the suit, e.g., if a suit is brought by one of the two persons jointly interested and the other dies during the pendency of the suit, the court should not dismiss the suit for non-joinder but should decree it.³ If the defect is pointed out to the plaintiff from the very outset and he has had ample opportunity of remedying it, which he fails to avail of, the suit may be dismissed,⁴ though the court may instead itself order the party to be impleaded rather than let the plaintiff suffer for the mistake of his counsel.⁵ A proviso has been added to O.1, R.9, by the Central (Amendment) Act, 104 of 1976, the effect of which is that where a necessary party has been omitted from being joined and the plaintiff does not obtain leave to join him, the suit ought to be dismissed. In view of the new proviso, if in a suit necessary party is not impleaded, the suit shall be dismissed not for the reason of non-joinder or mis-joinder of parties but because no effective order can be passed and consequently no relief can be granted to the parties on record.⁶ "The non-joinder of necessary parties is fatal to the suit."

O.34, R.1, which lays down who are the necessary parties to a mortgage suit, is made expressly subject to the other provisions of the Code,⁷ including O.1, R.9. If the court could decide the suit as between

20 *Taman v. Che Son*, 63 MLJ 369, 136 IC 632, A 1932 PC 317.

1 *Amir Chand v. Raoji*, 58 MLJ 613, 130 IC 453, A 1930 Mad 714.

2 *Ram Gulam v. Shyam Sarup*, 1933 ALJ 1917, 55 A 687.

3 *Sarnammal v. Thangavolu*, A 1940 Mad 412, 190 IC 657, 1940 MLJ 240.

4 *Naba Kumar v. Radha Shyam*, 54 CLJ 274, 134 IC 645, 1931 ALJ 797, 35 CWN 677, A 1931 PC 229, 61 MLJ 294; *Raghubar v. Firm of Piarclal*, 145 IC 178, A 1933 Lah 93; *Probodh Lal v. Nitratan*, A 1936 Cal 193; *C Pillai v. D.M. Devashyamo*, A 1956 Tr. Co. 181 (FB).

5 *State of Assam v. Basanta*, A 1985 Gau 13.

6 *Chuba Tamsu Ao v. Nangponger*, A 1994 Gau 110.

7 *Chuba Tamsu Ao v. Nangponger*, A 1994 Gau 110; *Nalla Venkateshwarlu v. Priso Pullamma*, A 1994 AP 87; *Gauhati University v. Bhabendra Thakuria*, (1989) 1 Gauhati LR 370 (Gauh); *Gopi v. Mohd. Hussain*, A 1993 MP 21; *Umma Saghir v. District Judge Gorakhpur*, A 1990 All 100; *Lakhana Nayak v. Basudev Swamy*, A 1991 Orissa 33.

8 *Lasadin v. Mahomedali*, A 1940 Oudh 235, 186 IC 540, 1940 OWN 209.

the parties before it, it could not, under the pre-amendment provision, dismiss it, but if it was not possible to pass any decree between such parties, the suit was to be dismissed.⁹ If, therefore, a prior mortgagee sued without joining a subsequent mortgagee, the whole suit could not be dismissed but only so much as related to property affected by the subsequent mortgage.¹⁰ Similarly, if a mortgagee impleaded only some of the heirs of a deceased mortgagor, sale could be ordered of the shares of the heirs impleaded,¹¹ or court could implead those omitted,¹² and if some of the heirs of a deceased mortgagee were omitted, a decree could be passed for the shares of the persons suing.¹³ The decree could be passed in respect of the entire amount due and need not have been for proportionate amount only.¹⁴ But in such cases the right of the mortgagor omitted would remain unaffected and could be enforced against the plaintiff even if he purchased the property in execution of the decree.¹⁵ In a case, where some heirs were omitted and were joined after limitation, the Oudh Chief Court decreed the entire suit, holding that section 22 of the Limitation Act, 1908, did not bar the suit as the suit was against property and no relief was sought against the defendants personally.¹⁶ Now see section 21, with proviso of new Limitation Act, 1963.

The Allahabad High Court¹⁷ following Madras¹⁸ and Bombay¹⁹ has held that where the court appoints one of the heirs of a deceased respondent as his legal representative, he must be deemed to represent the other heirs also and a decree passed against him will be binding on others also, even if the deceased is a Muslim. A decree for redemption can be given on the

9 *Narayan v. Surajbhan*, A 1937 Pat 414, 169 IC 897.

10 *Alam Singh v. Gokul Singh*, 35 A 484, 21 IC 271.

11 *Kherodamorji v. Habib*, 29 CWN 51, 82 IC 638; contra *Gurcharan v. Ram Chandra*, A 1942 Oudh 197, 1941 OWN 1297, in which it was held that the whole suit should be dismissed.

12 *Satyadeva v. Tribeni Pd.*, 161 IC 579, A 1936 Pat 153.

13 *Mohan v. Hem Chandra*, 105 IC 287, A 1931 Cal 648.

14 *Mohammad v. Champamani*, 179 IC 549, A 1939 Pat 49.

15 *Jasraj v. Sugrabai*, A 1940 Sindh 195.

16 *Gurcharan v. Ram Chandra*, 1941 OWN 1279, A 1942 Oudh 197.

17 *Sheikh Mohammad v. Taj Narain*, A 1942 All 324.

18 *Kadir Mohideen v. Muthu Krishna*, 26 Mad 230.

19 *Johrabi v. Bismillabi*, A 1924 Bom 420, 80 IC 758, see also, *Virchand v. Kondu*, 39 Bom 729.

suit of one mortgagor, though others are not impleaded, as one mortgagor can redeem the mortgage. In a mortgagee's suit no decree can be passed if all the mortgagees are not on record.²⁰ Even if all the mortgagees are not before the Court in a suit filed by the mortgagor for redemption of property, but the mortgagor is ready and willing to pay the entire amount due on the mortgage to such of the mortgagee as are before the Court and gives up his right under the mortgage as against those mortgagees who are not before the Court, the Court can pass a decree for redemption directing that the entire mortgaged amount should be paid to the mortgagees who are actually before Court.¹ In a suit for declaration by the mortgagee that transferee from mortgagor's son was not owner of the disputed property, the mortgagor's son was not impleaded. Suit against the transferee alone was held to be not properly framed.² A decree can be passed even if some co-mortgagees are impleaded as defendants beyond limitation,³ provided the earlier omission was *bona fide*. The contrary view,⁴ can not hold good in view of section 21 of the Limitation Act, 1963. Where, on failure of plaintiff's title claimed as mortgagee's adopted son, the mortgagee's heirs were impleaded, one as plaintiff and two as defendants in appeal, and a decree was passed, the Supreme Court held that the new parties were added to press their own rights and section 22, Limitation Act was attracted to such a case of addition of plaintiff under O.1, R.10. Also that O.1, R.10, allowed addition as plaintiff only and not some as plaintiffs and some as defendants.⁵

(On the question of limitation, see however, discussion under heading:-
Impleadment and Limitation *post*)

Adding, Substituting and Striking out Parties : The proper course when such defect is detected is to apply for removal of the defect by adding any person omitted,⁶ by substituting the right person for the wrong

20 *Girdhar v. Motilal*, 1940 NLJ 151; *Ram Pd. v. Vijay Kumar*, A 1967 SC 278.

1 *Chhaganlal Keshavalal v. Patel Narandas*, A 1982 SC 121.

2 *Jugraj Singh v. Jaswant Singh*, A 1971 SC 761.

3 *Baldeo Prasad v. Bholanath*, 52 All 134, 121 IC 106, A 1929 All 941; *Umesh v. Hemanga*, 60 C 87, 143 IC 315, A 1933 Cal 325.

4 *Adireppa v. Rechappa*, A 1948 Bom 211, 50 BLR 30, 34 CLR 113; *Govind v. Jamaluddin*, 60 C 777, 145 IC 259, A 1933 Cal 64.

5 *Ram Pd. v. Vijay Kumar*, A 1967 SC 278.

6 *Capt. Daniels v. GDF Trust*, A 1959 All 579.

person, or by striking off the name of any party improperly joined, and the court has a very wide power to order such amendment on such terms as may appear just at any stage of the proceedings,⁷ even after a preliminary decree for partition⁸ or sale of mortgaged property⁹ has been passed. After preliminary decree in a partition suit, the alienee from a coparcener was allowed to be added as a party, without right to reopen the preliminary decree.¹⁰ After an *ex parte* decree has been passed, a person who was a necessary party can be added and allowed to have the *ex parte* decree set aside.¹¹ An Appellate Court can also exercise this power. Where in a suit on a contract the defendant proved that a third person was also a party to the contract along with the plaintiff, it was held that the suit should not have been dismissed but the court should have impleaded that third person *suo motu*.¹²

When the original plaintiff was found not entitled to maintain a suit, transposition of a defendant as plaintiff was allowed.¹³ In a suit for specific performance of contract, where the plaintiff withdraws from the suit, the defendant claiming vested right in the property on the basis of the sale-deed may be transposed as plaintiff.¹⁴ In a suit under section 92 C.P.C. the plaintiffs withdrawing from the suit may be transposed as defendants.¹⁵ Where the plaintiffs withdraw the representative suit under O. I, R. 8, the Court on the application moved by the contesting defendants transpose them as plaintiffs and the plaintiffs as defendants.¹⁶ A co-sharer in the suit

7 O.I, R. 10 (2).

8 *Jotindra v. Bejoy*, 32 C 483; *Lakshmi Chand v. Kuchubhai*, 35 Bom 393, 13 BLR 517, 11 IC 559; *Krishnaji v. Motilal*, 122 IC 66, A 1929 Bom 337 DB; *Daw Aye v. U.Kwe*, 154 IC 465, A 1935 Rang 23; *Madadi Narasimha Reddy v. Madadi Ram Chandra Reddy*, 1975 AnWR 227; *Ramadar Appalla Narsingha Rao v. Chundurur Sarada*, A 1976 AP 226.

9 *Kunja Behari v. Bessudhar*, (1941) 7 Cutt LT 49.

10 *Manubhai v. Shiv Prasad*, 1979 Mah LJ 252.

11 *Rameshwar v. Th. Jeban Narayan Singh*, 166 IC 794, A 1937 Pat 49.

12 *Sheomurat v. Jhabbumal*, 1930 ALJ 247, 122 IC 597; see also, *Paras Ram v. Epling Singhji*, A 1985 Raj 236 (on O. 41, R. 20).

13 *Santaram v. Trust of India*, A 1945 Bom 11.

14 *Md. Muzahid v. John Wilson Zedak*, A 1989 Pat 2.

15 *Anand Prakash v. Sushil Kumar*, A 1987 All 296.

16 *B. Pattabhirmayya v. B. Gopalakrishnayya*, A 1986 AP 270 (DB).

property arrayed as a defendant can be transposed as plaintiff.¹⁷ A defendant can be transposed as plaintiff even if he has remained *ex parte*.¹⁸ In a suit for partition where the parties are Christians, on the death of the plaintiff who has not left any will, the defendant can be transposed as plaintiff.¹⁹

The power of transposition of parties can be exercised at any stage of the proceedings, the question of limitation is not involved in such cases.²⁰ If the conduct of the plaintiff has not been fair and straight forward and has been extremely negligent, e.g., when he persisted in two courts in not adding a party even when he was given an opportunity to do so, court may dismiss the suit.¹ Where in a suit against the railway administration, the defendant was described as, "Agent East Indian Railway", and no specific objection was taken at the trial and the suit was defended on merits, the defect in the title was allowed to be amended in second appeal.² Similarly, when the defendant was described as "firm S, through C.L. Manager," an amendment by the substitution of C.L. as sole proprietor and manager of the firm S was allowed,³ but when a firm was sued for a debt taken by one of the partners A and another partner B contested the suit on the ground that A had no authority to take loans for the firm, the Court rejected an application for amendment by substitution of the name of A only for that of the firm.⁴ Where a suit had been filed against K and S, on discovery that S had died before filing the suit, his heirs may be added,⁵ but where the sole plaintiff or the sole defendant was dead before the institution of the suit the plaint is a nullity and cannot be amended.⁶

17 *Nishabar Singh v. Local Gurdwara Committee Manju Saheb*, A 1986 P&H 402.

18 *Madhavan Pillai v. Vasu Pillai*, (1988) 2 Ker LJ 882; 1989 (I) KLT 168 (Ker).

19 *John Baptis Lobo v. Baniface Felix Lao*, (1989) 2 Karn LJ 42 (Kant) (DB).

20 *Reazuddin Ahmed v. Salema Nahar*, 1989 (I) Gauh LR 230 (Gauh).

1 *Narayanan v. Chekummi*, 170 IC 242, A 1937 Mad 520.

2 *Gopi Ram v. Agent East India Railway*, 30 CWN 209, 94 IC 762, A 1926 Cal 612 (DB).

3 *Kishen Singh Sant Ram v. Salig Ram Bhagat Ram*, 1938 Lah 718.

4 *Ahmad Moosa v. Lila Ram*, A 1942 Sindh 93.

5 *Rangrup v. Kashinath*, A 1947 Nag 73; *Raju v. D.D. Italia*, A 1961 AP 239; *Firm Palamal v. Fauja Singh*, A 1926 Lah 153, 89 IC 661; *Gordhandas v. Rijibai*, 168 IC 860, A 1937 Sind 47; *Joginder Singh v. Krishna Lal*, A 1977 P&H 180.

6 *Mt. Bondu v. Motichand*, A 1923 Lah 652; *Noor Bhoy v. Secretary of State*, 168

O.1, R.10(2) confers wide powers on the Court in the matter of striking out or adding parties. The court may, at any stage of the proceedings, either upon or without the application of either of the parties, and on such terms as may appear to the court to be just, order the name of any party improperly joined, whether as a plaintiff or a defendant, be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon every question involved in the suit be impleaded. The power thus conferred on the court is of great importance, since if the plaintiff is permitted as a rule to choose his opponents he may leave out the real owner or interested person, implead a person of his own choice and get a collusive decree which would have become final when the real owner comes to know about it and will create an ugly situation.⁷

The power can be exercised by the court even of its own motion, and this is done particularly in respect of, 'proper parties', *i.e.*, when the presence of a person (though not strictly a "necessary party") is considered expedient in order to enable the court effectually and completely to adjudicate upon, and settle all the questions involved in the suit.⁸ Where the addition of a party is necessary to avoid the possibility of multiplicity of judicial proceedings such a party should be added under O.1, R.10.⁹ The expression 'proper party' must be given a wide interpretation, and even questions between the parties to the suit and a stranger with regard to the subject matter of the suit may be taken into account.¹⁰ In such cases the power can be exercised even in the face of the plaintiff's opposition.¹¹ A

IC 748, A 1937 Sind 92; *C. Raju v. D.D. Italia*, A 1961 AP 239; *Calicut Municipal Council v. Kunlupathrama*, A 1933 Mad 854, 1933 MWN 644, 143 IC 596; *Hazarimal v. Shriram*, A 1934 Nag 55, 148 IC 241; *Mahtab v. Amulya*, 24 IC 112; *Ramrup v. Kashinath*, A 1947 Nag 73; *Cuttack Municipality v. Shyam Sunder Behera*, A 1977 Ori 137; *Joginder Singh v. Krishna Lal*, A 1977 P&H 180; see also, *Hiralal v. Kalinath*, A 1962 SC 199 (para 4).

7 *Kissan Uchatar v. 3rd District Deoria*, A 1989 All 168.

8 *Bheemavarap Venkateswara Reddy v. Naga Rami Reddy*, (1971) 2 APLJ 55.

9 *Tera Tea Co. Pvt. Ltd. v. Kumkum Mittal*, A 1994 Cal 191 (DB).

10 *G.M.V. Krishnamachari v. M.O. Dhanalakshmi*, A 1968 Mad 142.

11 *Secretary of State v. Durugesu*, 118 IC 780, A 1929 Mad 443; *Meyappa v. Seerthachi*, 171 IC 145, A 1937 Mad 200.

'necessary party', as contra-distinguished from a 'proper party', means a party 'necessary for the constitution of a suit and whose non-joinder affects the merits of the case and jurisdiction of the court and without whom no effective decree can be passed.'¹² But a party should not be added if the addition would result in the introduction of unnecessarily complex questions foreign to the issues in the case. Moreover a suit cannot be dismissed merely for failure to join a proper party as distinguished from a necessary party, and section 99 C.P.C. can also be applied in a suitable case.¹³ Similarly, where a third person alleged that he had acquired an interest in the property in suit under a compromise between the parties, and the parties denied the compromise, he was not impleaded.¹⁴ But in a partition suit, a person claiming that the plaintiff had entered into an agreement for sale of certain properties with him was made a defendant.¹⁵ Where defendant in a suit for accounts pleaded that he had settled with plaintiff's brother who was also a partner in plaintiff's firm, the plaintiff was allowed to implead the brother.¹⁶ Where in a suit on a pronote by an endorsee, the endorser alleged that he had endorsed the pronote only for collection, he was allowed to be made a defendant and not a co-plaintiff.¹⁷ The co-wife and step son were impleaded in a suit for declaration of status and recovery of *kharch-i-pandan* by a wife against her husband when the husband admitted the claim but the co-wife and step son wanted to contest it.¹⁸

Normally a triangular contest is not contemplated by Rule 10, and a person whose interest is opposed to that of the plaintiff as well as to the defendant should not be added as a party.¹⁹ In a suit by a landlord against his tenant for ejection where defendant pleaded that the land belonged

12 *Udit Narain v. Board of Revenue*, A 1963 SC 786; *Devi Das v. Shushailappa*, A 1961 SC 1277; *Kali Rai v. Tulsi Rai*, 93 IC 932, 4 Pat 723, A 1926 Pat 207 (DB); *Hari Ram v. Central Government*, A 1941 Lah 120.

13 *Sahasheeb v. Sadashiva*, 43 Bom 575; *Sital Prasad v. Asho Singh*, A 1922 Pat 651, 69 IC 677.

14 *Meyappa v. Seethachi*, 171 IC 145, A 1937 Mad 200.

15 *G.M.V. Krihnamachari v. M.O.Dhanalakshmi*, A 1968 Mad 142

16 *Har Prasad v. Shankar Lal*, A 1933 All 957.

17 *M.R.Nazareth v. Peroz Shaw*, A 1934 Sindh 182.

18 *Razia Begum v. Anwar Begum*, A 1958 SC 886.

19 *Chidambaram v. Subramaniam*, 105 IC 114, 53 MLJ 269, A 1927 Mad 834; *Devendra v. Batasibai*, A 1934 Nag 228, 148 IC 720.

to government, it was held that it was not proper to implead government.²⁰ A third party ought not to be made a party to a suit by landlord for rent¹ or ejectment² so as to convert it into one for determination of title to the property between rival claimants of ownership. The remedy of such rival claimant lies by way of separate suit. In a suit for specific performance of a contract, likewise, a rival claimant of ownership cannot claim to be impleaded.³ In an injunction suit also a stranger cannot claim impleadment as the judgment in such a suit is not judgement *in rem*.⁴ But even in a suit between landlord and tenant where the tenant pleaded that he had wrongly attomed in favour of the plaintiff in ignorance of the fact that the latter had no title, a stranger claiming to be co-owner was ordered to be impleaded on his application.⁵

If the object of an attaching creditor is not to be allowed to redeem the mortgage, but to challenge the mortgage itself and a compromise arrived at in the redemption suit between the parties to it, he would not be impleaded.⁶ But even a person not exactly a proper party may be added to avoid multiplicity of suits, e.g., in an administration suit, an alleged heir,⁷ but not a person outside the family though in possession of part of the property.⁸ So in a suit for rent against a recorded tenant, the transferee of the holding was allowed to be made a defendant though this involved determination of the question of the transferability of the holding.⁹ In a suit for property purchased by the plaintiff, the seller was also added as a co-plaintiff, but he afterwards denied that the sale was genuine. The court ordered his transposition to the array of defendants for the purpose of finally deciding the contest between him and the purchaser also.¹⁰ The

20 *Subramanya v. Anantha*, A 1932 Mad 688, 139 IC 679.

1 *Pravat Chandra v. Amulya Chandra*, A 1927 Cal 340, 45 CLJ 146 (DB).

2 *Balwant Raj v. Gian Singh*, A 1978 J&K 84; *Prabha Sexena v. II Addl. District Judge, Kanpur*, 1989 (2) ARC 197 (All).

3 *Raj K. Mehra v. Anjili*, A 1981 Del 237.

4 *Khushi Ram v. Lalman*, A 1983 Del 78.

5 *Satish Chandra v. Sarvesh Chandra*, A 1984 Del 409.

6 *Bruel & Co. v. Kesheoras*, A 1926 Nag 67 (DB).

7 *Maung Tuj v. Maung Po*, 103 IC 22 Rang.

8 *Ah Kyan Sin v. Yeo Ah Gwan*, A 1937 Rang 497; *contra, Suryanarain v. Anasyamina*, A 1963 AP 298.

9 *Sarju v. Bibi Bersatan*, 103 IC 544, A 1927 Pat 242, 8 PLJ 305.

10 *Vanjiappa v. Annamalai*, A 1940 Mad 69.

court cannot refuse a defendant to be made a plaintiff on the ground that it would increase the valuation of the suit and take it out of its jurisdiction.¹¹ The court has no power to join a person as a co-plaintiff who is a stranger and has no personal interest in any of the reliefs claimed by the plaintiff.¹² If the court considers it necessary for giving effect to the rights of parties, it can add even legal representatives of a party against whom the suit has abated.¹³ But the mere fact that a person might be affected by the result of a suit, e.g., a financier who is promised a share on the success of the suit, is no ground for impleading him as a co-plaintiff.¹⁴

No person can be added as a plaintiff without his consent.¹⁵ If he does not agree to be made a plaintiff, he should be added as a *proforma* defendant. Nor can anyone be added as a plaintiff without the consent of the existing plaintiff.¹⁶ The court should consider whether a person is a necessary or a proper party before calling him to be impleaded and exposing him to the travails of litigation.¹⁷

The court also has power to order the substitution of another person for a person appearing as a plaintiff, or to order the addition of another person also as plaintiff provided it is satisfied that the suit was instituted through a *bona fide* mistake in a name of a wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, and that the amendment is necessary for a determination of the real matter in dispute.¹⁸ But these conditions are necessary and must be satisfied. When a person brings a suit alleging that he has the right to sue and it is found that he has no such right, the court would not be justified in directing amendment to enable the proper party to sue.¹⁹ For instance, in a suit by a trustee against a co-trustee which is found to be time-barred,

11 *Raj Kishore v. Alam*, A 1926 Pat 28, 90 IC 82.

12 *Fakir Mohammed v. Agha Khan*, 120 IC 571, A 1930 Sindh 73.

13 *Mohammadally v. Safiabai*, A 1940 PC 215.

14 *Kailash v. Ranchani*, 58 MLJ 240.

15 *Narayanswami v. Subharamulu*, 68 MLJ 236, A 1935 Mad 102, 41 MLW 126.

16 *Gunendra Kumar v. Dura Steamship Ltd.*, A 1989 Cal 398; *Pravat Chandra v. Amulya Chandra*, 45 CLJ 146, A 1927 Cal 340 (DB).

17 *Pappa Ammel v. Pandiyan Bank Ltd.*, A 1963 Mad 480; *Ram Gopal Sah v. Dhirendra Nath*, A 1981 Pat 298.

18 O.1, R.10(1).

19 *Samanna v. Kadathur*, 93 IC 305, A 1926 Mad 577.

the plaintiff cannot add a beneficiary as a plaintiff in order to take advantage of section 10, Limitation Act, 1908.¹ But where the suit is not barred, a court has power to substitute a right person for a wrong person.² In a case of partnership business or joint family business, the Supreme Court allowed amendment on the ground of misdescription.³

If a suit is filed by an assignee of a bond and the assignment turns out to be void, the assignor can be substituted as plaintiff.⁴ When a person who had wrongly filed a suit made an application divesting himself of any claim and prayed for the substitution of another person who had a cause of action admitting that he himself had none, it was held that the case fell under Rule 10.⁵ If a suit is filed by a person as minor through a *bona fide* mistake, he can be allowed to continue the suit as major on discovery of the mistake even if limitation has expired.⁶ This power can be exercised even in second appeal.⁷ The court has no power to add as plaintiff a person whose interest is against the existing plaintiff, though he may be added as a defendant if his presence is considered necessary.⁸

Courts have inherent power to pass necessary orders for addition or substitution of parties,⁹ though ordinarily the court will not add a party particularly a defendant without the concurrence of the plaintiff.¹⁰ When a father, to whose share a pronote executed in the name of the son was allotted on partition, brought a suit impleading the son also as a defendant, it was held that the suit should not be allowed to fail for want of an

1 *Janna Das v. Damodar*, 29 BLR 418, 103 IC 225, A 1927 Bom 424.

2 *Krishnaji v. Harimaraddi*, 6 BLR 314, 54 B 536, A 1927 Bom 385.

3 *A. Purushottam & Co. v. Mani Pal & Sons*, A 1961 SC 325; *Jai Jai Ram Manohar Lal v. National Building Material Supply*, A 1969 SC 1267; *Ram Nath v. Kedar*, A 1970 All 406.

4 *Sitla Bux Singh v. Mahabir Pd.*, A 1936 Oudh 257, 162 IC 229.

5 *Municipal Committee v. Imran Ali*, A 1934 Nag 159, 150 IC 895.

6 *Inderpal v. Bhagwati*, 1940 OWN 100; *Ghasi v. Mangi*, A 1932 Lah 322, 132 IC 710; *Narayan v. Dulal*, 100 IC 469.

7 *Radhaballabh v. Raghunath*, 180 IC 833, A 1939 Pat 397; *Nur Mohammad v. Jaimulabdin*, A 1940 All 399, 190 IC 384.

8 *Vanjiappa v. Annamalai*, A 1940 Mad 69; *Daulat Ram v. Rama Kant*, 1971 RLR 658.

9 *Jaimala Kr. v. Collector of Saharanpur*, 1933 ALJ 1512.

10 *Virbhadrappa v. Shekabei*, A 1939 Bom 188, 182 IC 539; *Banarsi Das Durga Pd. v. Panna Lal Oswal*, ILR 1968-2 Punj 309.

endorsement by the son but the son should be allowed to be made a co-plaintiff.¹¹ But where a person was left out not by mistake but by gross negligence, he was not allowed to be impleaded.¹²

Intervenor : Besides acting on the motion of a party to the suit or on its own motion, the court can act under this rule on the application of a third person who wishes to be impleaded as a party to the case. Such a person is called "intervenor". If the intervenor is a necessary party to the suit, he must be joined, but if he is not a necessary party, the court has to exercise its discretion in making him a party and in doing so is guided by the same considerations which arise when a plaintiff applies for addition of a new person as defendant and which have been discussed above. An intervenor can be impleaded as a defendant (though not as plaintiff) even against the plaintiff's wish where there is one subject-matter out of which several disputes arise and the main evidence on the issues raised by the intervenor will be the same, but if serious embarrassment or inconvenience is likely to be caused to the plaintiff by addition of a third party, the court may refuse to implead him. An intervenor will generally not be impleaded where he is not directly interested in the issue between the existing parties but is only indirectly affected or where he claims adversely to both the plaintiff and defendant. It is not open to the court to examine the intervenor's case on merits at this stage, and more so where his defence is the same as that of existing defendants.¹³

Impleadment of Parties and Limitation : *Position under old section 22:* When a new plaintiff or a defendant was added, or substituted, the date of his addition or substitution was, under section 22 of the old Limitation Act, deemed to be the date of institution, as regards that person, for the purpose of limitation, so that if a defendant was added after the expiry of limitation the suit *against him* was barred. It was held that the date of addition meant the date on which application is made for his addition and not that on which the court passed its order on it.¹⁴ Sub-rule (5) of R.10 of O.1 provides that subject to the provisions of the said section 22 the proceedings as against the person so added as defendant shall be

11 *Virappa v. Mahadevappa*, A 1934 Bom 356, 36 BLR 807.

12 *Ghulam v. Lachman*, 148 IC 329, A 1934 Lah 36.

13 *Mukhtiyar v. Pannalal*, A 1985 MP 122.

14 *Praful v. Rao Gajendra*, A 1945 Nag 57.

deemed to have begun only on the service of the summons.¹⁵ This rule would apply even if order is passed by the court *suo motu*.¹⁶ Thus a suit on a contract in which there are several joint promisees, could not succeed unless brought by all the promisees and if any one was left out he could not be impleaded by amendment,¹⁷ and if he was impleaded after the period of limitation, the suit was to be dismissed.¹⁸ A suit by some of the heirs of a deceased partner against the other partners for account was dismissed when the other heirs were not joined within limitation.¹⁹ A suit on a mortgage by the assignee of one mortgagee without joining other mortgagees within the period of limitation was also held liable to fail for the same reason.²⁰

But no question of limitation could arise if, by the amendment, no really new person was brought on the record and only his description was changed. The test in such cases was whether one person or legal entity was substituted for another or the person or legal entity remains the same and only his name or description is altered.¹ For example, if a person has sued without saying that he was suing as a *shebait*, an amendment to show that he had sued in that representative capacity had not the effect of adding a new plaintiff.² Similarly, where a joint family sued or was sued in its business name (as firm so and so) but afterwards the members of the family were substituted either on the defendant's objection or on discovery that O.30 did not apply to a firm owned by a joint family (which is only one person in the eye of law), it was only a correction of a misdescription and no question of limitation could arise.³ However, where a member of a joint family sued in his individual capacity, he was not allowed after expiry of limitation to amend the plaint so as to show that he was suing as manager

15 *Indu Bhushan v. Hate Ram*, A 1972 Pat 229.

16 *Ram Kinkar v. Akhil*, 30 C 519, 11 CWN 350; *Maung Tun Thein v. Maung Sin*, 170 IC 105, A 1937 Rang 124.

17 *Tipan Prasad v. Secretary of State*, 154 IC 103, A 1935 Pat 86.

18 *Ram Dayal v. Jammenjoy*, 14 C 791.

19 *Abdul Hawk v. Tumulari*, 100 IC 616, 52 MLJ 318.

20 *Giris Chandra v. Ram Saran*, 125 IC 190, A 1929 Cal 591 (DB); *Bhagela v. Abdul Rahman*, 36 IC 77, A 1916 Pat 411.

1 *Mangharam v. Haji*, 182 IC 881, A 1939 Sindh 172.

2 *Kuarmani v. Wasif*, 28 IC 881, 19 CWN 1193.

3 *Ram Prasad Shivlal v. Sri Nivas*, A 1925 Bom 527 (DB).

of the joint family.⁴ Similarly, where a suit for declaration of invalidity of an assessment was brought against the Chairman, instead of the Municipal Commissioner as required by section 15, Bengal Municipal Act, but the main relief sought was against the Corporation and not against the Chairman, it was held that it was a case of misdescription and section 22, Limitation Act, 1908, did not apply to the amendment.⁵ When a person filed a suit but after the limitation had expired he was allowed to amend the plaint so as to make it appear that it was instituted on behalf of a company, there was no case of adding a new plaintiff.⁶ For the same reason in a suit instituted by a next friend of a minor, when it was discovered that he was major, he was allowed to appear as major even after limitation.⁷ But this could be done only if the plaintiff was under a *bona fide* mistake and not where he was found to be grossly careless,⁸ or to have instituted a suit deliberately as minor, as when he instituted the suit for setting aside a decree on the ground that he was minor.⁹

Where a party is already on the record, an amendment which merely alters the capacity in which he has been impleaded does not involve an addition of parties. Therefore, an amendment of the plaint by which a suit is converted into a representative suit does not involve an addition of a fresh party.¹⁰ Where the plaint contains necessary averments that the suit is laid in the general interest of all Muslims and the persons sued are also sued in the general interest of the Hindu Community, an application for amendment seeking permission under O. I, R. 8 did not introduce fresh parties & no question of limitation arises.¹¹ A suit was filed by the secretary of an unregistered association. Defect of capacity to sue stood removed by amendment by making it a representative suit.¹² Where a suit was filed in the name of the firm by partners doing business outside India, the names

4 *Ramchandra v. Kandaswami*, 1949 Mad 416, (1948) 2 MLJ 577, 1948 MWN 580.

5 *Municipal Commissioner v. Gangamani*, A 1940 Cal 153, see also, *Khadi & Village Industries Commission v. Sudhansu Shekhar Banerjee*, A 1973 Cal 534.

6 *Muthu Krishna v. Rajaram*, 33 IC 357, 3 MLJ 5.

7 *Narayan v. Dulal*, 100 IC 469; *Inderpal v. Bhagwati*, 1940 OWN 1007.

8 *Ghasi v. Manga*, A 1932 Lah 322, 132 IC 710.

9 *Sami Nandu v. Katha*, A 1940 Mad 522, 1940 MWN 500.

10 *Seth Nardaramdas v. Zuleka Bidi*, A 1943 Mad 531, 1943 MWN 304.

11 *Ahamadullah v. Ramasamy Udayar*, 1999 (1) LW 289.

12 *Saran Club v. C.T. Lodge*, A 1974 Pat 158.

of the partners were substituted for the name of the firm.¹³ Where an unregistered and unincorporated club sued in its own name and later wanted to substitute the names of its members as plaintiffs, it was held that the amendment could not be allowed as it was not a case of misdescription.¹⁴ Where the Receiver of a firm had sued in his own name and later wanted the title to be amended by making the firm suing through him, it was held to be a case of wrong description and amendment was allowed.¹⁵ When, however, a suit was brought in the name of a firm and was found to be not maintainable under section 69 of the Partnership Act, as the firm had not been registered, an amendment cannot be permitted after subsequent registration of the firm so as to treat the suit as instituted after date of the amendment.¹⁶ But where a suit can be maintained without joining certain persons, who are added for the benefit of the defendant only, no question of limitation arises,¹⁷ e.g., where the manager of a joint family sued on a promissory note in his name and other members of the family were added as plaintiffs for the defendant's protection, after the period of limitation, the suit was decreed.¹⁸

Similarly, the title of a suit was allowed to be altered from "The Agent, East Indian Railway" into "The East Indian Railway Administration through the Agent", even after the period of limitation, on the ground that the reading of the plaint showed that the suit was directed against the Railway Administration and not against the Agent.¹⁹ Likewise, a plaintiff who had originally sued in his individual name was permitted to amend the plaint so as to sue as proprietor of Hindu Joint Family business, and it was held that as the name was merely a misdescription no question of

13 *Purshottam v. Mannilal & Sons*, A 1961 SC 325, overruling *Vyankatesh Oil Mill Co. v. Velmahomed*, A 1928 Bom 191, 30 BI R 107.

14 *Rajendra v. R. C. Turf Club*, A 1964 Cal 57.

15 *Venkata Mallayya v. T. Ramaswami Co.*, A 1964 SC 818.

16 *Subramania v. East Asiatic Co. Ltd.*, 165 IC 939 (2), A 1936 Mad 991; *Ponnuchami v. Muthusami*, A 1942 Mad 252; *Govindmal v. Kunj Behari*, A 1954 Bom 364; *Firm Damnal v. Firm Babu Ram*, A 1936 All 3; *J. C. S. J. Mills v. K. L. Sons*, A 1960 J&K 101(FB); *Union of India v. Durga Dutt*, 1961 Assam 2; *Dwijendra Nath v. Govind Chandra*, A 1953 Cal 497.

17 *Pateshri Pratap v. Rudra Narain*, 32 A 241, 6 IC 981 PC.

18 *Kishen Prasad v. Har Narain*, 33 A 272, 9 IC 739 PC.

19 Section 22 (2), Limitation Act, 1908 (section 21, Limitation Act 1963); *Raj Kishore v. Alam*, 90 IC 82, A 1926 Pat 28.

limitation arose and the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff on the date on which it was originally instituted.¹

When a defendant is made plaintiff or *vice versa*, no consequential question of limitation arise.² Where A sued making B a *pro forma* defendant, and the court finding B and not A entitled to a decree transferred B to the array of plaintiffs and gave him decree even after limitation, it was held that this was right.³ In a similar case, however, the *pro forma* defendant was not allowed to be made a plaintiff on the ground that the defendant should not be deprived of the valuable right which accrued to him under the law of limitation.⁴ If, however, he had been allowed to be made a plaintiff, the case could not be dismissed on the ground of limitation.⁵

Effect of New Section 21 : The Limitation Act, 1963 contains section 21 in place of section 22 of the old Act. Hence in view of the provisions of section 8, General Clauses Act, O.1, R.10 (5) should now be treated as subject to section 21 of the new Limitation Act. This section contains a proviso which softens the rigour of the old section 22. The proviso gives discretion to the court, if it is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, that the suit as regards that plaintiff or defendant shall be deemed to have been instituted on any earlier date. The old cases noted above must, therefore, be read subject to this qualification. Thus where by a *bona fide* mistake in a suit by an airconditioner repairer for his charges the true owner of the airconditioner was not originally impleaded but was permitted to be impleaded after the expiry of limitation for a fresh suit against him the proviso was applied and the suit held to be within time.⁶ "Good faith" however implies due care and attention. The relevant facts should, therefore, be pleaded to show that the earlier omission was *bona fide*.⁷

1 *Jai Jai Ram Manohar Lal v. National Building Material Supply*, A 1969 SC 1267, (1969) 1 SCC 869.

2 *Ambi v. Kelan*, A 1937 Mad 843.

3 *Moolchand v. Bhup Singh*, 105 IC 473, 3 Luck 241.

4 *Ram Das v. Chhota*, 104 IC 526 Pat.

5 *Nanak Chand v. East Indian Railway*, A 1925 Lah 441 (DB), 6 Lah 193.

6 *Sizing Materials Chemicals Ltd. v. Asit Kumar*, A 1984 Guj 179; *Karuppasamy v. Ramamurthy*, A 1993 SC 2324.

7 *Lalit Kumar v. Jai Ram Das*, A 1984 P&H 426 (benefit not granted as mistake was not in good faith).

Form of Amendment : When permission has been obtained for substitution or removal or addition of a party, the plaint must be amended accordingly. It will not be sufficient to amend the cause title, but all consequential amendments in the body of the plaint should also be made. For example, if a new defendant has been added, a paragraph should be added showing his liability. If a defendant has been struck out, all references to him by name or number should be omitted and if the number of defendants in the cause title has been altered, the reference in the body should also be amended. If a defendant is dead and his heirs are substituted, allegations should be made about the death of the defendant, the fact that the newly added persons are his heirs, and facts showing how they are liable for the plaintiff's claims.⁸

Challenge to Amendment by Newly Added Party : Even after the court has allowed an amendment for addition of a new defendant after expiry of limitation accepting the plaintiff's plea that the earlier omission was *bona fide*, it is open to the newly added party to ask the court, after he appears to recall the order of amendment passed in his absence.⁹

Representative Suits : Suits in which parties represent others or themselves and also others, are called "representative suits." Such suits are allowed to be filed by one or more persons as a mere rule of convenience. They are really exceptions to the general rule that all persons interested in the subject-matter of the suit should be made parties to it, so that the dispute may be finally decided. The object is to avoid delay, harassment and unnecessary expenses to parties and to save public time.¹⁰ The condition, however, is that the number of interested persons should be numerous and they should have a common interest. In order to make a suit representative it is further necessary to obtain the permission of the court at the earliest opportunity. Examples of such suits are the suits by or against the manager of a joint Hindu family as representing the whole family, suits in respect of a public trust under section 92, C.P.C. filed for vindication of public rights as distinguished from individual or personal

8 *Kanailal v. Ram Nihash*, 55 CLJ 228.

9 *Leadhitter v. Lodge Finance Ltd.*, (1982) 2 All ER 167 (case law discussed).

10 *Chairman Tamil Nadu Housing Board v. T.N. Ganapathy*, A 1990 SC 642;
A. Ali Akbar v. Distt. Munsiff Pathikollai, A 1993 Mad 51.

rights of plaintiffs,¹¹ suits by members of the public in respect of a public nuisance under section 91, C.P.C., suits under section 14 of the Religious Endowments Act; suits under O. 1, R. 8. Examples of the other kind of such suits are by executors, trustees, *mutawallis*, *benamidars*, or by creditors.

Suits under O.1, R.8 : This rule is redrafted and substituted for the old Rule by the Code of Civil Procedure (Amendment) Act, 1976. The rule provides that where there are innumerable persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued or may defend suit on behalf of or for the benefit of all the persons so interested. The rule is intended to avoid conflicting decisions and multiplicity of proceedings when there are innumerable persons having the same interest in a suit. This rule formulates an exception to the general principle that all persons interested in a suit shall be parties thereto. It is an enabling rule of convenience prescribing the condition upon which such persons, when not made parties to a suit, may still be bound by the proceedings therein.

Scope : There are no words in O.1, R.8 to limit its scope to any particular category of suits or to exclude a suit in regard to a claim for money or injunction.¹² If there are creditors more than one, a representative suit may be filed under O.1, R.8.¹³ Under Rule 8A, the Court can allow third person or body of persons to present his or its opinion on the question of law and take part in the proceedings.

Numerous persons : The word "numerous" is not a term of art. It only means a group of persons so much as would make it inconvenient to implead all of them individually. 'Numerous' does not mean numberless or innumerable.¹⁴ The question 'Numerous' is a matter of discretion for the Court.¹⁵ There, in that case, members of an educational society not more than 30 were held to be numerous. The expression does not include the general public and a suit under O.1, R.8 on behalf of, general public is

11 *Sugra Bibi v. Haji Kummu*, A 1969 SC 884.

12 *Chairman, Tamil Nadu Housing Board v. Ganapathy*, A 1990 SC 642.

13 *Ranji Hirji v. Ranji Gopal*, A 1974 Guj 153.

14 *Kailash v. Goswami*, A 1950 All 409; *Vinal v. S.*, 66 CWN 912.

15 *Narayanan v. Kurichi Thanam*, A 1959 Ker 379.

not maintainable.¹⁶ The body of persons represented must be sufficiently definite.¹⁷ A suit must be on behalf of a defined class though that class may be composed of more or less indefinite persons or even fluctuating, eg., Legatees under the will;¹⁸ tax payers or residents of a locality,¹⁹ disciples of a mutt,²⁰ devotees of a deity,¹ worshippers in a mosque or beneficiaries of a wakf;² members of a sect;³ members of a caste;⁴ fellow villagers.⁵

Same interest : The persons on whose behalf the suit is brought must have the same interest. The existence of 'same interest' is the *sine qua non* for the application of O. 1, R. 8. The expression 'same interest' means a common interest or a common grievance.⁶ There must be community of interest.⁷ Where many tenants have a common grievance against the landlord regarding the denial of tenancy rights, a representative suit can be filed by one or more of the tenants.⁸ Either the interest must be common or they must have a common grievance which they seek to be redressed. The Tamil Nadu Housing Board allotted houses to the members of low income group, tentative prices were fixed and received. After the lapse of more than a decade, fresh demand were made in 1975 threatening dispossession in case of non-payment which led to the filing of the suit under O. 1, R. 8. It was held that though each allottee is interested individually in fighting out his demand separately made to him, that did not make O. 1, R. 8 inapplicable.⁹ It was further held that the word same should not be interpreted as "identical" and would cover similar though distinct interest.¹⁰

16 *Adamson v. Arumugam*, 9 Mad 463.

17 *Harson v. Mazoor*, A 1948 PC 66.

18 *Geerihabu v. Chanderkant*, 11 Cal 213.

19 *Manmatho Natu v. Harish Chandra*, 33 Cal 905.

20 *Chidambaranatha v. Nallasiva*, 41 Mad 124.

1 *Veerabasavara v. Devotees of Lingadagudi Mutt*, A 1973 Mysore 280;
M.M.B. Catholics v. Panlo, A 1959 SC 31.

2 *Ashraff Ali v. Md. Nurojomma*, 23 CWN 115; *Karima Beevi*, 27 MLJ 270.

3 *Srinivasa v. Raghava*, 23 Mad 28.

4 *Ganapathy v. Santhi*, 21 Mad 10.

5 *Kalan v. John*, 29 Cal 100.

6 *Manavednam v. Veerayan*, A 1939 Mad 751.

7 *Kodiya v. Velandi*, A 1955 Mad 28 (FB).

8 *Goshalmarg Residents Association v. DCM Ltd.*, A 1991 Del 334.

9 *Tamil Nadu Housing Board v. Ganapathi*, A 1990 SC 642.

10 *Batar Singh v. Bilaso*, ILR 46 Pat 977.

Cause of action : Under the old rule, there was a doubt whether a representative action could be brought when there were separate causes of action. The explanation introduced under the new rule has clarified the position. There is therefore no doubt that the persons who may be represented in a suit under O.1, R.8 need not have the same cause of action.¹¹

Permission of the Court : The permission of the court to sue or to be sued in a representative capacity is a mandatory condition. The proper course is to obtain the permission before the suit.¹² The permission may be granted even after the suit,¹³ and even by the Appellate court.¹⁴ The courts should not grant permission as a matter of course. It must consider the array of parties and must be satisfied that the parties sought to be represented are not prejudiced.¹⁵ In deciding the question of leave, the principal consideration that should weigh with the court is that whether there is sufficient community of interest as between the Plaintiffs or the defendants as the case may be, to justify the procedure laid down in O.1, R.8.¹⁶ Permission need not be express,¹⁷ and could be implied.¹⁸ Permission can also be inferred where the plaintiff's prayer is that she should be allowed to sue in a representative character.¹⁹ Even in the absence of a formal order granting permission, direction to issue public notice is sufficient to infer permission being granted.²⁰ In an application for permission, the nature of the common interest involved in the case of persons so interested and any special claim of the plaintiff to represent must be stated.

Notice of suit : The issue of notice of the institution of the suit is preemptory. Non compliance with this rule cannot be cured under

11 *Tamil Nadu Housing Board.*, supra

12 *Oriental Bank v. Gobin*, 9 Cal 604; *Giribala v. Chander*, 11 Cal 213.

13 *Maharishi Dayanand Educational Society v. Satyendra*, 1999 AIHC 1448; *Ahamed v. Abdul*, 14 Cal 258; *Sennu v. Krishnan*, 25 Mad 399; *Hubli & Co. v. Saraswaterva*, A 1953 Mad 334; *Narayanan v. Kunchitanam*, 1959 Ker 379.

14 *Kamaraju v. Malliya*, A 1947 Mad 194; *Mukaremdas v. Chhagam*, A 1959 Bom 491.

15 *Narayanan v. Kunachiyam*, A 1972 Ker 269.

16 *Kodiya v. Velandi*, A 1985 Mad 28 (FB).

17 *Dhupat v. Paresh* 21 Cal 180; *Ismail v. Niamat*, A 1927 Cal 608.

18 *Ramrup v. Makala*, 1981 Pat 315.

19 *Mukkaremdas v. Chhagam*, A 1959 Bom 491.

20 *Narayanan v. Kunachiyam*, A 1972 Ker 269.

section 99 C.P.C.²¹ The importance of the issue of notice cannot be over-emphasized as decisions in such suits become *res judicata* even against persons who are not on record but who are bound by virtue of the proceedings under this rule. The notice must mention the names of the persons who have been permitted to represent them so that the persons interested may have an opportunity of knowing who have been selected to represent them.¹ Further notice must disclose the nature of the suit as well as the reliefs claimed in order to enable the persons interested to get themselves impleaded as parties to the suit either to support the case or to oppose it.² Where the notice is not given as required by this rule, the decree will be *inter partes* only.³ The court shall issue notice of the institution of the suit after the leave is granted.⁴ The view that notice must be issued before the leave is granted,⁵ it is submitted, is not good law especially in the light of the sub-rule (2) as amended in 1976.

Miscellaneous matters : As pointed out by Their Lordships of the Judicial Committee, O. 1, R. 8 is only an enabling provision and it in no way debars a member of a community from maintaining a suit in his own right, although, the act complained of may also be injurious to the whole community.⁶ If no permission is taken, under O. 1, R. 8 for a suit for declaration that the defendants or any member of a Sabha or Hindu community have no right to a certain property, a decree cannot be passed as in a representative suit but the decree can be given against the defendants.⁷ But if the suit has been decided as a representative suit without sanction and without any objection by the defendants, it has been held that the frame of the suit cannot be allowed to be objected in the appeal.⁸

21 *Munni v. Sarguth*, A 1973 All 281.

1 *Suka Dev v. Sri Sidheswar*, A 1986 Orissa 100.

2 *Harihar v. Bhagabat*, A 1987 Orissa 270.

3 *Kumaravelu v. Ramasamy*, A 1933 PC 183.

4 *Munni v. Sigur*, A 1973 All 281.

5 *Amaravati v. Gobind*, A 1976 Bom 401.

6 *Kumaravelu v. Ramasamy*, A 1933 PC 183; *Jadu Singh v. Sandhya*, 101 IC 500; *Ramkli v. Munnalal*, A 1939 All 586.

7 *Gobardhan v. Shama*, 7 Pat 197.

8 *Dilawar v. Subham*, A 1931 Oudh 375.

O.1, R8A⁹ enables the court to permit any person or body of persons to present his or its opinion and to take part in the proceedings of the suit under Order 1 Rule 8, if it is satisfied that it is necessary in the public interest to allow the third person or body of persons to present his or its opinion on the question of law and take part in the proceedings. This provision would enable organizations of citizens to take action in defence of right and lawful interest of others.

PARTIES IN SPECIAL SUITS

Suits relating to Hindu Religious and Charitable Endowments:

Among Hindus there is no marked distinction between a religious and a charitable endowment. Whether the purpose of a grant is religious or charitable has to be decided in accordance with the Hindu notions.¹⁰ By far the most important of the religious foundations in India are the temples and mutts, both supplementary in the Hindu ecclesiastical system and both conducing to spiritual welfare, the former by affording opportunities for prayer and worship, the latter by facilitating spiritual instruction and the acquisition of the religious knowledge, the presiding element being the deity or idol in the one, the learned and pious ascetic in the other.¹¹ The temples or the *devasthanams* have the richest and largest endowments in India which are being daily added to by devotees that flock to them in thousands all the year around. The temple is not a juristic person. The presiding element, that is, the deity or the idol is a juridical person possessing the juristic capacity of receiving gifts and holding the property. But it is only in an ideal sense that property can be said to belong to an idol and the possession and management of it must in the nature of things be entrusted to some person known as manager or *shebait* in the north and the *Dharmakarta* in the south.

As an idol is a juristic person capable of holding property, suits relating to property vested in it should be brought in the name of the idol, and not in that of the manager or *shebait*.¹² Of course, the idol must be

⁹ Inserted by Act 104 of 1976, Section 52 (w.e.f. 1-2-1977)

¹⁰ *Kesava Gounder v. Rajan*, A 1976 Mad 102.

¹¹ *Vidyapurna v. Vidya Nidhi*, ILR 27 Mad 535.

¹² *Jodhe Rui v. Basdeo*, 35 A 735; *Thakurani v. Shiva Sundari*, A 1945 Cal 376.

represented in the suit by some sentient being, e.g. the manager of its property. It is not necessary that such manager should be *de jure* manager. A *de facto* manager can also sue.¹³ An idol is in the position of minor and when the person representing it leaves it in the lurch a person interested in the worship of the idol can be clothed with an *ad hoc* power of representation to protect its interest.¹⁴ In the case of a private temple, a person who has made large donations for the maintenance of the temple, can on behalf of the deity bring a suit for possession of the temple and the properties of the deity against the *pujari* or manager in order to protect the property from misuse and misappropriation.¹⁵ But any intermeddler cannot sue as of right.¹⁶ *Shebait*s do formally represent the deity and it is not necessary that it should be separately represented by a disinterested person unless the interest of the *shebait* is adverse to its interest.¹⁷ Even a suit by some of the *shebait* is held to be maintainable.¹⁸ The title of the suit would be like this: "AB, an idol installed in the temple at Meerut, through CD, the manager of the temple". It has however, been held that it is immaterial whether the suit is brought by the idol represented by the *shebait* or by the *shebait* of the idol, *i.e.*, whether the title is "AB, a deity, through CD, its *shebait*" or "CD *shebait* of the deity AB."¹⁹

Where, however, the *shebait* declines to institute a suit and his interest is adverse to that of the idol, the idol should be added as a party

13 *Gopal Datt v. Babu Ram*, 162 IC 346, A 1936 All 953; *Jawahar v. Radha Gopal*, A 1945 All 169.

14 *Bishwanath v. Radhaballabhi*, A 1967 SC 1044, (1967) 2 SCR 618; *Vikram Das v. Daulat Ram*, A 1956 SC 382.

15 *Ram Chand v. Thakur Janki Ballabhi Maharaj*, A 1970 SC 532; *Thenappa Chettier v. Karuppan*, A 1968 SC 915.

16 *Doongar v. Mukhu*, A 1947 ALJ 14; *Vikram Das*, *supra*.

17 *Shridhar v. Monudra*, A 1940 Cal 285; *Manmohan v. Debbendra Prasad*, A 1949 Cal 1997; *Vikram Das v. Daulat Ram*, A 1956 SC 382.

18 *Guru Charan Jena v. Satya Narayan Jena*, A 1971 Ori 15; *Idol Shivji Lakherapura v. Gappulal*, 1977 MPLJ 804; *Murthi Pujakar Samastha v. Waman Dattaraya*, A 1979 Kam 111.

19 *Gobinda v. Mahant*, 62 CLJ 153; *Deoki v. Raghvindra Singh*, 183 IC 371, A 1939 Pat 430; see also, *Maharaja Jagadindranath v. Rani Hemanta Kumari*, 32 C 129, 3 CWN 809 PC; *Gorachand v. Makhan Lal*, 11 CWN 489; *Jogannath v. Hari Mohan*, 59 IC 469 Cal.

represented by a disinterested next friend or guardian *ad litem*.²⁰ Ordinarily in such cases and in cases where the idol is added as defendant, a person interested in the worship or in the subject-matter of the suit, having no interest adverse to that of the idol, is appointed as a guardian *ad litem* of the idol.¹ A person appointed as *sarbarakar* of a trust property is entitled to bring a suit in his own name for the benefit of the idol.² This is only an alternative form which is also permissible (see the form given in item No. 1 of Appendix A to C.P.C.). A *shebait* or trustee is competent to defend a suit against an idol, and a decree obtained against him will be binding on the deity, even though the *shebait* had himself made the transfer which is sought to be challenged by the suit.

If a property is conveyed to a person in trust for a temple or idol, it vests in that person, the idol being only the beneficiary, and he is entitled to sue and liable to be sued in respect of such property. The idol is a necessary or at any rate a proper party in a suit under section 5 (3) of the Charitable and Religious Trusts Act.³ A suit for possession of endowed property on behalf of the idol, endowment or trust without resorting to the proceedings under Section 92 CPC is maintainable.⁴

A suit instituted in representative capacity under O.1, R.8 on behalf of the entire worshippers of the temple is maintainable.⁵ In a suit for administration of temple, idol is not a necessary party.⁶

Suits by or against *Mutt* (*Math*): Next to the temples a considerable portion of endowed property is held by *Mutts* presided either by ascetics or *sanyasis* called *Mahant* in the north or *Madathipathi* in the south. A *mutt* is an institutional sanctum presided either by a superior who combines in himself the dual office of being the religious or spiritual

20 *Kalimata v. Nagendra*, 44 CLJ 522; *Sharat v. Dwarka Nath*, 58 Cal 619; *Maruti v. Shrigopal*, 54 BLR 415, 418.

1 *Kalimata v. Nagendra*, 44 CLJ 522; *Sheoramji v. Sri Ridhnath*, 45 All 319; *Pashupati Nath v. Pradyumna Kumar*, 63 Cal 454.

2 *Radha Krishna v. Maharaj Kunwar*, 164 IC 919, 1936 OWN 728.

3 *Narayan Bhagwantrao v. Gopal*, A 1960 SC 100.

4 *Ram Lal Kanwal v. S.S. Jain Sabha, Faridkot*, A 1988 NOC 18, (1987) Punj LR 621 (DB).

5 *Palickal Mannady Bhagwathy (Deity) v. Velayudhan Pillai Govinda Pilaai*, 1986 (I) CCC 342 (Ker) (DB).

6 *Sukuaran v. Akamala Sree Dharma Idol*, A 1992 Ker 406.

head of the particular cult or religious fraternity and of the manager of the secular properties of the institution.⁷ These institutions whose object is the imparting of spiritual instruction and the maintenance and strengthening of the doctrines and tenets of particular schools of Philosophy have become the centres of classical and religious learning exercising considerable influence over the laymen in the neighbourhood.⁸ Like an idol, the *mutt* is also a juridical person.⁹

The property of the *mutt* vests in its *mahant* and suits in respect of it must be brought in the name of the *mahant*.¹⁰ A decree against the *mahant* is binding on his successors as they form a continuing representation of the property of the *mutt*.¹¹

Suits by or against Muslim Waqfs: A muslim *Waqf* is not juristic person and cannot sue or be sued in its name. The property which is subject to *waqf* vests in God Almighty, the *mutawalli* of the *waqf* can file a suit for recovery of *waqf* property.¹² Under Muslim Law, *waqf* can be created by dedication and in certain cases by user.¹³ Where a *mutawalli* has himself alienated the property illegally, or he neglects to protect the property from trespassers, even worshippers¹⁴ and other Muslims can maintain a representative suit. Under various *waqf Acts*—Central and State Acts, whichever be applicable—the statutory *waqf* Boards have also been given power to take action on their own to recover *waqf* properties from trespassers or transferees under illegal alienations from *mutawallis*.

Suits by or against Government: Under Article 300 of the Constitution of India, and section 79, C.P.C., the Central Government may sue or be sued by the name of the Union of India and the State

7 *Krishna Singh v. Mathura Ahir*, A 1980 SC 707.

8 *Vidyapurna v. Vidya Nidhi*, ILR 27 Mad 535.

9 *Pushpagiri Mutt v. Ramalinga Sastry*, 1979 (1) MLJ 54.

10 *Ram Prakash v. Anand*, 43 IA 73; *Narsembaswami v. Venkatalangan*, 50 Mad 687; *Thakurdwara v. Isher Das*, 9 Lah 588; see also, *Vidya v. Baluswami*, A 1922 PC 123.

11 *Gulabbhai v. Sahnag Das*, 52 Bom 431.

12 See in this connection, *Abdur Rahim v. Narayan Das*, A 1923 PC 44; *Saadat Kamil v. Attorney General*, A 1939 PC 185.

13 *Syed Edullah v. Madras State Wakf Board*, A 1966 Mad 439.

14 *Amir Jan v. Shaik Sulaiman*, (1968) 2 MLJ 559.

Government may sue or be sued in the name of the State. Where however, a suit was brought against "Government of Rajasthan" instead of "State of Rajasthan", and appeal was filed against, "State of Rajasthan", it was held that although the suit was brought wrongly against "Government of Rajasthan" the misdescription was not fatal. Such a misdescription can be corrected at any time.¹⁵ Suits between State Governments or between a State Government and the Central Government arising out of their respective rights and obligations under the Constitution, as distinguished from ordinary disputes arising out of commercial like transactions can only be filed in the Supreme Court under Art. 131 of the Constitution. Suits relating to ordinary disputes may be filed in the ordinary courts.¹⁶

In suits against Railways, administered by the Government, summons or notice of suits has to be served on the General Manager of the concerned Railways.¹⁷ Such a suit against the Railway administration must be instituted against the Union of India.¹⁸ The filing of an application for ejectment against President of India in respect of occupation of premises by military estate officer was held wrong and illegal.¹⁹

Suits by or against Partnership and H.U.F Firms: Any two or more partners carrying on business may, by virtue of O.30, R.1, sue or be sued in the name of their firm.²⁰ This is only an enabling rule and does not prevent parties suing or being sued in their individual names as a firm is not an independent or separate person but only a compendious name for denoting the partners.¹ The rule does not apply to foreign firms² and the suit must be brought by, or against, all the partners. Even after dissolution of the firm, the suit can be brought in the name of the firm provided the firm existed at the time of the accrual of the cause of action,³ though not

15 *Pusha Ram v. Modern Construction Co. (P) Ltd.*, A 1981 Raj 47.

16 *State v. South Central Railway*, A 1977 Karn 168.

17 *Union v. Andre Razack*, A 1956 Pat 511.

18 *S. v. General Manager*, A 1976 SC 2538.

19 *Union of India v. S.H. Surinder Chand Mehra*, A 1985 P & H 68, 70.

20 *Gambhirmal v. J.K. Jute Mills*, A 1963 SC 243.

1 *Atma Ram v. Mian Vma Ali*, A 1940 Lah 256, 190 IC 78.

2 *Joharmal v. Lakshmandas*, 36 BLR 1983, A 1934 Bom 467; *Purushottam v. Manilal & Sons*, A 1961 SC 325 (firm carrying on business outside India).

3 O.30, R.1; *American Furnishing v. Udai Ram*, A 1968 Delhi 163; *Afsar Husain v. Trilok Chand*, (1974) 2 CWR 1045; *Ganesh Trading Co. v. Moji Ram*, (1978) 2 SCC 91.

necessarily at the time of the suit.⁴ Even a suit for dissolution of partnership existing between the plaintiff on the one hand and a different partnership or firm on the other, may be instituted against such firm without disclosing the names of individual partners of the defendant firm in the plaint.⁵ In proceedings to which the provisions of O.30, are not applicable, all partners should be impleaded. But the suit against a firm to which partners are not made parties should not be dismissed on the ground of misdescription alone and the plaintiff may be allowed to correct the title.⁶

A suit by a joint Hindu family firm cannot be brought in the name of the firm under which the business is carried on; but must be brought by all the members or the managing member of the family in his capacity as such manager.⁷ A suit *against* a joint Hindu family firm does, however lie to such suit O.30, R.1, applies.⁸

It is not necessary that all the partners should join in the suit, but any partner can sue in the firm's name, even though others refuse to join, and in that case it is not necessary to implead the latter. If the latter wants an indemnity against costs, the court can stay the suit till the indemnity is furnished by the suing partner.⁹ It is not even necessary to disclose the names of partners of the plaintiff firm unless the defendant demands it, in which case the names have to be disclosed.¹⁰ The title in such suits should be as follows: "AB a firm carrying on business in partnership at Calcutta".

It is not necessary to add, "through or by CD, a partner or manager". If the firm is the defendant, it is not for the plaintiff to say through whom

4 *Firm of Baldeo Pd. v. Firm of Haji Ali*, 27 ALJ 73, 112 IC 715.

5 *Chowdhron v. Khonchand*, 113 IC 370, A 1929 Sindh 7.

6 *Chhetrylal P. aretal v. Shikharchand*, A 1984 SC 1570 (case under a State rent control law where the provisions of C.P.C. were not applicable).

7 *Amolak Chand v. Babulal*, A 1933 Bom 304, 35 BLR 569; *Lalchand v. M.C. Boid & Co.*, 61 C 975, 155 IC 991, A 1934 Cal 510, 38 CWN 914; *Hardeo Ram v. Giridhar*, 153 IC 510, A 1935 All 280; *Misri Lal v. Chandan Mal*, 1937 ALJ 41; *Monilal v. Giridhari Lal*, A 1942 Cal 613; *contra, Detaram v. Vishimidas*, 105 IC 854 Sind; see also, *Jai Jai Ram Manohar Lal v. National Building Material Supply Co.*, (1969) 1 SCC 869, A 1969 SC 1267.

8 *Alekha Chandra v. Krishna Chandra*, A 1941 Pat 596; *Jamunadhar v. Jumna Rai*, A 1944 Cal 138; *Hari Shankar v. General Merchants*, A 1956 Ori 186.

9 *Bhardreshwar Coal Co. v. Satish Chandra & Co.*, 165 IC 390, A 1936 Cal 353.

10 O.30, R.2.

the firm shall defend the case.¹¹ Under the law any partner can put in a defence on behalf of the firm.¹² If the firm is the plaintiff, the plaint will certainly be required to be signed and verified by one of the partners, and the name of that partner will be disclosed in the signature, with the addition "a partner of the firm", but there is no necessity of disclosing it in the cause-title. The opening words "any two or more persons" in Rule 1, do not imply that at least two persons should be named in the plaint as partners of the firm. If any partner is also sued in his individual capacity, he should be added as a separate defendant in his own name.

If any partner dies before the institution of the suit, the suit can still be brought in the name of the firm and it is not necessary to implead his legal representative.¹³ But in that case, the private estate of the deceased partner, as opposed to partnership assets, cannot be made liable even by a subsequent proceeding in execution under O.21, R.50 (2).¹⁴ Therefore, if it is proposed to make such estate also liable, the plaintiff should implead the legal representatives as defendants. If a partner dies during pendency of a suit brought in the name of or against a firm, the suit does not abate if legal representatives are not substituted.¹⁵ Even if all the partners die during the pendency of suit brought in the name of firm, the suit does not abate and legal representatives of all the deceased partners can be impleaded as plaintiffs.¹⁶ A plaint can be amended under section 153 to substitute the names of the partners in a suit filed in the name of the firm.¹⁷ The filing of a suit by the sole proprietor of the firm in the trade name is not fatal, as it amounts to filing of a suit in the name of a wrong person, such mistake can be rectified by amendment at any stage of the proceeding.¹⁸ The assignees of the partners of a firm have right to be arrayed as parties to the suit.¹⁹

11 *Ajit Sing v. Grunning & Co.*, A 1925 Bom 494 (DB); *Phusia v. Mohd. Tassadduq Hussain*, A 1952 All 685.

12 O.30, R.1.

13 O.30, R.4; *Afsar Husain v. Trilok Chand Premchand*, (1974) 2 CWR 1045.

14 *Mathuradas v. Ebrahim*, 105 IC 305, 29 BLR 1296, 51 B 986.

15 *Prayag Mandar v. Mukteshwar*, A 1949 Pat 63; *Godavari Pravara Canal Co-operative Purchase & Sale Union v. Krishna Rao*, A 1974 Bom 52; *Upper India Cable Co. v. Bal Kishan*, (1984) 3 SCC 462.

16 *Jagatjit Industrial Corp. v. Union of India*, A 1981 Delhi 34.

17 *Purshottam v. Manilal & Sons*, A 1961 SC 325.

18 *Oriental Coal Co. Ltd. v. Mohanlal Kisan Lal*, A 1984 Bom 174 (DB).

19 *Jagat Ram v. Bodh Raj*, 1988 Srinagar Law Journal 173 (J&K).

If a partnership firm is not registered with the Registrar of Firms, care should be taken to get it so registered before instituting the suit so that the suit may not fail due to the bar of section 69, Partnership Act. Registration subsequent to the suit cannot cure the defect.¹ If the plaintiff states that the firm is registered and the defendant has not taken any objection under section 69 or questioned the authority of the person suing "as partner" the court cannot dismiss the suit as barred by section 69 on the ground that the plaintiff has failed to prove the registration. If it has any doubt on this score it should give opportunity to the plaintiff to give evidence in that regard.² If a suit is dismissed as barred by section 69, a fresh suit after registration of the firm on the same cause of action will not be barred by *res judicata*.³

If a firm is made a defendant, the plaintiff will have to obtain the direction of the court as to how the summons should be served, for under O.30, R.2, the summons can be served on any partner or manager "as the court may direct". The plaintiff should therefore make an application with the plaint proposing on whom he wishes to have the summons served and praying for the orders of the court. It is not sufficient merely to mention in the cause-title the name of the person on whom summons should be served as this is not a matter for plaintiff's choice; but if service has been effected on a person as a partner, it would not be bad on the ground that the direction of the court had not first been obtained.⁴ Summons cannot be served on the legal representative of a deceased partner.⁵ If the firm has been dissolved, the summons should be served on all partners within India whom it is sought to make personally liable,⁶ and a partner not served will not be made liable by any subsequent proceeding in execution.⁷ If it is not sought to make any partner personally liable and the plaintiff will be satisfied with a decree against the firm property, he need not serve the

1 *K K.A. Ponnuchami Gounder v. Muthuswami*, A 1942 Mad 242; *Jammu Cold Storage v. Khairati Lal*, A 1960 J & K 101.

2 *Bhanu Enterprises v. Bhanu Beer Centre*, (1984) 2 An WR 122; see also, *Loonkaran v. John*, (1977) 1 SCC 379.

3 *Sri Baba Commercial Syndicate v. Channamaseti*, A 1968 AP 378.

4 *Keen v. Lily Biscuit Co.*, 138 IC 637, A 1932 Cal 541, 59 C 496.

5 *Mathuradas v. Ebrahim*, 105 IC 305, 29 BLR 1296, 51 B 986.

6 O.30, R.3.

7 *Madalsa Devi v. M. Ramnarain*, A 1965 SC 1718; *Topanmal v. Kundomal*, A 1960 SC 388.

partners personally.⁸ If summons is intended to be served on a manager, a notice should also be served along with it informing the manager in what capacity the summons is served upon him, otherwise the service upon him will not be an effective service on the firm.⁹

The defence on behalf of the firm may be made by any partner, but the partner must appear individually in his own name,¹⁰ though the defence will be on behalf of the firm. Each of the partners who has entered appearance as such has precisely the same right as regards the conduct of the case as one of the several defendants having a common defence.¹¹ The written statement should be headed as "Written Statement on behalf of firm AB, by CD, one of the partners appearing in the suit". The defendant firm will be sufficiently represented even if one of the partners appears. If several partners file separate defences, they will be all on behalf of the firm and will be regarded as so many different defences of one defendant. A manager cannot file a defence on behalf of the firm unless he comes within the definition of a "recognised agent" given in O.3, R.2, *i.e.*, unless (1) the partners live outside the jurisdiction of the court, and (2) they have not appointed any agent for defending their suits.

If a person is served as a partner, he may appear under protest denying that he is a partner, but in that case he cannot file a defence to the claim on merits.¹² In such cases, the plaintiff may disregard his appearance and serve another partner or the manager and, if no appearance is made, may obtain *ex parte* decree against the firm,¹³ without having the question of the partnership of the person appearing under protest determined. If the plaintiff afterwards wants to execute the decree against such person, he can do so only under O.21, R. 50(2).¹⁴ If, however, the person

8 *Topanmal v. Assudomal*, 165 IC 907, A 1936 Sind 206; *Ibrahimjee v. British India Steam Navigation Co.*, 161 IC 324, A 1936 Sind 34.

9 O.30, R.5.

10 O.30, R.6.

11 *Purshottamlal v. W.T. Henley*, 1933 ALJ 1264, 145 IC 812, A 1933 All 523.

12 *Gambhir Mal Pandiya v. J.K. Jute Mills*, A 1963 SC 243; *International Co. v. Mehta & Co.*, 105 IC 356, 31 CWN 103, A 1927 Cal 780; *Nandlal v. Baker*, A 1940 Bom 390.

13 O.30, R.8.

14 *P.S. Ramaujachary v. Pohoo Mal*, '95, 28 BLR 1275, 50 B 665, A 1926 Bom 585 (DB).

appearing under protest insists, the court is bound to decide the question of his partnership.¹⁵ In any case it is not possible for a person, who has been served with a summons to enter appearance and defend the suit on merits unless he admits that he is a partner, but when such person is interested in some way or the other in the assets of the firm, he can apply to be made a party and it will be proper for the court to implead him even against the wishes of the plaintiffs.¹⁶

If a single individual carries on business in a name other than his own, he cannot sue in that name and must sue in his individual name,¹⁷ but under O.30, R.10, he may be sued in the name under which he carries on business. If an individual is carrying on business in some name other than his own, even if it be called a "Company" or a "Firm", etc., will be covered by this rule.¹⁸ For instance, if A has a shop called the "Provincial Cycle Company" he can be sued in the name of the "Provincial Cycle Company", but if he himself has to bring a suit, he must do so in his personal name. But this rule applies only if business is carried on at the time of suit, and in India.¹⁹ If the proprietor is dead, the suit should be brought against his legal representatives and not against the trade name.²⁰ When a suit is brought against a person in his trade name, his legal representatives should be brought on record if he dies during the pendency of the suit.²¹ All the rules relating to service on a firm apply when the defendant is sued in such assumed names.

Other Suits by or against Joint Hindu Family : Members of a joint Hindu family may sue or be sued in their individual names, but the manager or *karta* may represent the family in all transactions relating to the joint family property or entered into by him as such manager.¹ A decision

15 *Vithaldas v. Hansraj*, 23 BLR 1249; *Gambhir Mal Pandiya v. J.K. Jute Mills*, A 1963 SC 243; see also, *Gajendra Narain Singh v. Johrimal Prahlad Rai*, A 1964 SC 581.

16 *Dhai v. Har Govindroy*, 40 CWN 677.

17 *Scott v. Jitta & Co.*, 38 BLR 529; *General Auto Agencies v. Hazari Singh*, A 1976 Raj 56.

18 *Rajendra Pd. Oil Mills v. Chunni Devi*, A 1969 All (FB); *M.K.M. Morsa Bhai Amin v. Rajasthan Textile Mills*, A 1974 Raj 194.

19 *Joharmal v. Lakshmandas*, 36 BLR 983, 34 B 467.

20 *Habib Bux v. Samuel Fitz & Co.*, 23 ALJ 861, 89 IC 22, A 1926 All 161; *Daulat Ram v. Ishar Das*, 111 IC 706, A 1929 Lah 149.

21 *Hari Bandhu v. Hari Mohan*, 34 CWN 36.

1 *Kallian Rai v. Kashinath*, A 1943 All 188.

in a suit by a managing member to establish a right in immovable property is, therefore, binding on the other members, and a decree obtained against him as manager for debts contracted by him or a deceased manager for family purposes will be binding on the whole co-parcenary property,² but a decree obtained against him personally can be executed against his share only. It is not necessary that a manager sued in his representative capacity should be so described in the plaint.³ But there is no presumption that whenever the manager is sued the members must be deemed to have been represented.⁴ The question always is whether in fact he did represent the family in the proceedings or not. Where he had contracted debts for family purposes and was sued in respect of those debts, the presumption is that he was sued in his representative capacity.⁵

Where one R was one of the plaintiffs and other members of his family were defendants and one of the latter, on his application was transposed as a plaintiff and was represented by another pleader, it was held that R could not be said to have sued as manager of the family but all members were parties in their individual capacity.⁶ In a suit on a mortgage of joint family property, all the members may be impleaded as defendants, but the manager may ordinarily represent the junior members.⁷ The other members may be joined as proper but are not necessary parties.⁸ In such cases it is always better to say in the plaint that a particular person sues or is sued as manager of a family, but even if there is no express allegation and the circumstances show that the defendant was manager and that the property was a joint family property, the natural inference will be that he is sued in his capacity as manager.⁹

If, however, every member of a family is impleaded including the manager without the latter being described as such, and one member is

2 *Lingangowda v. Basangowda*, 51 B 450 PC.

3 *Devidas v. Shailappa*, A 1961 SC 1277.

4 *Rangaswami v. Kandaswami*, A 1942 Mad 732.

5 *Mulgund Co-operative Society v. Shidhugappa*, A 1941 Bom 385.

6 *Labhu Ram v. Ram Pratap*, A 1944 Lah 76.

7 *Harilal v. Munman*, 34 A 549, 15 IC 126; 9 ALJ 819; *Raja Ram v. Gopinath*, 133 IC 416, A 1931 All 721.

8 *Devidas v. Shailappa*, A 1961 SC 1277 (para 12).

9 *Sheo Shankar v. Jaddo Kuar*, 36 A 383, 21 IC 504 PC; *Prithipal v. Rameshwar*, 99 IC 154, 3 OWN 954; *Rameshwar v. Bishambhar*, 111 IC 174 Oudh; *Sethuratnam*

either left out,¹⁰ or though impleaded, is a minor for whom no guardian *ad litem* has been appointed,¹¹ the manager cannot normally be presumed to represent him. If the manager is the mortgagor himself, a suit can be brought against him alone, and as he cannot plead that he was not authorised to make the mortgage, and a decree can also be passed against him, but the other members can have it set aside on grounds ordinarily open to such members under the law.¹² If any of the junior member wishes to be joined in the mortgage suit, the court should implead him as a proper party.¹³

The widow of a deceased co-parcener succeeding with her son under Hindu Women's Right to Property Act, 1937, is not an heir but continues to be member of a joint family and the son is entitled to represent her also in a suit on a pronote belonging to the joint family and to bring a suit without impleading her.¹⁴ In a suit for partition of joint family property, every person entitled to share is a necessary party. So in a suit by the widow of a pre-deceased son against her father-in-law, her mother-in-law is also a necessary party.¹⁵

Suits by or against a Corporation : Corporations are of two kinds :-

(1) "Corporation Sole" is an incorporated series of successive persons.¹⁶ It is a body corporate having perpetual succession, constituted at a time, in a single person, e.g., the Administrator General and the Official Trustees who is under law constituted as corporation sole under section 5 of the Administrators General Act 1963 and section 6 of the Official Trustees Act 1913 respectively.

A suit by or against a corporation sole must be brought in its corporate name, e.g., "The Administrator General and Official Trustee for the State of Uttar Pradesh."

v *Chinna*, A 1930 Mad 206; *Ram Kishen v. Ganga Ram*, 133 IC 1161; *Mukhran v. Kesho Pd.*, 162 IC 879, A 1936 Pat 258; *Bhagwandas v. Radha Kishan*, 164 IC 69, A 1946 Sind 87; *Trimbak v. Sonkaran*, A 1948 Nag 324.

10 *Ganganand v. Rameshwar Singh*, 102 IC 449 Pat; see however, *Deo Narain v. Phagu*, 121 IC 817, A 1930 All 541.

11 *Chandi Prasad v. Balaji*, 129 IC 560, 1931 ALJ 152, A 1931 All 136.

12 *Nathu v. Ram Sarup*, 23 ALJ 246, A 1925 All 335 (DB).

13 *Moti Ram v. Lal Chand*, 170 IC 192, A 1937 Nag 121.

14 *Markipudi v. Madanamchedu*, A 1943 Mad 708.

15 *Bhanwar Singh Bhandari v. Pilabai*, A 1972 MP 204.

16 Salmond's Jurisprudence, 12th Edition, p. 308.

(2) "Corporation Aggregate" is an incorporated group of co-existing persons.¹⁷ It is a collection of many individuals united into one body under a special denomination having perpetual succession under an artificial form and vested by the policy of the law into the capacity of acting in several respects as an individual. Joint Stock Companies, Municipal Boards, District Boards, Co-operative Societies, Universities, State Electricity Boards, State Road Transport Corporations, State Financial Corporations, and Nationalised Banks, are examples of such corporations.

Suits by or against a registered company or by other corporation aggregate should be brought in the official style and name of the corporation,¹⁸ and not in the name of any of its officers, or of an agent, unless a corporation is, by the statute incorporating it, permitted to sue, or is required to be sued in some other name, in which case it should sue or be sued in that name. When suing on behalf of a corporate body or bringing a suit against it, the relevant Act under which it is incorporated and the provisions of incorporation should be carefully looked into. The name of the officer signing or verifying a plaint need not be mentioned in the heading.¹⁹ For instance, the title of a suit against a registered company²⁰ should be like this: "AB Company Limited, having its registered office at 9/20, Civil Lines, Kanpur". A suit on behalf of a company in liquidation should be brought in the name and on behalf of company and not in the name of the liquidator.¹ A decree against an officer, e.g., the agent, would not bind the company, but if the plaint shows that the description of the defendant is a mere error and that the real person sued was the company, the suit may proceed against the company.² A suit against a Municipal Board should be brought against the Board and not against the Secretary or the Chairman. The title would be "The Municipal Board of—." In all

17 Ibid.

18 *Ramdas v. Stephenson*, 10 WR 366; *Singer Manufacturing Co. v. Baijnath*, 30 C 105.

19 *Naram Das v. Quershi*, A 1933 Sindh 102, 142 IC 361.

20 *Campbell v. Jackson*, 12 C 142.

1 *Liquidator of Globe United Engineering & Foundry Co. Ltd. v. Hindustan Brown Boveri Ltd.*, A 1974 Del 200.

2 *Radhelal v. E.I. Ry.*, A 1926 Pat 40, 90 IC 680, 5 Pat 128.

such cases, the name of the officer, upon whom service of summons should be made, should be mentioned after the name of the company or corporation, by the addition of such words as "through the Secretary" or "through the Managing Director". Even though this is not a legal requirement, the court should get this information *i.e.*, mode in which, and the person on whom, the plaintiff desires the summons to be served.³

Suits by or against Societies : Societies registered under the Societies Registration Act, 1860 are not corporations aggregate⁴ and cannot therefore, sue or be sued in their names but may sue or be sued in the name of the President, Chairman, Principal Secretaries or Trustees as may be determined by the rules of society (see section 6). The title of the suit should be somewhat as follows:

"AB, President of the Arya Sabha U.P., a society registered under the Societies Registration Act, 1860".⁵ Where the rules of a Society empower its Secretary to institute and defend the proceedings on behalf of the Society, suit instituted by the Secretary of the Society is properly instituted suit.⁶ A person having a claim against the society may sue any of the above persons, unless on an application to the governing body referred to in section 16 some other officer or person is nominated to be the defendant (section 6, proviso). The society can sue its individual members for any arrears or dues or penalty, or for any damage in respect of any unlawful detention of, or injury, or destruction to, any property of the society (section 9, 10).

Suits by or against Co-operative Societies : Such societies like joint stock companies, owe their existence to agreement among members and are registered under the provisions of an enactment. They are registered with the Registrar of Co-operative Societies of the State. Unlike societies registered under the Societies Registration Act, the Co-operative Societies can sue and be sued in their own names. Under the rules and bye-laws, generally the Secretary is authorised to represent them. In a suit by a Bank for recovery of loan from a registered Co-operative Society, the

3 *Narain Das v. Qureshi*, A 1933 Sindh 102, 142 IC 361.

4 *Board of Trustees v. State of Delhi*, A 1962 SC 458.

5 *Moti Ram v. Mangharam*, A 1942 Sindh 130.

6 *Parul Das Roy v. Anath Das*, A 1991 Cal 1.

administrator or any officer of the society is neither a necessary nor a proper party as he acted for and on behalf of the society in taking loan and not on his own behalf.⁷ However, the disputes touching the business of such societies, whether between two societies or the society and its officers or servants and agents or between any two or more members, are decided through arbitration machinery provided in the statute relating to registration of such societies.

Suits by or against Unregistered Associations : Suits by, or against, an unregistered company, society or other association such as an unregistered club or a library, cannot be brought in the name of the company, society or association but must be brought by or against, all the members of such institutions. If the number of such members is large, advantage may be taken of the special procedure of O.1, R.8,⁸ but that is only if there is a cause of action against all the members, e.g., when they entered into the contract or they authorised it.⁹ Often in case of unregistered clubs, members at the time of a suit are different from those at the time of accrual of cause of action, as the composition of such bodies is fluctuating. In such a case, present members cannot be liable for debts incurred before they became members; and therefore the procedure under O.1, R.8, cannot be availed of.¹⁰ It has been held that this procedure is inapplicable to a money suit but can be applied in a suit for declaration or injunction.¹¹ The plaintiff may however, claim a declaration that he is entitled to the sum due to him which should be paid out of the funds of the society.¹²

Suits by or against Trustees : In all suits concerning property vested in a trustee, executor, or administrator, where the contention is between the person beneficially interested and third persons, the trustee,

7 *Punjab National Bank Ltd. v. Panchsheel Industrial Cooperative Society Ltd.*, ILR 1979(1)Del300.

8 *Radhaswami Satsang Sabha v. Putta*, A 1984 All 198; *Muhammadan Association v. Bakshi*, 6 A 284; *Corporation of Trivandrum v. Narain Pallai*, 1968 Ker T 285, 1968 Ker LR 180.

9 *Scott v. The Firm*, 88 IC 784 Sindh.

10 *Barker v. Allamassar*, (1937) 1 All ER 75, 78, 79.

11 *Ratnaswami v. Prince of Arcots Endowment*, ILR 1938 Mad 1094.

12 *Harish Chandra v. A.S. Graig*, A 1942 Bom 136; *Ideal Films v. Richard*, (1927) 1 KB 374.

executor or administrator shall represent the persons beneficially interested¹³ and shall be described as follows :

“AB, a trustee of the estate of CD, deceased”, or “AB, executor of CD, deceased”.

If there are more trustees, executors or administrators, than one, all shall be joined as parties, except those who are outside India.¹⁴ If any one refuses to join or has an adverse interest, he should be impleaded as defendant.¹⁵ If any trustee is not joined, the suit will fail, and O. 1, R. 9, will not save it.¹⁶ It can, however, be saved by impleading the remaining trustees by leave of the court.¹⁷ An executor who has not proved his testator's will, need not be joined. The court may, in a proper case, add the beneficiary as a party, e.g., when the trustee, executor or administrator's interest is hostile to the beneficiary or he appears to be in collusion with the debtor of the estate.

Suits by or against Foreign States, Ambassadors and Envoys:

“Foreign State” and “Ruler” of foreign State are defined in section 87A, C.P.C. Section 84 permits a foreign State to sue to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity.¹⁸ Section 85 provides for appointment of authorised persons to act on behalf of such Rulers. Section 86 places certain restrictions on suits against Rulers, Ambassadors, Envoys and High Commissioners and other specified members of embassy or High Commission staff of such foreign States. Normally consent should be sought from the Central Government through the Secretary to Government of India, Ministry of External Affairs, New Delhi, before instituting such suit except where the case is covered by the proviso to section 86(1) or by any general order of the Central Government under section 86(2). When such suit is maintainable the suit may be filed by or against the Ruler in the name of his state or when such state is defendant,

13 O. 31, R. 1.

14 O. 31, R. 2.

15 *Mohammad Soleman v. Tasadduq Hussain*, A 1935 Cal 623; *Nazir Ahmad v. Raghbat Ali*, 53 IC 478 Cal.

16 *Ram Ghulam v. Shyam Sarup*, 1933 ALJ 1393, 55 A 687.

17 *Capt. Daniels v. G.D.F. Trust*, A 1959 All 579.

18 *Mirza Ali Akbar v. U.A.R.*, A 1966 SC 230.

in the name of an agent, or in any other names as may be specified in the consent granted by the Central Government. While considering whether to give consent or not the Central Government is not expected to decide whether the claim is well founded or not but may refuse consent for frivolous suits so that the foreign States may not be unnecessarily harassed.¹⁹

Suits by Other Aliens : Alien enemies residing in India with the permission of the Central Government, and alien friends, may sue in any court otherwise competent to try the suit, as if they were citizens of India, but alien enemies residing in India without such permission, or residing in a foreign country, shall not sue in any such court.¹

Every national of a foreign country, the government of which is at war with India, is deemed to be an alien enemy. Besides, every other person residing in such country and carrying on business in that country without a licence in that behalf granted by the Central Government, shall, for the purpose of section 83, be deemed to be an alien enemy residing in a foreign country. A foreign national who is not alien enemy is deemed to be an alien friend.

Suits against Rulers of Former Indian States : Section 87 B, provides that the provisions of section 85 and sub-sections (2) & (3) of section 86 (referred to above) apply *mutatis mutandis* to suits by or against rulers of former Indian State but only in respect of a suit based wholly or in part upon a cause of action which arose before 26th January 1950 or of a proceeding arising out to such suit.² This restriction is thus of not much practical importance now.

Suits by or against Insolvents and Receivers of their Property: On the making of an adjudication order, the entire property of an insolvent vests, in the Presidency towns, in the Official Assignee,³ and in other towns in the court or in the Official Receiver.⁴ No suit can, therefore, be brought in respect of such property by or against the insolvent, but such suits should be brought by or against the official assignee or the receiver. The

19 *Tokendra Bir Singh v. Government of India*, A 1964 SC 1663.

1 Section 83 C.P.C.

2 *Mandalsa Devi v. Ramnarain R. Ltd.*, A 1965 SC 1718.

3 Section 17, Presidency Towns Insolvency Act.

4 Section 28, Provincial Insolvency Act.

title of the suit should be as follows :

“The Official Assignee of the property of CD, an insolvent”.⁵

“AB, Receiver in insolvency of the property of CD, an insolvent”.

“AB the Official Receiver for the district of Patna and Receiver of the property of CD, an insolvent”.

But the insolvent has a right to bring a suit in his own name and can be sued personally in respect of any property which does not, under the law, vest in the Assignee or Receiver or for damages or costs. An insolvent cannot be sued for debts provable in insolvency without previously obtaining the leave of the court.⁶ Notice under section 80, C.P.C. is necessary before a receiver can be sued.

Suits by or against Other Receivers: A receiver appointed by court under O.40, can sue with the leave of the court, and he cannot be sued without such leave, which should ordinarily be obtained before the suit; but the defect of omission to obtain such leave before hand can be cured by subsequent leave.⁷ As a general rule when a suit is instituted by or on behalf of a receiver, the authority of the court⁸ under which the receiver sues should be specifically alleged in the plaint. Reference to the sanction obtained should also be made in the plaint when a suit is filed against a receiver. A receiver, being an officer of the court, notice under section 80, C.P.C. is necessary before he can be sued. A suit instituted without leave must be dismissed, if objection is taken, but the omission to take objection is tantamount to waiver and the suit cannot be dismissed.⁹ A suit may be brought by the receiver in his own name if the court authorises

5 Section 3, Presidency Towns Insolvency Act.

6 Section 17, Presidency Towns Insolvency Act, and section 28 (2) & (6), Provincial Insolvency Act; *In re Dwarkadas*, 40 Bom 235; *Ghous Khan v. Bala*, 15 Mad 833.

7 *Srihari Jana v. Satya Charan*, A 1926 Cal 1040 DB; *Karooth v. Manavikraman*, 43 Mad 793; *Ram Sarandas v. Shanti Devi*, A 1977 All 175; *Md. Gulam Ghouse v. A.R. Deshmukh*, (1984) 2 An WR 457; *Subramania Iyer v. Rajanunni Nair*, 1987 (2) KLT 998 (Ker); *Horace William Davis v. International Investments & Finance Corporation*, (1986) Kant LT 75 (Kant); *Kotani Construction Co. v. Anwar Haji Alimohammed*, 1986 (3) Bom CR 454; *Madhavan Sunanda v. Krishnan Chetoharan*, A 1988 Ker 228.

8 See O.40, R.1 (1) (d).

9 *Satya Kirpal v. Satya Bhupal*, 18 CWN 596.

him to do so.¹⁰ Owners of the property are necessary party to such suits.¹¹

Suits by or against Minors and Lunatics: A minor or lunatic cannot sue or be sued himself but must sue through a next friend, and if a defendant, a guardian *ad litem* must be appointed by the court to represent him. The only exception is the case of a minor who sues in a Presidency Small Cause Court for his wages or for work done by him as defendant's servant and whose claim does not exceed Rs. 500. Section 32 of Presidency Small Cause Court permits such suits to be instituted without a next friend.

If a person is adjudged lunatic by a court and a curator is appointed, he can sue or be sued by such curator.

If a minor or lunatic is duly represented by a guardian and such guardian is not hostile or negligent or in collusion with the other side, any decree passed in such suit will be binding on the minor or lunatic.¹² This includes a compromise decree where the provisions of O.32, R. 7, were duly complied with.¹³ But if no guardian was appointed for a lunatic defendant the decree passed is nullity.¹⁴

Normally the legal guardian would be the next friend to sue on behalf of a minor or lunatic, but where his interest is likely to be adverse to the latter's, then any other suitable person can act as next friend.¹⁵ If a major has been wrongly assumed to be a minor and has sued through a next friend the mistake can be rectified¹⁶ under O. 1, R. 10.

If a plaintiff has not already been adjudicated a lunatic it is not open to the defendant to insist on a finding from the court to that effect at the preliminary stage under O. 32, R. 15 though it is open to the court to

10 *Achut v. Shivaji Rao*, A 1937 Bom 294.

11 *Kotani Construction Co. v. Anwar Haji Alimohammed*, 1986(3) Bom CR 454.

12 *Bishundeo Narain v. Seogeni Rai*, A 1951 SC 280; *Dokku Bhushayya v. Katragadda*, A 1962 SC 1886; *Sarda Pd. v. Jumna Pd.*, A 1961 SC 1074.

13 *Bishundeo*, supra; *Kaushalya v. Baijnath*, A 1961 SC 790; *Dhirendra Kumar v. Sugandhi Bai*, A 1989 SC 147, (1989) 1 SCC 85 (compromise filed without considering the interests of the minor, guardian guilty of gross negligence, compromise decree liable to be set aside).

14 *Ramchandra v. Man Singh*, A 1968 SC 954.

15 *Thulasi Kumar v. Raghavan*, (1985) 1 CCC 38 Ker, A 1985 Ker 20.

16 *Durai v. Lakshmanan*, A 1985 Mad 376.

make an inquiry under that rule.¹⁷ But if the plaintiff claims to be insane and sues through a next friend, the defendant can contest the alleged insanity even at the preliminary stage.¹⁸

If a party attains majority after the institution of the suit, it is for him to come forward to prosecute his suit or defend himself and to apply for discharge of his guardian; and if he fails to do so he is barred from later contending that the decree passed in the case is a nullity.¹⁹ This follows from O. 32, R. 3 (5) in as much as the guardian does not cease to function automatically as soon as the minor attains majority and has to be discharged.

Where a defendant attains majority during the pendency of the suit, on attaining majority he can file a separate written statement, contrary to the written statement filed earlier in the case, the provisions of O. 6, R. 17 are not applicable in such a case.²⁰

Mortgage Suits: A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced as a loan, an existing or future debt or the fulfillment of an obligation which may give rise to a pecuniary liability.

In such suits all persons having an interest either in the mortgage security or the right of redemption shall be joined as parties.¹ It is not necessary that all should be arrayed on one side; it is sufficient that they are all before the court. For instance, one of the several mortgagees can sue if he impleads the others as defendants.² The primary parties to the mortgage, as well as those who have acquired the mortgagor's or mortgagee's rights by operation of law or by voluntary transfer, must be impleaded. If a property vests in trustees, they alone are necessary parties and the beneficiary need not be added.³ The son of mortgagor who has transferred the property is at least a proper party and the suit against the

17 *Godavari v. Radha Pyari*, A 1985 Pat 366.

18 *Papi v. Rami*, A 1969 AP 362; distinguished in, *Godavari*, supra.

19 *Paritosh Ganguli v. Sital Ghosh*, (1985) 89 CWN 441.

20 *Vanimisatti Anil Kumar v. Jayavarapu Krishna Murty*, A 1995 AP 105.

1 O. 34, R. 1; *Mangru Mehto v. Taraknathji*, A 1967 SC 1390, *Nagubai v. B. Shama Rao*, A 1956 SC 593.

2 *Jamna Das v. Maniram*, 162 IC 15, A 1936 Pat 439.

3 O. 31, R. 1.

transferees without impleading him was not properly framed.⁴ A prior mortgagee is not a necessary party to the suit on a subsequent mortgage but a subsequent mortgagee must be impleaded in a suit on a prior mortgage.⁵ Other co-mortgagors are necessary parties to a suit for redemption by one of the mortgagors.⁶ Attaching creditor is not a necessary party to a mortgage suit,⁷ though he is a proper party,⁸ and so even an auction purchaser, purchasing property during the pendency of mortgage suit, need not be impleaded.⁹

If a subsequent mortgagee is not impleaded,¹⁰ or the prior mortgagee's suit against him is dismissed,¹¹ his rights remain unaffected by the decree.¹² He can sue for redemption within the prescribed period which was 60 years under Limitation Act, 1908,¹³ and is 30 years under the Act of 1963. The prior mortgagee can also bring a separate suit against him.¹⁴ If the omission is objected to at the trial, the suit cannot be dismissed, but a decree can be passed for the sale of property not affected by the subsequent mortgage.¹⁵

A person claiming a title paramount to that of both the parties should not be impleaded in a mortgage suit,¹⁶ but if such a person has an interest in the mortgage security and his claim is not in any way in derogation of the rights of the mortgagor or the mortgagee, he should be impleaded

4 *Jugraj Singh v. Jaswant Singh*, A 1970 SC 1039.

5 *Karrar Hussain v. Jai Narain*, 100 IC 198; *Saed-ud-din v. Hiralal*, 12 ALJ 619.

6 *Ahmad Husain v. Muhammad Qasim Khan*, A 1926 All 46, 24 ALJ 88.

7 *Baijulal v. Thakur Pd.*, 19 PLT 781, 1938 PWN 836.

8 *Ittiavira v. Krishna*, 28 TLJ 383, 12 TLT 1015.

9 *Lalit Mohan v. Hardat Rai*, A 1939 Lah 146.

10 *Sukhi v. Ghulam Safdar*, 43 A 469 (475, 476); *Ganpat Lal v. Bindasini*, 47 C 924.

11 *Sheo Pd. v. Prakash Rani*, 171 IC 434, A 1938 Oudh 10.

12 *Sailendra v. Amrendra*, A 1941 Cal 484; *Udhodas v. Girdharilal*, A 1941 Lah 96, 193 IC 656; *Rowshan Khan v. Abdul Khaliq*, 45 CWN 705, 74 CLJ 1.

13 *Priyalal v. Bohra Champaram*, 45 A 268; *Amulya v. Raruli*, A 1940 Cal 150.

14 *Nanhelal v. Ram Bharose*, 174 IC 315, A 1938 All 115 (discussed in *Bajinath v. Ramadhar*, 1963 ALJ 214 (FB) on another point.)

15 *Alam Singh v. Gokal Singh*, 35 A 484.

16 *Musammatt Radha v. Thakur Reoti Singh*, 20 CWN 1279 PC; *Gobardhan v. Munnalal*, 16 ALJ 639; *Rasoolam Bibi v. Ram Kunwar*, 155 IC 156, A 1935 All 205, 1934 ALJ 1177; *Niamba v. Narajan*, A 1948 Nag 369.

notwithstanding that his claim is adverse to the plaintiff.¹⁷ A person claiming paramount title, if impleaded, may apply to be discharged. But if he does not apply and an issue is framed about his rights and is decided, it binds the parties.¹⁸ In a suit by a vendee of mortgage rights, the vendor may be joined and relief may be claimed against him personally in case plaintiff fails to get a decree against the mortgaged property.¹⁹

Suits under Section 92 of CPC : In the case of any alleged breach of any express or constructive Trust, created for public purposes of charitable or religious nature or where the direction of the court is deemed necessary for the administration of any such Trust, the Advocate General or two or more persons having interest in the Trust and having obtained the leave of the court, may institute a suit to obtain any of the reliefs mentioned in section 92 of the Code. The suit must be a representative one, brought by individuals for the benefit of and as representatives of the general public for the purpose mentioned in it and not in their own interest.

The suit being a representative action, is binding not only on the parties to it, but all the persons interested in the Trust.¹ The Court is bound to give such notice to the defendants. An order granting leave to institute a suit under section 92 of the Code without notice to defendants is void.²

Interpleader Suits: O.35 deals with interpleader suits. An interpleader suit is an action in which the plaintiff claims no interest in the subject matter in dispute, other than for charges or costs and the dispute is between the defendants *inter se*. But there must be no collusion between the plaintiff and any of the defendants.

Where the plaintiff colludes with one of the claimants or takes indemnity from one of the claimants or enters into an agreement with one of them to receive less than what is actually due, the interpleader suit must be dismissed.³ Where the amount deposited by the plaintiff is in dispute, the court may declare that the plaintiff is discharged from liability only to

17 *Chettyar v. Narayanaswami*, 196 IC 389, A 1941 Mad 710.

18 *Mst. Satwati v. Kalishankar*, A 1955 All 4 (FB).

19 *Khat Khata v. Surajpal*, 190 IC 334, 1940 OWN 807.

1 *Buddree v. Chooni*, 33 Cal 789; *Anand Rao v Ramlal*, A 1921 PC 123.

2 *Lakshmanan Chettiar v. Narayana Chettiar*, 1990 (I) MLJ 113.

3 *Banuchandra Naidu v. Venkata Raju Naidu Charities*, A 1990 SC 444.

the extent of the amount admitted and leave the parties to settle their dispute for the balance otherwise or in other proceedings.⁴ Any finding in an interpleader suit will operate as *res judicata*.⁵

4 *Sambiah v. Subba*, A 1952 Mad 564; *Harinamarkar v. Robin*, A 1927 Rang 31.

5 *Inuganti Subbana Dirao v. Muthangi Jaggayya*, A 1966 AP 92; *Abdul Halim v. Saadat Ali*, A 1928 Ori 155. (See also precedents Nos. 262 and 263 in part II).

Chapter XIII

PLAINT-THE STRUCTURE

A suit is instituted by filing a plaint, which is the first pleading in a civil suit. It is a statement of the plaintiff's claim and its object is simply to state the grounds upon, and the relief in respect of which, he seeks the assistance of the court. It consists of the following three essential parts:

Part I—The Heading and Title

Part II—The Body of the Plaint

Part III—The Relief Claimed

Part I—Heading and Title

Heading : Every plaint should begin with the name of the court in which the suit is brought,¹ to be written at the head of the plaint and this is called its heading, e.g., "*In the Court of the Civil Judge at Allahabad.*" It is not necessary to add the name of the presiding officer of the court. Where a court, e.g., the High Court, has various jurisdictions, the jurisdiction in which the suit is brought should be stated below the name of the court, thus :

In the High Court of Judicature, at Bombay

Testamentary and Intestate Jurisdiction, *or,*

Matrimonial Jurisdiction, *or,*

Ordinary Original Civil Jurisdiction

Then follows the number of the suit in the next line. The number is noted by the court officials and a place should be left blank for it. The year should be written thus :

Original Suit No.—of 1972, *or,*

Title Suit No.—of 1972, *or,*

Suit No.—of 1972,

according to the practice of the court.

Title : Next to the heading, should be written the title or cause title consisting of—

¹ O.7, R.1 (a).