DEFENCE

It has been fully explained in Chap. XV of the first part how a written statement should be drafted by the defendant. There are some pleas which are of general character e.g., pleas of denial, limitation, jurisdiction, etc. What other particular and special pleas can be raised in particular suits has been indicated in the foot-notes to the precedents of plaints in such suits. It should not, therefore, be a difficult task for a defendant to frame his pleas in the written statement. It has not, therefore, been considered necessary to give precedents of written statement in all the suits for which forms of plaints have been given. But model written statements have been drawn up for more important suits and these written statements have been drafted with reference to the precedents of plaints given in this book. The number of the plaint to which a particular written statement relates has been given at the top of the written statement, and it would be profitable to read the plaint and the written statement together.

Before these model written statements will be found forms of certain pleas of general character which can be taken in most kinds of suits. They will show how such pleas which are common to many suits should be drafted.

GENERAL DEFENCES

No. 1—Accord and Satisfaction *(a)*

(By Work Done)

From January 20,1996 to January 29, 1996 the defendant did certain work for the plaintiff in repairing his furniture and making certain new furniture, which work was done by the defendant and accepted by the plaintiff in satisfaction and discharge of the plaintiff's claim under the said bond in suit.

(By giving a bond)

1. The defendant, on May 4, 1995, executed a bond in favour of the plaintiff in lieu of the price of grain due from the defendant to the plaintiff for which the plaintiff has brought this suit.

(a) The plea of mere accord is no defence and should not be raised without the plea of satisfaction.

2. The said bond was executed and delivered by the defendant and received and accepted by the plaintiff in discharge of the plaintiff's claim for the said price of grain.

(*By delivery of Cattle*)

1. On November 15, 1995, it was agreed between the parties that the defendant should deliver to the plaintiff, and the plaintiff should accept, 2 cows and 2 bullocks belonging to the defendant, in full satisfaction and discharge of the plaintiff's claim under the bond in suit.

2. On November 16, 1996, the defendant in pursuance of the said agreement, delivered to the plaintiff, and the plaintiff accepted, the said cows and bullocks in full discharge of the said bond.

(*Or*, 1. On November 15, 1995, it was agreed between the plaintiff and the defendant that the defendant should deliver to the plaintiff and the plaintiff should accept, the defendant's horse, in full satisfaction and discharge of the plaintiff's claim for damages for the horse shot by the defendant.

2. On November 20, 1995, the defendant, in pursuance of the said agreement, delivered to the plaintiff, and the plaintiff accepted, the said horse in full discharge of his said claim).

No. 2—Acquiescence

See Chapter XV ante, for ingredients of this plea.

No. 3—Condition Precedent *(b)*

(*Condition in the agreement*)

1. By the agreement of October 20, 1993, referred to in the plaint, it was a condition precedent to liability of the defendant for payment of the work done by the plaintiff that the plaintiff should get the said work checked by the District Engineer, Saharanpur, and certified by him as having been properly done.

2. The plaintiff did not get the said work checked or certified as aforesaid.

(b) Vide O.6, R. 6, the defendant must specifically plead any condition precedent, the performance or occurrence of which he intends to contest. If the defendant does not plead it, the objection will be considered to have been waived.

(*Condition of statutory notice*)

1. Under section 54 of Cess Act (Bengal Act IX of 1880) a notice by the plaintiff to the defendant is condition precedent to the liability on the part of the defendant to pay cess.

2. The said condition was not performed in that no such notice was given by the plaintiff to the defendant before the suit.

(*The like, in a brief form*)

The plaintiff did not prefer his claim in writing to the defendant Railway Administration in the manner, and during the period, prescribed by section 106 of the Indian Railways Act, (section 78-B of the old Act) and the suit is not, therefore, maintainable.

(*See also under "notice", post*)

No. 4—Custom or usage *(c)*

(*Communal custom*)

Amongst the (*name the caste or sub-caste*) of the Meerut division there is a certain and reasonable custom which is immemorial and has been followed without interruption, that a widow can take a married boy in adoption as son.

(*Local custom*)

There is in *mohalla* Abupura, in the town of Muzaffarnagar, a local custom of pre-emption, particulars of which are given below and the said custom is certain, reasonable and immemorial and has been followed without interruption.

The plaintiff is not bound to plead the performance or occurrence of it in his plaint, therefore, the defendant cannot take an objection in point of law on the basis of the plaintiff's omission to plead the same. If the condition is statutory, e.g., of a previous notice required by law as in the case of a suit against railway administration, the condition need not be stated at length, but a reference to the law may be made and it may be alleged that the condition required by it has not been performed.

(c) Custom should be alleged specifically with all material details. It is not sufficient to plead that the defendant is entitled to such and such thing under village custom or that the plaintiff has no right to the property under the local custom of the village. The custom should be alleged in a separate paragraph, with such terms as are material to the defence. If the custom is so well established as to

Particulars : The custom is about pre-emption of houses and its incidence are the same as of the law of pre-emption under the Mohammedan Law with this exception that under the custom *talabs* or demands are not necessary in any particular form but simply one demand is necessary to be made in any form.

(Usage of trade)

There is a custom in the Shamli grain market that on all *khatti* transaction interest is charged at fifteen per cent per annum on all money due to the principal from a commission agent or *vice versa*, and this custom, which is certain, reasonable and immemorial, has been followed without interruption.

No. 5—Denial *(d)*

(Denial of execution)

The defendant denies that he borrowed Rs.200 or any other sum from the plaintiff, or that he executed the bond in suit.

(Denial of custom)

The defendant denies that there is any custom amongst the (*caste or sub-caste*) of the Meerut division under which a widow may take a married boy in adoption as son.

(Denial of consideration)

The defendant admits that he executed the bond in suit, but denies that he received the consideration alleged in para 1 of the plaint, or any consideration, for the said bond.

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have become a well-known law, it need not be alleged with full particulars. As the essential requisites of a valid and binding custom are that it should be certain, reasonable and immemorial and should have been followed without interruption, those qualities should also be alleged. If the particulars and details of the custom are small, these requisites may be alleged along with them, but if they are considerable, they may be briefly referred to with the allegation of custom and particulars should be given separately below.

(d) The words used in the plaint should normally be used when denying a fact. But where the statement of facts in the plaint is very lengthy there is no objection to the defendant alluding to the facts by their substance and denying them but the facts denied must be clearly and unmistakably referred to in the plea.

(*Denial of tenancy*)

The defendant denies that he entered into possession of the house in suit under the lease alleged in para 1 of the plaint or under any other lease.

(*Denial of lengthy allegations of facts*)

The defendant denies that he spoke or published the words alleged in para 1 of the plaint.

(*Or*, 1. The defendant denies that he made any of the several representations alleged in paras 2, 3 and 4 of the plaint.

2. The defendant denies that the plaintiff was induced to execute the said sale-deed by any of the said alleged representations).

(*Denial of due execution and attestation*)

Defendant denies that the alleged deed of gift was duly executed or attested.

Particulars : The signatures of the executant were obtained on blank paper on which the deed appears to have been engrossed subsequently. The attesting witnesses neither saw the executant sign the deed nor did they attest it on the executant's acknowledgment.

[*Forms given in Appendix A, C.P.C.*]

The defendant denies the (*set out facts*).

The defendants does not admit that (*set out facts*).

The defendant admits that but says that

The defendant denies that he is a partner in the defendant firm of

No. 6—Estoppel *(e)*

(*Estoppel by document*)

The plaintiff is estopped from saying that he was not the owner of the property in suit on December 20, 1995 because the plaintiff represented by his recitals in the sale-deed executed on the aforesaid date in favour of the defendant that he was the owner of the said property, and thereby induced the defendant to purchase it from the plaintiff.

(e) Full facts constituting the estoppel must be given. Plea of promissory estoppel can also be raised against government and public bodies (*Gappu Lal*

(*Estoppel by representation*)

The plaintiff is estopped from denying the defendant's vendor Smt. Ram Piari had an absolute interest in the property, by reason of the fact that the plaintiff had himself represented to him on December 20, 1995, that the said Smt. Ram Piari had an absolute interest in the property, and had thereby induced the defendant to purchase it from the said Smt. Ram Piari.

(*Estoppel by conduct*)

The plaintiff is estopped from asserting that the property belongs to him because the said property was, in the knowledge of the plaintiff, put up to auction sale in execution of decree No. 900 of 1986 passed by the Munsif of Rangpur, against one Karim Baksh, and the plaintiff and the defendant both attended the said auction sale on June 10, 1986, and bid for the property, and the defendant purchased the property, as the highest bidder, and the plaintiff never made any claim to the said property but by his said conduct induced the defendant to believe that the plaintiff had no claim to the said property.

(*Estoppel by omission*)

The plaintiff is estopped from asserting the mortgage in suit by the reason of the fact that he had put to sale the property in suit in execution of his money decree No.200 of 1980, passed by the Subordinate Judge of Delhi, without giving the purchasers a notice of the mortgage now sought to be enforced and thus induced the defendant to believe that the

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Muni Lal v. *State of U.P.*, 1971 ALJ 796; *Century Spinning & Manufacturing Co.* v. *Ulhasnagar Municipal Council*, A 1971 SC 1021; *Gujarat State Finance Corporation* v. *Lotus Hotel*, A 1983 SC 848). The doctrine of promissory estoppel cannot be invoked to compel the public bodies or the Government to carry out the representation or promise which is contrary to law or which is outside their authority or power (*Shabi Construction Company* v. *City and Industrial Development Corporation*, (1995) 11 MLJ (SC) 62).

For invoking the principle of promissory estoppel, the promisee must have altered his position on the basis of the promise (*Dr. Ravi Srivastava* v. *Vikram University*, 1995 (3) SLJ 18 (SC); see also *State & H.P* v. *Ganesh Wood Products*, (1995) 6 SCC 363, A 1996 SC 149). The principle of promissory estoppel is not a pure question of law. A person invoking benefit of promissory estoppel must provide precise data in support of his plea and specify the various ingredients of the rule

property was being sold free from plaintiff's encumbrance, if any, and to purchase the property under the said belief.

[*Form given in Appendix A, C.P.C.*]

The plaintiff is estopped from denying the truth of (*insert statement as to which estoppel is claimed*) because (*here state the facts relied on as creating the estoppel*).

See also in Chapter XV, page 311 ante.

No. 7—Fraud *(f)*

The defendant was induced to make the alleged contract by fraud of the plaintiff.

Particulars of the fraud : In order to induce the defendant to agree to purchase the property, the plaintiff, on June 10, 1995, verbally represented to the defendant, falsely and fraudulently, that the net annual profits of the property were Rs.4,000, whereas, as the plaintiff well knew, the fact was that the net profits of the said property were only Rs.2,250.

No. 8—Illegality *(g)*

The alleged agreement was without consideration and is therefore void.

The alleged contract was against public policy.

The consideration of the alleged contract was immoral.

No. 9—Insolvency *(h)*
(*Plaintiff's insolvency*)

The plaintiff has been adjudged insolvent by order of the District

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laid down in Motilal Padampat's case [(1979), 2 SCC 409] (*International Limited* v. *Assistant Director, General of Foreign Trade*, (1996) 2 SCC 439).

(f) Fraud may be pleaded as an answer to the enforcement of any contract. But full particulars of the fraud alleged must be given.No case of fraud can be gone into by courts unless it is pleaded with the utmost particularity and unless it is found as laid (*Mate Nande* v. *Dalchand*, A 1948 Nag 170).

(g) Facts showing the illegality of the contract must be given. It is not sufficient to allege that the contract was illegal or void. **A plea of mere denial for the contract would not include a plea of its illegality.**

(h) The result of adjudication of insolvency is described in Sec. 28 of Act V of 1920. All property of the insolvent vests in the receiver and the latter, not the former, should therefore bring any suit concerning the same. No creditor of the

Judge of Bhagalpur, dated May 15, 1994, and the cause of action sued on herein vested in the Receiver of his property.

(*Defendant's insolvency*)

1. The defendant has been adjudged insolvent by order of the District Judge of Trichnopoly, dated November 16, 1995.

2. The debt in suit is one which was provable under the Provincial Insolvency Act.

3. The plaintiff has not obtained the leave of the court as required by section 28, Act V of 1920, and cannot, therefore, bring this suit.

[*Form given in Appendix A, C.P.C.*]

The defendant has been adjudged an insolvent.

The plaintiff before the institution of the suit was adjudged an inslovent and the right to sue vested in the Receiver.

No. 10—Jurisdiction *(i)*

(*Territorial*)

Defendant denies that he resides within the jurisdiction of this court. He resides at Karnal, and this court, therefore, has no jurisdiction.

(*Or*, The defendant denies that the bond was executed at Meerut. It was executed at Delhi, and this court has, therefore, no jurisdiction to try the case).

(*Or*, The defendant denies that money payable under the said contract was made payable at Meerut, and submits that this court has no jurisdiction to try the case).

(*Pecuniary*)

The defendant denies that the value of the subject matter of the suit is

insolvent can sue the insolvent in respect of any debt provable under the Act, except with the leave of the court obtained before the suit (*Dwarka* v. *Tej Bhan*, 40 B 235).

The prohibition does not extend to debts not provable under the Act. For what debts are provable, *see* section 34. But proceedings commenced before adjudication can be continued without leave of the court against the insolvent. Mere filing of a petition of insolvency does not debar any remedy against the insolvent. The bar continues up to the date of discharge.

(i) *Vide* Chap. XV Page 307

Rs.20,000. It is Rs.900, and the suit is not cognizable by this court.

(Regular and Small Cause Courts)

The suit is cognizable by the Small Cause Court and this court has no jurisdiction to try it.

(*Or*, The alleged act of the defendant amounts to a criminal offence, hence the cognizance of this suit by Small Cause Court is barred by Article 35 (ii) of the first schedule to the Provincial Small Cause Act).

(Civil and Revenue)

The suit is one cognizable by a Revenue Court under section _____ of Act _____ of _____, and its cognizance by a Civil Court is barred by section _____ of that Act.

[*Form given in Appendix A, C.P.C.*]

The court has no jurisdiction to hear the suit on the ground (*set forth the grounds*).

No. 11—Limitation *(j)*

The plaintiff has not been in possession at any time within 12 years before this suit, and the suit is barred by Article 64, Limitation Act, 1963.

(*Or*, The defendant obtained physical possession of the house purchased by him on June 13, 1964, hence his suit, filed on June 15, 1972, is barred by Article 97, Limitation Act, 1963).

(*Or*, The defendant does not admit that the plaintiff attained majority on June 10, 1970, and submits that he attained majority in 1968 and the suit is, therefore, barred by section 8 of the Limitation Act, 1963).

(*Or*, The defendant denies that he made the payment alleged in para 4 of the plaint).

(*Or*, The defendant admits that he paid Rs.500 as alleged in para 4 of the plaint, but denies that he did so on account of the debt in suit).

(*Or*, The defendant admits having made the payment alleged in para 4 of the plaint, but denies having put his thumb mark under the endorsement of payment).

(j) When the plaintiff claims that the suit falls within any exception to the general rule, it is enough to deny the facts bringing the suit within that exception,

(Or, The defendant did not make the acknowledgment alleged in para 4 of the plaint).

(*Or*, The defendant admits having made the statement alleged in para 4 of the plaint, but contends that it does not amount to an acknowledgment which could, under the law, extend the period of limitation).

(*Form given in Appendix A, C.P.C.*)

The suit is barred by Article ____ or Article _____ of the Limitation Act, 1963.

No. 12—Minority *(k)*

The defendant was born on ___, and was, on the date of the alleged agreement, a minor.

(*Or*, The plaintiff is and on the date of the institution of this suit was, below the age of 18 and, therefore, a minor, and he cannot bring this suit without a next friend).

(*Or*, 1. The defendant was born on

2. By an order, dated ____, the District Judge of Poona appointed one Ram Prasad as guardian of the person of the defendant.

3. The defendant, therefore, was on the date of the alleged execution of the bond in suit, a minor).

(*Or*, The defendant was born on ____, and is a minor and cannot be sued without a guardian *ad litem*).

(*Form given in Appendix A, C.P.C.*)

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and it is not necessary expressly to plead that the suit is barred by limitation.

(k) Minority may be pleaded as a complete defence to a suit on the basis of an agreement, as all contracts made by a minor are void. The minor is not estopped from pleading his minority as a defence by his having himself represented to the plaintiff at the time of contract that he was major (*Radha Kisen* v. *Bhorey*, 26 ALJ 83, 110 IC 837, A 1928 All 626; *Gulabchand* v. *Chunnilal*, A 1929 Nag 156, 25 NLR 85; *Khangul* v. *Lakha*, 111 IC 175, A 1928 Lah 609; *Gadigeppa* v. *Balangowda*, 55 B 741, A 1931 Bom 561, 33 BLR 1313. *See* note under "Suits for cancellation"). The minority on the date of the alleged agreement must be alleged specifically. The present minority of the plaintiff may be pleaded as bar to the institution of the suit without a next friend. If the defendant is a minor and is sued as major, he must make an application through some guardian pleading that he is a minor, and the court will

The defendant was a minor at the time of making the alleged contract.

No. 13—Misjoinder

The suit is bad for misjoinder of causes of action.

(*Or*, The suit is bad for misjoinder of defendants and causes of action).

(*Or*, The suit is bad for misjoinder of plaintiff and causes of auction).

(See also Chapter XI page 192)

No. 14—Non-joinder

_____ being a subsequent mortgagee (*or*, a son of the mortgagor and having an interest in the mortgaged property) is a necessary party.

(*Or*, _____ is also a joint co-sharer in the land in dispute and the plaintiffs cannot sue alone).

(*Or*, The suit is bad for non-joinder of _____ who is a necessary party).

(Also see Chapter XII Page 207)

No. 15—Mistake *(l)*

The agreement to sell the horse as alleged in para 1 of the plaint was entered into under a mutual mistake about a fact essential to the agreement.

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then have a preliminary hearing on that question and determine whether he is minor or major. But the minority of a co-defendant is no defence and should not therfore be pleaded. For example, if there are two defendants A and B to a suit for possession, and B is a minor and is absent. A cannot plead that the suit is barred as B is sued as a major. That is no concern of A and the defect in the suit does not exonerate him from his liability. If B wants to plead it, he can.

But while minority is a defence to a suit on a contract, it is no defence to a suit based on tort, e.g., to a suit for assault, false imprisonment, trespass, libel, etc. But when intention, knowledge, malice or some other condition of the mind forms an essential ingredient of the wrong (as in the case of fraud), extreme youth by reason of which the defendant was incapable of contriving the fraud, etc., will afford a defence. An action which arises from a contract cannot be changed into one for tort in order to make the minor defendant liable, e.g., in a suit on a bond given by a minor, the plaintiff, cannot succeed by alleging that the defendant had made fraudulent representation about his age (*Dhanmull* v. *Ramchander*, 24 C 265).

(l) A mistake in order to render an agreement void must be a mutual mistake of both the parties and it must be about a matter of fact essential to the agreement (section 20, Contract Act). These facts should be alleged. If the mistake is not

Particulars of the mistake : The horse which the defendant agreed to sell and the plaintiff agreed to buy, had, before the date of the said agreement, been dead, and neither the plaintiff nor the defendant was aware of this fact at the time of making the agreement.

No. 16—Notice *(m)*

(Defence by a Public Officer)

The plaintiff did not deliver to the defendant any notice as required by section 80, C.P.C. before the institution of this suit, and the suit is, therefore, not maintainable.

(Defence by Central Government Representing Railway)

The defendant does not admit the allegation in para 6 of the plaint that a notice was delivered as required by section 80, C.P.C. The notice as alleged in para 6 was sent to the Divisional Commercial Superintendent of the Northern Railway and not to the General Manager thereof.

(*Or*, The plaint contains no statement of any notice having been delivered to one of the officers mentioned in section 80, C.P.C. and is therefore bad).

(*See also under "condition precedent" ante page 849*).

No. 17—Insufficiency of Notice

The notice under section 80, C.P.C. upon the Collector was not sufficient in law inasmuch as it did not specify the relief which the plaintiff has claimed, (*or*, inasmuch as the cause of action stated therein was an

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mutual, but the defendant alone was under a mistake, he cannot avoid the contract, unless he can show that the mistake was caused by the plaintiff, in which case it would become a misrepresentation. Nor will a mistake about law be any defence unless there was a mistake of fact about which it was made.

(m) There are some suits which cannot be instituted without a previous notice. The notice may be one provided by the agreement between the parties or by law. It is a "condition precedent" and is not pleaded by the plaintiff, but defendant must plead its absence if he wants to contest the suit on the ground of want of notice.

But when law which requires, it also lays down that the fact of the giving of the notice should be mentioned in the plaint, the plaintiff must allege it. If he does

alleged negligence, while the present suit has been brought on the ground of an alleged nuisance).

No. 18—Payment

See Chapter XV, page 309 ante for precedents of plea for payment.

No. 19—Payment into Court *(n)*

1. The defendant deposits in court the sum of Rs.500 and says that the said sum is sufficient to satisfy the plaintiff's claim.

2. The plaintiff never demanded the same from the defendant before instituting the suit.

(*Or*, 1. The defendant does not admit that any interest was agreed upon as alleged in para 1 of the plaint.

2. The principal amount is due. The defendant deposits the same in court and says that it is sufficient to satisfy the plaintiff's claim.

3. The defendant was always ready and willing to pay the principal amount).

(*Form given in Appendix A, C.P.C.*)

The defendant as to the whole claim (*or* as to Rs._____ part of the money claimed, or *as the case may be*) has paid into court Rs._____ and says that this sum is enough to satisfy the plaintiff's claim (*or* the part aforesaid).

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not allege it, the defendant may take a legal objection that the plaint is bad. If he alleges it, and the defendant pleads non-service of the notice he may simply deny the plaintiff's allegation, and that will be a sufficient defence. It will not be necessary to plead that the suit is bad. A plea that the suit is barred by section 80, C.P.C. is not in proper form.

(n) See O. 24, C.P.C. It is always better for a defendant, who has no other defence, to pay the amount he considers due to the plaintiff, as that will save him from further interest and costs. He may also plead that the plaintiff had not demanded the money from him before bringing the suit, and if he proves this or any other facts showing that the plaintiff was to blame for the litigation, he will get his costs and the plaintiff will not be allowed any costs. But a plea that the plaintiff had not demanded the money from the defendant, without payment of the amount in court, would be no defence to a suit, nor would it deprive the plaintiff of his costs, unless demand was a part of the cause of action, e.g., in a suit by a customer against a banker.

No. 20—Performance Remitted*

The plaintiff by a letter written and signed on the_____and posted to the defendant which the defendant received on the _____excused the defendant from the obligation to perform the alleged promise.

(Form given in Appendix A, C.P.C.) **

The performance of the promise alleged was remitted on the (date).

No. 21—Penalty

The clause in the deed of contract (*or*, bond) on which the plaintiff bases his claim is a penalty and the defendant submits that in the event of a breach being established, the plaintiff should be allowed only a reasonable compensation which will be very much less than the penal sum provided in the said clause.

No. 22—Protest

(Form given in Appendix A, C.P.C.)

The defendant denies that he made the contract alleged or any contract with the plaintiff.

No. 23—Rescission

The contract alleged in the plaint was rescinded (*or*, the defendant was exonerated and discharged by the plaintiff from performing the alleged contract) before breach, by an arrangement between the plaintiff and the defendant made verbally on November 14, 1994.

(*Or*, The contract alleged in the plaint was rescinded by the parties before breach, by being superseded by another contract made between the plaintiff and the defendant in writing on November 14, 1994).

(Form given in Appendix A, C.P.C.)

The contract was rescinded by agreement between the plaintiff and defendant.

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*This is allowed by section 63, Contract Act and therefore unlike the English Law does not require any consideration (*Mulchand* v. *Tarachand*, 116 IC 646, A 1929 Nag 137; *Govind Singh* v. *Bijoy Bahadur*, A 1929 All 980 DB).

** This form is devoid of particulars and is as such defective.

No. 24—Registration, Invalidity of

The mortgage deed has not been duly registered as the property comprised therein wholly lies within the circle of the Sub-Registrar of _____ while the purported registration was made in the Sub-Registrar's office at _____.

No. 25—Res Judicata

(Form given in Appendix A, C.P.C.)

The plaintiff's claim is barred by the decree in suit (*give the reference*).

See also Chap. XV, page 312 ante for precedents of this plea.

No. 26—Set off *(o)*

1. As to Rs.504, part of the money claimed by the plaintiff, the defendant claims to set off the same, against the sum of Rs.300, principal and Rs.204 interest due to the defendant at the agreed rate of interest of 12 per cent per annum, on account of the price of cloth purchased by the plaintiff from the defendant on November 14, 1993.

2. As to the rest of the plaintiff's claims, the defendant confesses judgment.

(*Or*, 1. The plaintiff purchased from the defendant on January 14, 1993, two bullocks for Rs.4,000, and paid Rs.1,000 as earnest money, and the remaining Rs.3,000 is still due to the defendant from the plaintiff.

2. And the defendant claims to set-off the said sum of Rs.3,000 against the plaintiff's claim in this suit).

(*Or*, 1. The defendant admits that the plaintiff had agreed to sell and the defendant had agreed to purchase, 2,000 quintals of cotton on the date mentioned in para 1 of the plaint.

2. The defendant admits that the plaintiff suppplied 1,500 quintals of cotton to the defendant and the defendant has not yet paid the price thereof.

3. The defendant claims set-off of Rs.25,000 due to him from the

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(o) A written statement pleading set-off must be framed in an appropriate manner having regard to the provisions of O. 8, R. 6, and must bear the necessary court fee. (Also see chapter XV Page 315).

plaintiff on account of damages for the plaintiff's breach of contract to supply the remaining 500 quintals of cotton.

2. The defendant admits that the plaintiff suppplied 1,500 quintals of cotton to the defendant and the defendant has not yet paid the price thereof.

3. The defendant claims set-off of Rs.25,000 due to him from the plaintiff on account of damages for the plaintiff's breach of contract to supply the remaining 500 quintals of cotton.

Particulars : Difference between the contract price and the market rate on January 15, 1924, at Rs.10 per quintal on 500 quintals Rs.5,000).

(*Or*. 1. The plaintiff owes to the defendant the sum of Rs.2,000 on account of the price of goods sold and supplied by the defendant to the plaintiff and cost as per particulars given below :

		Rs.
Baisakh Sudi 5th, 1943 To 100 maunds of wheat @ Rs. 5 per quintal	...	500
Jeth Sudi 5th, 1943 To 50 maunds of grain @ Rs. 4 per maunds	...	200
Magh Sudi 5th, 1943 To 60 maunds of Sugar @ Rs. 20 per maunds	...	1,200
Cost of transport of wheat and jowar	...	70
Cost of transport of sugar ...	...	30
Total ...	...	2,000

2. The defendant claims a set-off of the said sum against the plaintiff's claim and prays for judgment for the amount of his claim which may be found to be in excess of the plaintiff's claim).

No. 27—Stay of Suit (Section 10, C.P.C.)

(*See Chap XV ante for precedents of stay of suit u/s 10, C.P.C.*)

No. 28—Ground of Defence Subsequent to Instiutition of Suit *(p)*

(Form given in Appendix A, C.P.C.)

Since the institution of the suit, that is to say, on the .....day of ..... (*set out facts*).

No. 29—Tender *(q)*

The defendant, on September 14, 1995, tendered Rs.500 to the plaintiff on account of the bond in suit, but the plaintiff refused to accept the same (and the defendant now deposits the same in court).

No. 30—Undue Influence *(r)*

The defendant admits that she executed the deed-of-gift alleged in para 1 of the plaint, but pleads that she was induced to do so by undue influence of the plaintiff.

Particulars of the undue influence

(i) The defendant is an illiterate *pardanashin* lady and the plaintiff is her family priest.

(ii) The plaintiff told the defendant that the defendant would be gaining an immense religious merit if she made the gift and that if she did not, the plaintiff would not pray for her soul.

(iii) The defendant had no adequate advice in the matter and she succumbed to the influence of the plaintiff.

(p) For the purpose of shortening litigation and doing complete justice to the parties the court is not precluded from taking into consideration facts which happened after the suit was filed (*Kamla Ranjan Roy* v. *Baijnath Bajoria*, 53 CWN 329).

(q) Tender of the money claimed before the suit, is a good defence against the claim for costs and interest. It must have been unconditional and of the full amount due to the plaintiff. If the tender was short it is no defence, unless the shortage was due to a *bona fide* mistake (*Abdul Rahman* v. *Nur Muhammad*, 16 B 141). Tender should be alleged in details as to when and how much was tendered. In order to make the plea fully effectual, it should be accompanied by a deposit of the money in cash (*Abdul Rahman* v. *Nur Muhammad*, 16 B 141).

(r) The relation between the parties should be shown to have been such that the plaintiff was in a position to dominate the defendant's will. It should then be shown that the plaintiff used that position to obtain an unfair advantage over the defendant (*vide* section 16, Contract Act).

(*Or*. 1. The defendant is an old man of 70 years and has been in a bad state of health and constantly ill for the last 4 years.

2. The plaintiff has, for the said last 4 years, been the medical attendant of the defendant.

3. The defendant executed the agreement to pay Rs.5,000 as fees to the plaintiff under the aforesaid undue influence of the plaintiff).

(*Or*. The defendant admits the execution of the bond, but says that when he executed the bond, the plaintiff was in a position to dominate, bad state of health and constantly ill for the last 4 years.

2. The plaintiff has, for the said last 4 years, been the medical attendant of the defendant.

3. The defendant executed the agreement to pay Rs.5,000 as fees to the plaintiff under the aforesaid undue influence of the plaintiff).

(*Or*. The defendant admits the execution of the bond, but says that when he executed the bond, the plaintiff was in a position to dominate, and did dominate, the will of the defendant and thereby induced him to agree to pay interest at 3 per cent per mensem.

Particulars

(i) The defendant was a foolish youth of dissipated habits and constantly stood in need of money for immoral purposes.

(ii) The defendant's father did not supply him with any money.

(iii) The plaintiff began to lend money to the defendant six years ago, and since then the defendant borrowed money from the plaintiff from time to time on the terms dictated by the plaintiff).

No. 31—Unsoundness of Mind

The defendant was, on the date of the alleged contract, a man of unsound mind and incapable of understanding the contract and of forming a rational judgment as to its effect upon his interests.

Urgent need of money on the part of borrower will not itself place him and the creditor in such a position that the latter would be in a position to dominate the former's will (*Sunder Kumar* v. *Sham Kishan*, 5 ALJ 199 PC). This defence is very good in the case of *pardanashin* ladies as it is for the plaintiff to prove that he had explained the effect of the transaction to her and she had agreed to it after fully understanding it. Where undue influence is alleged the questions for consideration

The defendant is a man of unsound mind and incapable of protecting his interest in the case.

(*Or*, the plaintiff is a man of unsound mind and incapable of protecting his interest in the case. He cannot, therefore, sue without a next friend).

No. 32—Wager *(s)*

The alleged agreement of sale of grain pits was made only as a wager on the price of grain of January 15th 1995 and no actual delivery of grain was intended by the parties at the time they entered into the said agreement.

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are : (1) Was the transaction a righteous transaction i.e., was it a transaction which a right-minded person might be expected to do? (2) Was it an improvident act, i.e., does it show so much improvidence as to suggest the idea that the lady was not a mistress of herself and not in a state of mind to weigh what she was doing ? (3) Was it a matter requiring legal advice ? (4) Did the intention of making the gift originate with the donor ? (*Karnamaya Debi* v. *Mahamoya Debi*, (1947) 82 CLJ 26).

(s) See *Bhagwan Sarup* v. *Burjorji*, 16 ALJ 241, for the essentials of a wagering contract. It is not sufficient that the party agreeing to deliver goods never intended to deliver them, even if the other party knew of that intention. To constitute a contract by way of wager, a *common intention* to wager is essential (*Gherulal Parkash* v. *Mahadevadas*, A 1959 SC 781) and should be pleaded. It will not be sufficient to plead the intention of one party only. The fact that a contract is highly speculative will not make it wagering; but there must be proof that it was entered into upon the term that performance should not be demanded but that difference only should become payable (*Sukhdevadas* v. *Govindass*, 26 ALJ 484 PC). A subsequent agreement to the effect that buyer has no longer right to demand delivery does not make the contract a wagering one (*Rangasa* v. *Hukumchand*, 120 IC 406, A 1930 Nag 111). A plea of wager must be specifically raised, otherwise, the court cannot give relief on that ground (*Mukat* v. *Gulab*, 1931 ALJ 363, A 1931 All 229, 132 IC 422). Though a wagering contract cannot be enforced, money deposited as margin or security can be recovered (*S.P. Bhoominathan* v. *K.S.N.Chari*, A 1944 Mad 321, 216 IC 183).

FORMS OF WRITTEN STATEMENTS

DEFENCE IN SUITS ON CONTRACTS

No. 1—Defence to a Suit for Accounts

(Plaint No.1)

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

ORIGINAL SUIT NO. OF 1995

Alfred Addison ... ... *Plaintiff*

versus

Muhammad Hussain ... ... *Defendant*

Written statement on behalf of the above defendant

1. The defendant admits that he was appointed by the late George Addison as his agent, as alleged in para 1 of the plaint.

2. The defendant denies the allegation in para 2 of the plaint that he began collecting rents from July 1990. Under verbal orders of the said late George Addison, the defendant began collecting rents from July 1991 and has been collecting them ever since.

3. The defendant does not admit the allegation in para 3 of the plaint that the said George Addision died intestate, but admits that the plaintiff is his son and has obtained letters of administration. The late George Addison has left a will, dated January 15, 1992, bequeathing all his property, movable and immovable, to his wife Sarah Addison, and the plaintiff is not, therefore, entitled to sue as the representative of the said George Addison.

4. The defendant denies the allegation in para 4 of the plaint that he has not rendered account of the money received by him. The defendant did render to the said late George Addison, regularly at the end of every year, full and correct account of all collections made by the defendant, up to December 1991, and has paid to him whatever was found due from the defendant.

5. The defendant denies the allegation in para 4 of the plaint that the plaintiff ever requested the defendant to render to him any accounts. The defendant is, and always has been, ready and willing to render accounts

of his collections for the period after December 1991, to the legal representative of the said George Addison.

(Sd.) Muhammad Hussain

I, Md. Hussain, declare that the contents of paras 1,2, 4 and 5 of the above written statement are true within my personal knowledge. The allegation that the late George Addison has left a will bequeathing all his property to his wife is verified on information received and believed by me to be correct. Verified at Agra this the ___ day of _____.

(Sd.) Faiyaz Ali, Advocate (Sd.) Muhammad Hassain

No. 2—Defence to a Suit on an Account Stated

(Plaint No. 8)

1. The defendants admit the allegations in para 1 and 2 of the plaint.

2. The defendants admit the allegation in para 3 of the plaint that Ram Lal went to the plaintiffs' shop on April 20, 1983, and stated an account in writing and signed a balance of Rs.2,440 in the plaintiffs' *khata bahi*, but does not admit the allegation that the said Ram Lal understood the accounts on each side. The said Ram Lal accepted, without checking or understanding it, the account as given to him by the plaintiffs.

3. The defendants assert that in the account as shown in the plaintiffs' account-books and as given by the plaintiffs to the said Ram Lal there were certain substantial errors of calculation, and the rates at which the plaintiff purchased *arhar* for the defendant firm as given in the plaintiffs' account-books were false and known by the plaintiffs' to be false, and the plaintiffs entered or got them entered in their account-books fraudulently to cause injury to the defendant firm.

Particulars of the fraudulent entries

20-6-1984 — The market rate of *wheat* was Rs. per kg. Plaintiff has charged Rs. per kg. on ..... kgs. purchased for the defendant.

Difference—Rs.....

10-10-1984 — The market rate of *cotton* was Rs. per kg. Plaintiff has charged Rs. per kg. on .....kgs. purchased for the defendant.
Difference—Rs.....

Particulars of errors

20-6-1984 — Commission at Rs. per kg. on kg. of *wheat* comes to Rs. Plaintiff has charged Rs .
Difference—Rs.....

20-7-1984 — Price of kg. of *rice* at Rs. per kg. comes to Rs. . Plaintiff has charged Rs.
Difference —Rs.....

3-8-1984 — Price of kg. of sugar at Rs. per kg. sent by defendant firm comes to Rs. Plaintiff has credited only Rs.
Difference—Rs. _____

Total difference in favour of defendant—Rs._____.

4. The defendant denies that he has not paid anything since April 20, 1983. The defendant paid, through the said Ram Lal, a sum of Rs.1.500 to the plaintiff on April 24, 1983.

No. 3—Defence to a Suit by an Agent for Money Paid on Behalf of the Principal

(Plaint No. 16)

1. The defendant denies that interest was agreed to be paid at one percent and says that it was agreed to be 0.75 per cent per mensem. The defendant admits the rest of the allegations in para 2 of the plaint.

2. The defendant admits the allegations in para 1,3,4 and 6 of the plaint.

3. The defendant admits the allegation in para 5 of the plaint that by letter, dated November 30, 1994, he instructed the plaintiff to sell the said 200 bags of wheat at the market rate, but does not admit that the plaintiff sold the said bags of wheat. The plaintiff had secretly, and against the directions of the defendant, sold the said 200 bags of wheat on November 12, 1994, at Rs.____ per quintal and must account to the defendant for the profits which have accrued by the sale.

No. 4—Defence to an Agent's Suit in Respect of *Khatti* Transactions

(Plaint No. 17)

1. The defendant admits the allegations in para 1 of the plaint.

2. The defendant denies the existence of the custom alleged by the plaintiff in the first sentence of para 2 of the plaint as authorising a commission agent to sell the *khattis* purchased by him for his principal. The defendant denies that there is any custom to pay anything on account of contribution to school or servant's expenses or on account of correspondence expenses. He admits custom about payment of commission, brokerage, charity and *gaoshala*. The defendant admits the custom about payment of interest as alleged in the 3rd sentence of para 2 of the plaint.

3. The defendant admits the allegation in para 3 of the plaint.

4. The defendant denies the allegation in para 4 of the plaint that the plaintiff had expressly stated that the purchase would be subject to the conditions mentioned in para 2 or that the defendant had expressly agreed to all or any of those conditions.

5. The defendant admits the allegation in para 5 of the plaint that the rate began to fall soon after the aforesaid purchase, but does not admit that on September 6, 1982, it was as stated in para 5 of the plaint.

6. The defendant admits the allegation in para 6 of the plaint.

7. The defendant does no admit the allegation in para 7 of the plaint that no reply was received by the plaintiff or that the plaintiff then or ever sent a reminder through a special massenger or otherwise. The defendant sent a letter to the plaintiff on September 9, 1982, through his *munim*, Mussaddi Lal, denying the plaintiff's right to call for more advance money, and expressly forbidding the plaintiff to sell the *khattis* without the defendant's instructions.

8. The defendant denies the allegation in para 8 of the plaint that he sent his *munim*, Mussaddi Lal, to the plaintiff on September 25, 1982, or on any day after September 9, 1982. The defendant does not admit that the said Mussaddi Lal ever asked the plaintiff to sell the *khattis*. Alternatively, the defendant says that he had given no authority to the said Mussaddi Lal to ask the plaintiff to sell the aforesaid *khattis*.

9. The defendant does not admit that the plaintiff sold the *khattis* to Ram Bilas or to any other person, or that the plaintiff sold them at the rates alleged in para 9 of the plaint. Alternatively, the defendant pleads that the sale being unauthorised and against the defendant's instructions, the plaintiff cannot recover any loss sustained thereby.

10. In view of the reply above to para 2 and 4 of the plaint no separate reply is required in respects of para 10 of the plaint.

11. The defendant does not admit any of the allegations in para 11 of the plaint.

No. 5—Defence to suit by the Assignee of a Debt

(Plaint No. 21)

1. The defendant admits the allegation in para 1 of the plaint.

2. The defendant does not admit that Ram Prasad, obligee of the bond, assigned the debt to the plaintiff as alleged in para 2 of the plaint, or at all.

3. In the alternative, the defendant pleads that the plaintiff being an

Advocate, the assignment of the debt alleged by him is against law, and the plaintiff cannot enforce the claim.

4. The defendant admits that he has not paid the debt to the plaintiff, but pleads that he has paid the whole of the debt to the said Ram Prasad on April 13, 1995.

No. 6—Defence in Suits on Bonds

(Plaints No. 23 to 26)

(*Form No. 2, Appendix A, C.P.C.*)

1. The bond is not the defendant's bond.

2. The defendant made payment to the plaintiff on the day according to the condition of the bond.

3. The defendant made payment to the plaintiff, after the day named and before suit, of the principal and interest mentioned in the bond.

No. 7—Defence to Suit on an Instalment Bond

(Plaint No. 24)

1. The defendant admits all the allegations made by the plaintiff in para 1 of the plaint.

2. Of the allegations in para 2 of the plaint, the defendant admits that he paid the first instalment on due date, that he did not pay the 2nd instalment on due date, and that the plaintiff accepted payment of the said instalment three days after the due date. But the defendant denies that the plaintiff had verbally or otherwise agreed to waive the benefit of the acceleration clause in the bond. On the contrary, the plaintiff had expressly told the defendant that he would not accept payment by instalments any longer.

3. Under the acceleration clause of the bond, the whole money became payable on July 1, 1982, and the suit is, therefore, barred by Article 37 of the Limitation Act 1963.

4. The defendant denies the allegations in para 3 of the plaint that the defendant has not paid anything. The defendant has made the following payments:

Rs.300 on November 25, 1982.

Rs.150 on December 15, 1982.

Rs.200 on February 20, 1983.

Total Rs.650.

No. 8—Defence to a Suit for Cancellation of a Sale-Deed

(Plaint No. 29).

1. The defendant admits the allegation in para 1 of the plaint.

2. The defendant denies that he made the representations alleged in paras 2, 5 and 6 of the plaint, or that the plaintiff assented to a proposal of executing a power of attorney or that she asked the defendant to have a power of attorney drawn up.

3. The defendant admits the allegation in para 3 of the plaint that on December 22, 1994, he took to the plaintiff a document, but denies that he represented to the plaintiff that it was a general power of attorney or that he induced the plaintiff by such representation to affix her thumb mark on to it. The plaintiff had, by her free will and consent, agreed to sell her holdings in village Nalagarh to the defendant in consideration of debt of Rs.15,000 due to the defendant from the plaintiff's deceased husband Ram Lal on a pronote, dated January 4, 1992. The sale-deed was drawn up under the plaintiff's instructions and she put her thumb mark on it, well knowing that it was a sale-deed.

4. The defendant admits the allegation in para 4 of the plaint that he took the Sub-Registrar of Ghazipur to the plaintiff's house but denies that the said Sub-Registrar did not read out or explain the contents of the deed to the plaintiff. The said Sub-Registrar had read out the deed and had fully explained to the plaintiff its purport and effect, and the plaintiff had admitted before him the execution of the sale-deed, and the said Sub-Registrar then registered the said deed according to law.

5. The defendant denies the allegation in para 5 of the plaint that the plaintiff has now learnt that the deed was a deed of sale and says that she has well known that fact ever since she executed the said deed.

6. The defendant admits the allegation in para 7 of the plaint.

No. 9—Defence to a Suit for Cancellation of Will

(Plaint No. 30)

1. The defendant admits the allegations in paras 1-3 of the plaint.

2. The defendant does not admit the allegation in paras 4 and 5 that the said Ram Prasad did not execute the said will or that he was not in his proper senses when he executed it, or that he was incapable of understanding his affairs, or that he was totally unconscious or could not hear or talk to anyone on April 14, 15 or 16, 1995.

3. The said Ram Prasad duly executed the said will, while he was in full possession of his senses, and fully able to understand the effect of it.

No. 10—Defence to a Suit for Contribution

(Plaint No. 34)

1. The defendant admits the allegation in para 1 of the plaint regarding the purchase of the house, but denies that he and the plaintiff remained jointly in possession of the said house. The defendant asserts that the house remained in the exclusive possession of the plaintiff from the date of purchase to the date of delivery of possession to Sri Narayan.

2. The defendant admits the allegation in para 2 of the plaint.

3. The defendant denies the allegation in para 3 that he and the plaintiff agreed to defend the suit jointly, but admits that the plaintiff incurred all the costs. He does not admit that the costs incurred by the plaintiff amounted to Rs.3,200.

4. The defendant admits the allegation in para 4 relating to the obtaining of a decree by Sri Narayan, but does not admit that Sri Narayan realised Rs.14,000 or any other sum, from the plaintiff.

5. The defendant had come to know that Ram Narayan was not the adopted son of Sant Lal, and was not therefore willing to defend the suit of Sri Narayan. The plaintiff was bent on defending it and prevailed upon the defendant to join, and the defendant did join the defence, on the express agreement made verbally by the plaintiff, that the defendant would not be liable either for the cost of the defence or for the costs of Sri Narayan.

No. 11—Defence to a Suit for Refund of Decree-Money

(Plaint No. 37)

1. The defendant admits the allegation in para 1 of the plaint that the plaintiff paid to him Rs.800 but does not admit that the payment was made on account of the said decree or that the defendant agreed to credit the money towards the said decree.

2. The defendant admits the allegation in para 2 of the plaint.

3. The plaintiff owed on the date of the said payment, and still owes, to the defendant money under a bond, dated June 14, 1992.

4. The plaintiff did not, at the time of making the said payment, intimate to the defendant to which debt the payment was to be applied. The defendant appropriated and credited the payment towards the debt due under the said bond.

No. 12—Defence to a Suit for Dower

(Plaint No. 42)

1. The defendants admit the allegation in para 1 of the plaint about the plaintiff's marriage, but do not admit that the dower fixed was Rs.10,000. The defendants aver that the plaintiff's dower was only Rs.2,000, out of which Rs.1,000 was prompt, and Rs.1,000 was deferred.

2. The defendants admit allegations in paras 2,3 and 5 of the plaint.

3. The defendants deny the allegation in para 4 of the plaint that the dower debt has remained unpaid.

Additional Pleas

4. Mt. Ilahi Jan had demanded her prompt dower from Khuda Baksh, in December, 1968 and the said Khuda Baksh had paid her Rs.1,000 on account of the prompt dower in the said month of December, 1968.

5. In the alternative, the defendants plead that the said Khuda Baksh, refused to pay her the prompt dower in December, 1968 and the claim for that is now barred by Article 113, Limitation Act, 1963.

6. At the time of the death of the said Khuda Baksh, Musammat Ilahi Jan had verbally relinquished her dower debt, and the said debt has thus been discharged.

7. In the alternative, the defendants plead that Musammat Ilahi Jan took possession of the house at No. 25, Cotton Street, Calcutta, in lieu of her dower debt, and as the profits of that house, being Rs.2,400 a year were more than her legal share in the whole income of the assets of the said Khuda Baksh (such legal share being only Rs.1,900 a year), the plaintiff must, in any case, account for the profits of the said house realised by Musammat Ilahi Jan.

No. 13—Defence in Suits on Guarantee

(Plaint nos. 43,44 and 45)
(*Form No. 3, Appendix A, C.P.C.*)

1. The principal satisfied the claim by payment before suit.

2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 14—Defence to a Suit on an Implied Indemnity

(Plaint No. 52)

1. The defendant admits the allegations made in paras 1, 2, and 4 of the plaint subject to the Additional Pleas.

2. The defendant admits the allegations in Para 3 of the plaint that Ram Chandra has obtained a decree against the plaintiff but does not admit that the plaintiff has paid Rs.24,543, or any other sum to the said Ram Chandra.

Additional Pleas

3. The defendant did offer Rs.22,000 to Ram Chandra in full discharge of his mortgage, but the said Ram Chandra replied that Rs.23,864 was due to him and refused to accept any smaller sum.

4. On August 20, 1991, the defendant informed the plaintiff of the aforesaid facts whereupon the plaintiff promised to provide Rs.1,864 and to go with the defendant to the said Ram Chandra to have the mortgage redeemed.

5. The defendant has always been ready and willing to pay Rs.22,000 but he plaintiff himself failed to provide Rs.1,864 and to accompany the defendant to the said Ram Chandra to have the mortgage redeemed.

No. 15—Defence to a Suit for Ejectment

(Plaint No. 64)

1. The defendant admits that he held the house in suit as the plaintiff's tenant, but does not admit that his tenancy commenced on March 25, 1992. The said tenancy commenced on April 1, 1992.

2. The defendant admits service of the notice alleged in para 2 of the plaint, but does not admit that the plaintiff duly determined the defendant's tenancy thereby. The notice did not expire with the month of tenancy and was not according to law.

(NOTE :—*In U.P. the notice need not end with the month of tenancy (U.P. Act 24 of 1954). So this defence is not available in U.P. But the notice in U.P. must be for a period of 30 and not 15 days*].

3. The defendant admits that he has not paid the rent claimed by the plaintiff. The same was tendered to the plaintiff out of court (*or*, by money order) on October 25, 1994, but the plaintiff refused to accept it. The defendant has unconditionally paid into court the sum of Rs.2,100 on January 31, 1995 to the credit of the plaintiff.

No. 16—Defence to a Suit for Ejectment on the Ground of Denial of Title

(Plaint No. 67)

1. The defendant admits the allegations in paras 1 and 3 of the plaint, subject to Additional Pleas.

2. The defendant admits the allegations in para 2 of the plaint that in his written statement in Suit No.22 of 1995, he stated that the plaintiff had no title to the house but denies that he stated that the defendant was the owner of the said house.

Additional Pleas

3. The plaintiff is not the owner of the said house, but the owner of

it is one Sayyid Muhammad Husain of Burdwan and the plaintiff is the local manager of the said Sayyid Muhammad Husain, and had let the house to the defendant expressly on behalf of, and as agent of the said Sayyid Muhammad Husain.

4. In the alternative, the alleged forfeiture was waived by the plaintiff on August 20, 1995, by accepting rent for the month of July, 1995, from the defendant.

No. 17—Defence to a suit for Wrongful Dismissal

(Plaint No. 73)

1. The defendant admits the allegation in paras 1, 2 and 4 of the plaint, subject to the Addtional Pleas.

2. The defendant admits the allegation in para 3 of the plaint that he dismissed the plaintiff by letter dated June 10, 1995, without giving any notice as required by the terms of employment, but denies that the dismissal was wrongful.

Additional Pleas

3. The defendant was induced to take the plaintiff in his employment by the plaintiff, on June 20, 1994, verbally representing and warranting to him that he, the plaintiff, was then reasonably competent to perform the service for which he was engaged, viz., that of helping the defendant in editing the daily paper, "The Tribune," whereas the plaintiff was not then, nor has he since been reasonably competent to perform the said service; and therefore the defendant rescinded the contract and dismissed the plaintiff (*or*, the plaintiff misappropriated Rs. 2,500 which he had received on behalf of the defendant and did not credit the same in the account register which he kept in discharge of his duties, and was thus guilty of gross misconduct, and therefore the defendant rescinded the contract and dismissed the plaintiff).

4. The defendant offered to pay Rs.2,500 to the plaintiff on account of pay up to June 10, but the plaintiff declined to accept it. The defendant pays into court the said sum in full satisfaction of the plaintiff's dues.

No. 18—Defence in any Suit for Debt

(Form No. 4, Appendix A, C.P.C.)

1. As to Rs.200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows :

1907, January 25	...	...	...	150
1907, February 1	...	...	...	50
		Total	...	200

2. As to the whole [*or*, as to Rs._____, part of the money claimed] the defendant made tender before suit of Rs. _____, and has paid the same into court.

No. 19—Defence to Suit Under Section 69 Contract Act

(Plaint No. 79)

1. The defendant admits the allegation in para 1 of the plaint that in execution of decree No.545 of 1991, Ram Lal attached the house. The said house belonged to the defendant.

2. The defendant does not admit that the plaintiff paid Rs.4,564 or any other sum as alleged in para 2 of the plaint, and alleges that the said payment, if made, was made voluntarily and fraudulently in order to establish a false claim to the said house.

No. 20—Defence of Junior Member of a Hindu Family to Suit for Redemption of Mortgage by Manager

(Plaint No. 88)

1. The defendant does not admit the mortgage alleged by the plaintiff in paras 1 and 2 of the plaint.

2. The defendant admits that the allegedly mortgage property is ancestral, that the defendant and the alleged mortgagor were members of a joint Hindu family and that the latter was the manager of the said family.

3. (a) The defendant does not admit the allegation in para 3 of the plaint that the alleged mortgage was made for the necessity alleged in the plaint, or for any legal necessity (*or*, the defendant does not admit the alleged antecedent debt), [*or*, (*if the mortgagor was not the father*) the

defendant does not admit that the alleged antecedent debt was taken for the necessity alleged in the plaint or for any legal necessity], [*or*, (*if the mortgagor was the father*) the alleged antecedent debt was taken to pay off gambling losses (give particulars)].

(b) In the alternative, the defendant denies that there was any necessity to borrow money at the rate of interest stipulated in the mortgage-deed.

4. The defendant does not admit the allegation in para 4 of the plaint in respect of any representations made to or inquiries made by the plaintiff.

No. 21—Defence to Suit for Foreclosure

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

1. The defendant did not execute the mortgage.

2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied.*)

3. The suit is barred by Article————of the Limitation Act, 1963.

4. The following payments have been made, viz. :

	Rs.
(*Insert date*)	1,000
(*Insert date*)	500

5. The plaintiff took possession on the _____ of and has received the rents ever since.

6. The plaintiff released the debt on the ___ day of _____.

7. The defendant transferred all his interest to AB by a document, dated _____.

No. 22—Defence of a Mortgagee Claiming Priority

On the _____ the plaintiff orally represented to the answering defendant that his mortgage had been satisfied and that his mortgage-deed had been lost whereby the answering defendant was induced to advance money to defendant No.1 on the security of the mortgaged property. The answering defendant therefore claims that the plaintiff's mortgage is postponed to the answering defendant's mortgage.

No. 23—Ditto

The mortgaged property was, prior to the mortgage in suit, mortgaged to one AB under a mortgage deed dated the ___ and registered on the _____. The answering defendant has redeemed the said mortgage of AB on the___ by paying to him Rs. _____on account of his mortgage and claims to have acquired priority against the plaintiff.

No. 24—Defence to Suit for Redemption

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

1. The plaintiff's right to redeem is barred by Article _____ Limitation Act 1963.

2. The plaintiff transferred all his interest in the property to AB.

3. The defendant, by a document, dated the __day of _____ transferred all his interest in the mortgage-debt and property comprised in the mortgage to AB.

4. The defendant never took possession of the mortgaged property, or received the rent thereof.

(If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits).

No. 25—Defence to Redemption Suit

(Plaint No. 93)

1. The defendant does not admit the allegation in the plaint that the plaintiff is the mortgagor and the defendant is the mortgagee of the property in suit.

2. The defendant does not admit the mortgage alleged in para 2 of the plaint.

3. The defendant does not admit the allegations in paras 3 and 4 of the plaint about deposit of the mortgage money under Section 83, Transfer of Property Act, or the issue of a notice against the defendant by the court. The defendant denies that any such notice was served upon him.

Additional Pleas

4. The suit is not maintainable without a tender of the mortgage money.

5. In the alternative, the defendant pleads that the suit is not maintainble without a previous offer of redemption made in the month of *Jeth*.

6. The amount of the mesne profit claimed is excessive.

No. 26—Defence Claiming Marshalling

Of the serveral items of the mortgaged property which the plaintiff claims to sell, the following items alone are mortgaged to the answering defendant and the answering defendant prays that the plaintiff should be required to marshal.

No. 27—Defence to a Payee's Suit on a *Hundi*

(Plaint No. 104)

1. The defendant admits the allegation in para 1 of the plaint.

2. The defendant does not admit the allegation in para 2 of the plaint that the plaintiff presented the *Hundi* to the said firm Lachmi Narain Panna Lal at their place of business at Kanpur after maturity, or at all, or that the said firm refused to honour or accept it.

3. The defendant does not admit the allegation in para 3 of the plaint that the plaintiff sent any notice of dishonour to the defendant. The defendant did not, at any rate, receive any such notice.

Additional Pleas

4. The said *Hundi* was drawn against the price and charges of 100 bags of wheat which the plaintiff had agreed to despatch to the defendant within 10 days of receiving the said Hundi, but the plaintiff has not despatched the said or any bags within the said time or at all.

No. 28—Defence to a Suit on a Promissory Note

(Plaint No. 106)

1. The defendant admits that he executed a promissory note on December 6, 1993 for Rs.1,000 and that he has not paid the same or any part thereof to the plaintiff.

2. The defendant denies that interest was payable under the said promissory note at 1 per cent per mensem. Under the promissory note as originally written, the defendant had agreed to pay interest at 1 per cent

per annum. The said promissory note has been materially altered by alteration of the word "*Salana*" into "*Mahana*" hence no suit is maintainable on it.

No. 29—Defence to a Suit for Dissolution of Partnership

(Plaint No.108)

1. The defendant admits the partnership agreement alleged in para 1 of the plaint but denies that it was agreed that the parties should contribute equally to the capital and should share equally the profit and loss. The plaintiff contributed 1/3rd and defendant contributed 2/3rd towards the capital and they agreed to share the profits and losses in the same ratio.

2. The defendant admits the allegation in para 2 of the plaint as regards the giving of a loan of Rs.2,000 to his nephew and the borrowing of Rs.1,500 from the Allahabad Bank, but denies that these acts amount to any misconduct. Both the giving and the taking of the said loans were done with the consent and approval of the plaintiff.

Additional Plea

3. The partnership has, on January 4, 1995, been by mutual consent and by a verbal agreement, dissolved and the accounts have been settled and squared up between the parties on the said date.

No. 30—Defence to a Suit for Price of Goods Sold

(Plaint No. 129)

1. The defendant admits the agreement about sale and purchase of grain and sugar alleged in para 1 of the plaint, but denies that it was agreed that the defendant should pay the price on delivery or should pay interest at 9 per cent per annum or at any other rate. It was verbally agreed on the said January 4, 1994, at the time of the agreement of sale of grain and sugar that an account should be made and settled, on December 31 every year, and this suit has been filed before December 31, 1994.

2. The defendant admits that all the goods mentioned in the plaintiff's particulars given in para 2 of the plaint were sold and delivered to him except that 50 bags of sugar were not sold and delivered on April 20,

1995. Only 40 bags of sugar were sold and delivered by the plaintiff to the defendant on the said date.

3. The defendant admits the allegation in para 3 of the plaint that no price was fixed between the parties. The defendant also admits the correctness of the plaintiff's particulars of the amount due to him, except that on April 20, 1995, the price and other charges of 40 bags of sugar only, and not of 50, should be debited against the defendant and therefore the amount due to the plaintiff for the price and other costs of goods sold and delivered to the defendant should be Rs.48,900 only and not Rs. 54,337.

No. 31—Defence in Suit for Goods Sold and Delivered

(Form No. 1, Appendix A, C.P.C.)

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.
3. The price was not Rs._____.

[*or*]

4. 5. 6. — Except as to Rs. _____, same as 1. 2. 3.

7. The defendant [*or* AB, the defendant's agent] satisfied the claim by payment before suit to the plaintiff [*or* to CD, the plaintiff's agent] on the day ___ of _____ 19 __.

8. The defendant satisfied the claim by payment after suit to the plaintiffs] on the day ___ of _____ 19___.

No. 32—Defence to a Suit for not Accepting Goods Purchased

(Plaint No.131)

1. The defendant admits the allegations contained in para 1 of the plaint, but pleads that by a previous letter dated January 10, 1995, the defendant had asked the plaintiff to send him only first class white sugar, and the letter of January 14, 1995 referred to in para 1 of the plaint was intended to refer to the same quality of sugar.

2. The defendant admits the allegation in para 2 of the plaint, but says that the sugar sent by the plaintiff was not first class white sugar. It was brown sugar of very inferior quality for which there was no market at Patna.

3. The defendant admits the allegation in para 3 of the plaint that he refused to accept delivery of the sugar sent by the plaintiff and pleads that he did so as the sugar was not of the quality indented for.

No. 33—Defence to a Suit for not Accepting Delivery of Part and for Price of Part Accepted

(Plaint No.134)

1. The defendant admits the allegation in para 1 of the plaint, but adds that the 18 cases of coloured glazed paper were sold by sample and were warranted equal to sample. The said warranty was verbal and was given on August 20, 1980.

2. The defendant admits acceptance of delivery of two lots each of 6 cases of the glazed paper alleged in para 2 of the plaint, but pleads that they were not of the description or quality warranted and were inferior to sample, and the defendant refused to accept the same and gave notice to the plaintiff that they remained on the defendant's premises at the plaintiff's risk.

3. The plaintiff refused to deliver glazed paper according to sample on December 20, 1980, but insisted that he would deliver paper of the same quality as that sent in October and November, 1980, and it was such glazed paper only which the plaintiff was ready and willing to deliver and which the defendant refused to accept.

4. The defendant admits that he did not pay the price of the glazed paper delivered by the plaintiff.

No. 34—Defence to a Suit for Price of Articles Prepared to Order

(Plaint No. 142)

1. The defendant admits the allegation in para 1 of the plaint and pleads that the said necklace was required by the defendant, as the plaintiff well knew, for presentation to his niece on the occasion of the latter's

marriage which was fixed for January 14, 1996, and that the time of one month fixed by the agreement was, therefore, of the essence of the contract.

2. The defendant admits that the plaintiff did make a necklace and offered it to the defendant on January 10, 1996 but denies that it was of the specification agreed upon. The said necklace was studded with rubies of 1.5 *ratti* each instead of 2 *ratti* and was different from the agreed pattern in the following particulars : (*Points of difference*).

No. 35—Defence to Suit for Specific Performance

(Form No. 13, Appendix A, C.P.C.).

1. The defendant did not enter into the agreement.

2. AB was not the agent of the defendant (*if alleged by plaintiff*)

3. The plaintiff has not perfomed the following conditions:- (*conditions*)

4. The defendant did not —(*alleged acts of part performance*).

5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matters — (*state why*).

6. The agreement is uncertain in the following respects— (*State them*).

7. (*Or*) The plaintiff has been guilty of delay.

8. (*Or*) The plaintiff has been guilty of fraud (*or*, mis-representation).

9. (*Or*) The agreement is unfair.

10. (*Or*) The agreement was entered into by mistake.

11. The following are particulars of (7), (8), (9), (10), (*or, as the case may be*).

12. The agreement was rescinded under conditions of sale, No.11 (*or*, by mutual agreement).

(*In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other grounds of defence he intends to rely on, e.g., the Limitation Act, accord and satisfaction, release, fraud etc.*)

No. 36—Defence to a Vendor's Suit for Specific Performance

(Plaint No.148)

1. The defendant admits the allegations contained in para 1 of the plaint.

2. The defendant does not admit the allegation in para 2 of the plaint that the plaintiff required the money by December, 16, 1995, and denies that the defendant had notice of this fact or that time was intended to be the essence of the contract.

3. The said contract was, by mutual verbal agreement, on December 14, 1995, rescinded and the earnest money was forfeited.

4. In the alternative, the defendant, denies that the plaintiff was ready and willing on the date fixed to execute a proper deed of sale or had called upon the defendant to perform his part of the contract, or that the defendant failed to do so. The defendant was always ready and willing to perform his part of contract, but the plaintiff himself neglected to execute a proper deed of conveyance.

Additional Plea

5. In the alternative, the defendant pleads that plaintiff is not the sole owner of the property, he contracted to sell and cannot transfer to the defendant a right free from doubt and dispute. The defendant has learnt, after the contract, that the plaintiff's brother Babu Ram has also a share in the said property.

No. 37—Defence to a Suit for Breach of Contract to do Work within Time

(Plaint No.161)

1. The defendant admits the allegation in para 1 of the plaint.

2. The defendant admits the allegation in para 2 of the plaint that the plaintiff brought the car to the defendant but does not admit that the plaintiff told him that he required the car to be in perfect running order by April 25, in order to carry passengers from Jammu to Srinagar, or for any other purpose, or that the plaintiff told the defendant that, if the car was

not in perfect running order by that date, the plaintiff would lose a profit of Rs.1,000 a week, or any profit.

3. The defendant admits the allegation in para 3 of the plaint that he agreed to put the car into running order, but denies that he agreed to do so by April 25, or by any other date. The defendant agreed to do so within reasonable time.

4. The defendant admits that he did not deliver the car to the plaintiff on April 25, but did so on June 6, 1995. He says that June 6, 1995 was a reasonable time.

Additonal Plea

5. The defendant contends that the damages claimed are too remote in law.

DEFENCE IN SUITS ON TORTS

No. 38—Defence in all Suits for Wrongs

(Form No. 6, Appendix A, C.P.C.)

Denial of the several acts [*or* matters] complained of.

No. 39—Defence to a Suit for Damage to Plaintiff's Crop by Defendant's Cattle

(Plaint No.166)

1. The plaintiff's field No.512 is situated on the highway leading from the *abadi* of the village to the pasture land.

2. The said bullocks were being lawfully driven by the defendant's servant along the said highway, and they strayed upon the plaintiff's field, without any negligence on the part of the defendant or of his said servant.

No. 40—Defence to a Suit for Damages for Wrongful Attachment before Judgment

(Plaint No.170)

1. The defendant admits the allegations in paras 1 and 2 of the plaint.

2. The defendant denies the allegation in para 3 of the plaint that he obtained the said order maliciously or without any reasonable and probable

cause or knowingly made a false allegation that the plaintiff was intending to dispose of his stock-in trade. The defendant had a reasonable cause for making the application and the said allegations.

Particulars : The plaintiff's neighbours Ram Lal, Bishen Lal and Kishen informed the defendant on August 1, 1984, that the plaintiff was intending to dispose of his sotck-in trade and had negotiated with them. The defendant believed this information to be true.

Additional Plea

3. The plaintiff had made an application under section 95, C.P.C., which was dismissed by the Civil Judge (Junior Division) by an order, dated January 14, 1985. The present suit is, therefore, not maintainable.

No. 41—Defence to Suit for Conspiracy to Defraud a Decree-Holder

(Plaint No.171)

1. The defendants admit the allegations in para 1 of the plaint.

2. The defendant do not admit the allegations in paras 2 and 3 of the plaint that the plaintiff obtained a decree against defendant No.1 or that the plaintiff made attempts to execute it or that he obatined a warrant of attachment of any house, transistors or scooter.

3. The defendants deny the allegation in para 4 of the plaint that they conspired with the defendant No.1 to defraud the plaintiff and to prevent him from recovering his decretal money by means of execution, or for any other purpose.

4. The defendants' acts alleged in para 5 of the plaint are admitted but it is denied that they, or any of them, were done in pursuance of any conspiracy.

5. The defendant Nos.2 and 3 purchased the transistors and defendant No.4 purchased the house from defendant No.1 in good faith and for value.

6. Defendant No.2 purchased the scooter in good faith for price paid in cash to the defendant No.1 and rightfully took it away to his own house.

7. The defendants admit the allegations in para 6 of the plaint.

Additional Pleas

8. The plaintiff's decree is still capable of execution and the plaintiff has suffered no damage.

9. In the alternative, the defendants contend that the damages claimed are too remote in law.

No. 42—Defence in Suits for Infringement of Copyright

(Form No. 8, Appindix A, C.P.C.)

1. The plaintiff is not the author (*assignee*, etc.)

2. The book was not registered.

3. The defendant did not infringe.

No. 43—Defence in Suits for Detention of Goods

(Form No. 7, Appendix A, C.P.C.)

1. The goods were not the property of the plaintiff.

2. The goods were detained for a lien to which the defendant was entitled.

Particular are as follows :

1907, May 3. To carriage of the goods claimed from Delhi to Calcutta :

45 Maunds, at Rs. 2 per maund ... ... Rs. 90

No. 44—Defence to a Suit for Movables Inherited by the Plaintiff

(Plaint No.175)

1. The defendant does not admit the allegation in para 1 of the plaint that Rahim Baksh was owner of the whole property entered in the plaint schedule. He was owner only of one cow and one she-buffalo and 20 quintals of wheat.

2. The defendant does not admit the allegation in para 2 of the plaint that he left no heir except the plaintiff or that the defendant was his kept mistress. The defendant was his lawfully wedded wife.

3. The defendant denies the allegation in para 3 of the plaint that she

took possession of the whole of the property entered in the plaint schedule or has retained it since. She took possession of one cow and one she-buffalo and 5 quintals of wheat only and has retained the said cow and she-buiffalo since. She sold the said 5 quintals of wheat for Rs.2,120 and spent that money on the funeral expenses of the said Rahim Baksh. A full account of such expenses has been given in the schedule attached to this written statement.

Additional Pleas

4. On November 4, 1995, shortly before his death, the said Rahim Baksh verbally gave the said cow and she-buffalo to the defendant in satisfaction of her dower debt which was Rs.5,500.

5. In the alternative, the defendant has been in possession of the said cow and she-buffalo in lieu of her dower debt of Rs.5,500.

No. 45—Defence to a Suit for Obstruction of a Right of Way

(Plaint No.180)

1. The defendant admits the allegation in para 1 of the plaint.

2. The defendant denies that the plaintiff was entitled to the right of way alleged in paras 2 and 3 of the plaint.

3. The plaintiff has not enjoyed the alleged right of way for 20 years or at any time within two yerars of the institution of this suit.

4. If he has so enjoyed it, such enjoyment has not been as of right, but has been a secret enjoyment without the knowledge of the defendant and his predecessors-in-title.

(*Or*, the said enjoyment was with the permission and licence of the defendant. The defendant gave the said permission verbally to the plaintiff in the month of April, 1972, when the plaintiff had planted new trees in his grove).

If easement of necessity is claimed, state— The alleged way is not absolutely necessary, as the plaintiff can reach the highway from his grove by another way, viz. across the open space of ground belonging to the plaintiff and lying to the north of the defendant's grove No.513).

5. The defendant admits obstruction of the plaintiff's alleged way, but denies that the said act was unlawful.

No. 46—Defence to Suit for Obstruction of Light and Air

(Plaint No.185)

1. The plaintiff has not enjoyed the use of the light and air for 20 years before the suit.

2. The plaintiff has not enjoyed the use of the light and air within two years of the institution of this suit. The defendant's wall obstructing the light and air of the plaintiff, was built in, and has been in existence, since February 1982.

3. The plaintiff had three large windows in his said room on the east side, through which sufficient light and air used to enter the plaintiff's house. The said windows existed for more than 30 years, and the plaintiff has himself closed them two months before bringing this suit.

4. The defendant denies that the plaintiff's house was rendered unfit for comfortable habitation by the defendant obstructing the plaintiff's western windows. On the other hand, it has been rendered so by the plaintiff closing his eastern windows.

(*Or*, the defendant denies that the plaintiff's house has been rendered unfit for comfortable habitation, or that the obstruction complained of prevents him from carrying on his business as a tailor, or has materially diminished the value of the house. The house receives a sufficient quantity of light and air by two windows in the northern wall).

No. 47—Defence to a Suit for Interference with a Right of Privacy

(Plaint No.186)

1. The defendant denies that the plaintiff has been using his house adjoining the defendant's house as a residence of his ladies, for 50 years or for any considerable period. The said house was formerly used as a godown for storing plaintiff's timber and fodder, and the plaintiff turned it into a residential house for this family only one year ago, after the defendant had started construction of his upper storey.

2. In the alternative, the defendant contends that the plaintiff's house is visible from the public road on the north which is on a much higher level than the houses of the parties, and from the window of the neighbouring houses belonging to Radha Mohan, Gopal Prasad and Dwarka Prasad, and the right of privacy claimed by the plaintiff has not been substantially enjoyed.

No. 48—Defence to a Suit for False Imprisonment

(Plaint No.189)

1. The defendant admits the allegations in para 1 of the plaint.

2. As regards para 2 of the plaint, the defendant No.1 denies having arrested the plaintiff or having detained him for two hours or for any length of time, or having given him into the custody of defendant No.2. On the occasion mentioned in para 2 of the plaint, Khuda Baksh, the son of defendant No.1, asked the plaintiff not to go near the tent of defendant No.1. The plaintiff thereupon began to abuse the said Khuda Baksh, and when the said Khuda Baksh asked him not to use abusive language, the plaintiff threatened to beat him, and flung his shoe at him. The defendant No.1 was then sitting in his tent and was talking to defendant No.2. On hearing the plaintiff abusing the said Khuda Baksh, both the defendants came out of the tent and defendant No.2 asked the plaintiff to give him his name and address. The plaintiff refused to give his name and address, and defendant No.2 thereupon, lawfully and gently, and without using any unnecessary force, arrested the plaintiff and detained him in the tent of defendant No.1, for about an hour, in order that his name and residence might be ascertained, and when the same could not be ascertained, the defendant No.2 produced the plaintiff before the nearest Magistrate at Bulandshahr.

3. The defendants deny the allegation in para 3 of the plaint that the plaintiff offered to give his correct name and address to defendant No.2 or to execute a bond for appearance before the Magistrate. The rest of the allegations in para 3 of the plaint are admitted.

4. The damages claimed by the plaintiff are excessive.

No. 49—Defence to a Suit for Moving a Police Officer to make Arrest

(Plaint No.190)

1. The defendant admits the allegation in para 1 of the plaint that he made a report of theft expressing suspicion against the plaintiff but denies that he requested the Sub-Inspector to arrest the plaintiff.

2. The defendant admits the allegations in para 2 of the plaint except the averment regarding request.

Additional Pleas

3. The defendant contends that he had a reasonable and probable cause for believing that the plaintiff had committed theft, and made the said report honestly beleiving on credible information received, that the plaintiff had committed theft of his gold watch.

Particulars of reasonable and probable cause

The plaintiff was a servant of the defendant. The defendant missed his gold watch in the morning of October 14, 1995. The plaintiff was then absent and when the defendant questioned his other servants, Ram Din and Alla Baksh, they told the defendant that they saw the plaintiff in possession of Rs.400 on the night of October 13, and, on being questioned, the plaintiff had told them that he had borrowed the money from one Shanker Lal. The defendant then questioned Shanker Lal who informed the defendant that the plaintiff had pledged a gold watch with him for Rs.400 on the evening of October 13, but had redeemed the same in the morning of October 14. The defendant searched for the plaintiff at the latter's house but could not find him.

No. 50—Defence to a Suit for Libel

(Plaint No.204)

(Admission and Apology)

1. The defendants admit all the allegations of the plaint except damages.

2. The defendants published the said libel without actual malice.

The defendants very much regret that they published the said libel and tender a sincere and unqualified apology to the plaintiff for the same.

3. The defendants have published the said apology at a prominent place in the issue of the "Meerut Herald" for February 10, 1996.

(The defendants may pay into court full costs of the suit and any reasonable amount which they consider proper, and may then add—

4. The defendants pay into court full costs of the plaintiff's suit and Rs.1,000 on account of damages and say that the sum is sufficient to satisfy the plaintiff's claim).

No. 51—Defence of Justification to Suit for Libel

1. The defendant admits all the allegations contained in the plaint except that by the publication of the said words, the plaintiff has been injured in his credit.

2. The words complained of are true in substance and in fact.

No. 52—Defence to a Suit for Malicious Prosecution

(Plaint No.206)

1. The defendant admits that allegations in paras 1 and 2 of the plaint.

2. The defendant denies the allegation in para 3 of the plaint that the charge against the plaintiff was false, or was brought maliciously and without a reasonable probable cause.

3. The charge brought by the defendant against the plaintiff was true.

4. In the alternative, the defendant had a reasonable and probable cause for believing it to be true.

Particulars : The plaintiff used frequently to visit the defendant's house, even in the absence of the defendant. On the date defendant's wife ran away, the plaintiff also left the village. Several residents of the village told the defendant that they had seen the plaintiff going with the defendant's wife from the defendant's village towards the Railway Station and the defendant believed these persons.

5. The special damages claimed in para 4 of the plaint for loss of

business are, even if suffered, not the direct consequence of the plaintiff's prosecution and are too remote in law.

No. 53—Plea Denying that the Defendant was the Prosecutor

(Plaint No.208)

The defendant denies that he prosecuted the plaintiff. The defendant has simply made a report to the police of what he believed to be the true facts and took no further active part in the plaintiff's prosecution.

No. 54—Defence in a Suit for Negligent and Rash Driving

(Plaint No.210)

1. The defendant admits the collision alleged in para 1 of the plaint but denies that it was due to any negligence on the part of the defendant's coachman.

2. The accident was caused by contributory negligence of the coachman of the plaintiff.

Particulars : The plaintiff's driver was, at the time of the accident, drunk and was driving at a very fast speed. When the defendant's coachman turned round the corner and saw the plaintiff's *tonga*, he pulled up the reins of his horses and shouted to the plaintiff's coachman to stop, but the plaintiff's coachman did not listen and did not slacken the speed of his horse, who came running into the defendant's *landau*, causing the accident complained of.

3. The defendant does not admit the injuries to the person of the plaintiff and to his horse and *tonga*, as alleged in para 2 of the plaint.

No. 55—Defence in Suit for Injuries Caused by Negligent Driving

(Plaint No.211)
(*Form No.5, Appendix A, C.P.C.*)

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control

of the defendant's servants. The carriage belonged to _____ of _____ Street, Calcutta livery stable keepers employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said stable keepers.

2. The defendant does not admit that the said carriage was turned out of Middleton Street negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 56—Defence in Suits Relating to Nuisances

(Form No. 10, Appendix A, C.P.C.)

1. The plaintiff's rights are not ancient (*or*, deny his other alleged prescriptive rights).

2. The plaintiff's rights will not be materially interfered with by the defendant's buildings.

3. The defendent denies that he or his servants polute the water (*or*, do what is complained of].

[*If the defendant claims the right by prescription or otherwise, to do what is complained of, he must say so, and must state the grounds of the claim, i.e., whether by prescription, grant, or what.*]

4. The plaintiff has been guilty of laches of which the following are particulars :

1870. Plaintiff's mill began to work.

1871. Plaintiff came into possession.

1883. First complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. [*If other grounds are relied on, they must be stated, e.g., limitation as to past damages*].

No. 57—Ditto

(Plaint No.217)

1. The defendant admits the allegation in para 1 of the plaint (*or*, the defendant denies that the piece of land to the east of the defendant's house belongs to the plaintiff. The said piece of land belongs to the defendant).

2. The defendant does not admit that the *mori*, the spouts or the door alleged in para 2 of the plaint have been constructed in December last or that the defendant's act in running water through the *mori* or discharging water through the spouts or passing through the door is wrongful.

Additional Pleas

3. The defendant claims (in the alternative) a right of easement to do the acts alleged in para 2 of the plaint, on the said piece of land.

The following are the particulars of the said right :

(i) The defendant has been running the water of his latrine through a *mori*, and has been discharging the rain water of his roof through three water spouts on the said land, for over 20 years before this suit, as of right and without interruption.

(ii) The defendant for over 20 years before this suit, enjoyed, as of right and without interruption, a way on foot from the defendant's house over the said piece of land to the public highway to the east of the said piece of land and back from the said highway over the said piece of land to the defendant's house.

(iii) The eastern wall of the defendant's house had fallen down during the last rains and has been rebuilt by the defendant in the first week of December 1983, and the *mori*, the water spouts and the door have been constructed in the said wall at identically the same place at which they existed in the old wall at the time the said old wall fell down.

No. 58—Defence to a Suit for Seduction

(Plaint No.225)

1. The defendant does not admits that Smt. Ramo was wife of the plaintiff and denies that the defendant knew that she was the plaintiff's wife.

2. The defendant denies the allegation in para 2 of the plaint.

3. The defendant admits that he received Smt. Ramo and has ever since harboured her at his house but denies that he did so wrongfully or that he has detained her or that he refused to deliver her to the plaintiff.

4. The said Smt. Ramo came to the defendant's house of her own accord and asked for protection and shelter, telling a pitiable tale of her sufferings and the defendant gave her protection from motives of pure humanity.

No. 59—Defence to a suit for Slander (General)

1. The defendant did not speak or publish the said words.

2. The said words did not refer to the plaintiff.

3. (The special damage alleged in the plaint is not sufficient in law to sustain the claim).

No. 60—Special Defence to Claim in a Suit for Slander

(Plaint No.226)

1. The defendant admits that he spoke and published the words set out in para 1 of the plaint to Ram Prasad, Bihari Lal and Ram Narain, but denies that he did so to any other person.

2. The said words are true in substance and in fact.

3. Ram Gopal, Amrit Lal and Hafiz Abdul Karim, former patients of the plaintiff who were on intimate terms with the plaintiff, had told the defendant that the plaintiff was a man of immoral character, and the defendant honestly believed the information. On February 8, 1996 the friends of the defendant asked defendant's opinion as to the professional skill and the moral character of the plaintiff, and the defendant spoke and published the words complained of to the said three persons in reply to their questions, in the *bona fide* belief that the said words were true, and without any malice towards the plaintiff. Such publication was, therefore, privileged.

No. 61—Defence to Claim in a Suit for Slander

(Plaint No.230)

1. The defendant admits the allegations in paras 1 and 2 of the plaint.

2. The defendant does not admit that he spoke or published any of the words set out in para 3 of the plaint.

3. The defendant did not mean, and was not understood to mean, what is alleged in para 5 of the plaint. The said words were incapable of conveying the alleged meaning or any other defamatory or actionable meaning.

4. The said words, without the said alleged meaning, are true in substance and fact. The work was very badly done and the defendant broke the contract in many important particulars.

Particulars

(a) *Elgin Road* : The *kankar* used was of an inferior kind. It was not properly metalled. The *kankar* was found loose at several places.

(b)

(c)

5. The chairman of the Buildings and Roads Sub-Committee moved that the plaintiff should be paid the money due to him under the contract. The defendant opposed the motion and made a speech. If, in the course of the speech, he spoke the words alleged in para 3 of the plaint, he did so in the *bona fide* discharge of his duty, as member of the said Sub-Committee, without any malice towards the plaintiff in belief that what he said was true, and the words were published only to the members of the said Sub-Committee who had a corresponding interest and duty in the matter. The occasion was, therefore, privileged.

6. The said words were a fair and *bona fide* comment on matters of public interest, viz. the condition of the roads within the limits of the Allahabad Corporation and the claim of the plaintiff to be paid by the said Corporation for making the said roads.

7. The defendant does not admit that the plaintiff was, in consequence of the said statement, injured in his credit and reputation, and that the Zila

Parishad of Allahabad and the Zila Parishad and Municipal Board of Mirzapur have ceased to employ him as a contractor, in consequence of the above statement or for any other reason.

No. 62—Defence in Suits for Infringement of Trade Mark

(Form No 9, Appendix A, C.P.C.)

1. The alleged trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No. 63—Defence to a Suit for Injury to Animal

(Plaint No.230)

1. The defendant admits the allegations in para 1 of the plaint.

2. The defendant did not intentionally shoot the plaintiff's horse. The horse was shot on account of a pure and inevitable accident, without any negligence on the part of the defendant.

Particulars : (State facts showing how the gun accidentally went off).

No. 64—Defence to a Title Suit for Possession

(Plaint No.235)

1. The defendant denies that the plaintiff is the owner of the house in suit or that he was in possession at any time within 12 years before the suit.

2. The defendant denies that he broke open the lock of the plaintiff's house and entered into possession of the said house on November 5, 1995 or on any other date within 12 years before the suit.

3. The suit is barred by Article 64 Limitation Act, 1963.

No. 65—Defence to a Similar Suit by a Gaon Sabha Against a Person in Possession of a House in the Abadi

1. The defendant admits the allegations in paras 1 and 2 of the plaint.

2. The defendant does not admit that Rameshwar Singh abandoned the house. He really sold the house to the defendant by a registered sale-

deed dated 19th April, 1953 and put the defendant in possession. Since then the defendant has been in possession.

(Or, The defendant does not admit that Rameshwar Singh died heirless and the house escheated to the State. Hanuman Singh is the nephew of Rameshwar Singh being the son of his brother and is his heir at law and in his presence the plaintiff cannot claim any rights in the house.

DEFENCE IN OTHER SUITS

No. 66—Defence in Administration Suit by Pecuniary Legatee

(Form No. 14, Appendix A, C.P.C.)

1. AB's will contained a charge of debts; he died insolvent; he was entitled at his death to some immovable property which the defendant sold and which produced net sum of Rs.____, and the testator had some movable property which the defendant got in, and which produced the net sum of Rs.

2. The defendant applied the whole of the said sums and the sum of Rs._____ which the defendant received from rents of the immovable property to the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts, and sent a copy thereof to the plaintiff on the___day of_____ 19__, and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant submits that the plaintiff ought to pay the cost of the suit.

No. 67—Defence to a Suit for Setting Aside an Adoption

[*Pleading custom against the ordinary rule of the Hindu Adoptions and Maintenance Act, section 10 (iv)*]

Amongst the (*name caste or sub-caste*) of the Uttar Pradesh there is an immemorial custom, which is reasonable and has been followed without interruption that a widow can adopt a boy aged more than 15 years of age.

No. 68—Defence to a Suit for Possession against a Transferee of a Hindu Widow

(Plaint No.248)

1. The defendant admits the allegations in paras 1 and 3 of the plaint.

2. The defendant admits the pedigree given in para 2 of the plaint so far as it goes, but says that it is incomplete in as much as it does not show the following facts:

(a) Smt. Piari had, after the death of Ramkishan, given birth to a posthumous son Dhani Ram. Dhani Ram married one Smt. Ram Kali.

(b) Har Narain had a third son, Piarey Lal, who had a son, Raj Narain, who had a son, Sri Narain. Sri Narain has left a daughter Smt. Pirano.

3. The defendant does not admit that all persons in the plaintiff's family, nearer to Ramkishan than the plaintiff, had died before Smt. Piari. Sri Narain was alive at the time of Smt. Piari's death and was the nearest reversioner. The plaintiff is not, therefore, the heir of Ramkishan.

4. It is admitted that, on the death of Ramkishan, Smt. Piari entered into possession as widow, but on the birth of Dhani Ram the property vested in him, and on his death, it devolved on Smt. Ram Kali, but, in spite of this Smt. Piari remained all along in adverse possession and has become absolute owner by such possession for over 12 years when she sold it to the defendant.

5. In the alternative, the defendant pleads that the sale was made to pay off the debt of Ramkishan, due on a bond, dated June 4, 1932 to one Tarachand, and was therefore justified.

No. 69—Defence to a Suit for Declaration of the Invalidity of a Widow's Transfer

(Plaint No.249)

1. The defendant No.2 admits the allegations in paras 1 and 2 of the plaint.

2. The defendant No.2 admits that Ramkishan died in 1960, and, on his death, defendant No.1 entered into possession, but not that she

entered into such possession as his widow. The said Ramkishan bequeathed the property in suit, by a will dated August 14,1958, absolutely to defendant No.1, and defendant No.1, entered in possession as aboslute owner under the said will.

3. The defendant No.2 does not admit the pedigree given in para 4 of the plaint and says that the plaintiff is not connected with the family of Ramkishan.

4. In the alternative, the defendant No.2 pleads that Ram Bihari is not colluding with the defendants and that the plaintiff cannot sue in the lifetime of Ram Bihari.

5. The defendant No.2 admits that defendant No.1 has sold the property to him but not that she did so without a legal necessity. The sale was made to pay off government revenue due from her husband for the year 1959 and to pay the expenses of a pilgrimage to Gaya for the benefit of the soul of the said Ramkishan.

No. 70—Defence to a Suit for Setting Aside a Father's Alienation

(Plaint No.251)

1. The defendant admits the allegations in paras 1 and 3 of the plaint.

2. The defendant denies that the property was the joint family property in which the plaintiff had any interest. It was the self-acquired property of the defendant No.2.

3. The defendant denies that the mortgage was made without a legal necessity or that there was no necessity for the rate of interest stipulated.

4. The Mortgage was made to meet the expenses of the marriage of Satyavati, daughter of defendant No.2.

(*Or*, the defendant No.2 owed a debt to one Chand Prasad under a bond, dated June 4, 1978, and the mortgage was made to pay off the said debt).

(*Or*, the defendant denies that the antecedent debt was incurred for the purposes of gambling).

(*Or*, the defendant had, before advancing money to defendant

No. 2, made proper and *bona fide* inquiries as to the existence of the aforesaid necessity and did all that was reasonable to satisfy himself as to existence of such necessity).

5. The rate of interest stipulated in the mortgage-deed is what was, at the time, generally prevalent in the market (*or*, was, at the time and under the circumstances a fair and reasonable one).

6. The plaintiff had not been born when the said mortgage was made, and the only other members of the family of the defendant No.2 at the said time were the plaintiff's uncles and elder brother, and the mortgage was made with the consent of the said uncles and brothers.

No. 71—Defence to a Suit for Recovery of Family Property Sold in Execution of a Decree against the Father

(Plaint No.252)

1-2. Same as in the previous precedent.

3. The defendant denies that the defendant No.2 had any *badhni* transaction with defendant No.1 or made the mortgage to pay off any debts incurred in such transaction or to raise money for drinking. (*Or*, the defendant denies that defendant No.2 maintained a mistress Smt. Putli or any other mistress, or that he made the said mortgage to pay off debts incurred for the purpose of maintaining any such mistress.)

No. 72—Defence to a Wife's Suit for Maintenance

(Plaint No.255)

1. The defendant admits that plaintiff is his wife.

2. The defendant denies that he took a mistress and further denies each and every one of the other allegations of cruelty to the plaintiff made in para 2 of the plaint.

3. The plaintiff was leading an unchaste life, and when the defendant remonstrated her, she voluntarily and without the consent or permission of the defendant, left the defendant's house and has since, without any lawful excuse, refused to return to the defendant's house. She cannot, therefore, claim maintenance.

4. The plaintiff is still leading an unchaste life.

Particulars of Unchastity

The plaintiff has an immoral connection with one Ram Prasad. She has given birth to an illegitimate son begotten of the said unlawful connection.

5. The defendant admits the allegation in para 3 of the plaint that income of the defendant's property is Rs. 4,900 per mensem but says that he is heavily indebted, and under the circumstances, cannot afford more than Rs.250 a month for plaintiff's separate maintenance.

No. 73—Defence to a Suit for Restitution of Conjugal Rights

(Plaint No.261)

1. The defendant admits that she is the wife of the plaintiff.

2. The defendant admits that she refuses to go to the plaintiff's house but does not admit that she does so without any lawful excuse.

3. The defendant left the plaintiff on account of the plaintiff's cruelty, and she fears that her life would be in danger if she returns to the plaintiff.

Particulars : The plaintiff leads an immoral life, keeps a prostitute and is addicted to drinking. He is constantly in need of money for his immoral purposes. When the defendant was living with him, the plaintiff used to press her to pay him money or to give him her jewellery, and when she refused to comply, he used to beat her, and to confine her in a room without giving her food for several days and nights. On October 14, 1994, the day before she finally left the plaintiff, the plaintiff asked her to execute a deed of gift in his favour in respect of the property which she had received from her father, and on the defendant refusing to do so, the plaintiff beat her and threatened to kill her, and would have killed her had she not run away to her parents' house.

No. 74—Defence to a Suit for Partition

(Plaint No.264)

1. The defendant admits the pedigree given in the plaint, but does not admit that the parties are members of a joint Hindu family.

2. By a private partition, made verbally in the month of April 1982, between the defendant and Ram Sundar, father of the plaintiff, the whole family property had been partitioned and the parties have since been in separate possession of their shares.

3. In the alternative, the defendant claims to be allotted in his share, at the partition, the houses specified below, which have been in his possession since 1982.

4. The defendant has spent Rs.44,000 in building the second storey of house No.1 and in rebuilding the whole of the house No.2.

5. Items.....are the separate properties of this defendant and are not part of the joint family properties, as they were purchased by this defendant from his separate earnings as a Deputy Collector.

6. The plaintiff has left out from his claim 2 shops situate at Khatauli which also belonged to the ancestors of the parties. The suit for partial partition is not maintainable.

No. 75—Ditto

1. The defendants Nos.2 and 3 admit all the allegations in the plaint.

2. Item 1 of the properties detailed in the plaint is a dwelling house. The answering defendants undertake to buy the 1/3rd share of the plaintiff and pray that the same be valued and directed to be sold to them and all necessary and proper directions be given in that belhalf.

No. 76—Defence to a Suit for Declaration of Title

(Plaint No.268)

1. The defendant denies that the plaintiff is owner of the property in suit.

2. The defendant denies that the plaintiff is in possession of the said property. The defendant is in possession and the plaintiff's suit for a mere declaration is not, therefore, maintainable.

No. 77—Defence to a Suit for Pre-emption under Mohammedan Law

(Plaint No.271)

1. The defendant admits the sale of the property in suit by Rasula to

the defendant but denies that the real consideration was Rs.30,000. He asserts that Rs.40,000 was the real consideration.

2. The defendant admits that the plaintiff is a *Shafi-i-sharik*, but denies that the defendant has no superior right. The defendant has a right of way through *sehan* land appertaining to the latter house, and is therefore a *Shafi-i-khalit* also.

3. The defendant does not admit that, immediately on hearing of the sale, the plaintiff declared his intention to assert a right of pre-emption.

4. The defendant denies that the plaintiff made the *talab-i-ishtishad* in the presence of the defendant, or at all.

No. 78—Defence to Minor's Suit for Setting Aside a Decree

(Plaint No.275)

1. The defendant admits the allegations in paras 1, 3, 4 and 7 of the plaint.

2. The defendant does not admit the allegation in paras 2 and 5 of the plaint.

3. The defendant denies that Smt. Ram Dei was blind or deaf at the time of the defendant's rent suit, or was incapable of defending the suit on behalf of the plaintiff.

4. The defendant denies that the rent for the suit period had been paid up. The rent was in arrears and had not been paid before the said suit or at all. The plaintiff had no defence to the defendant's said suit for arrears of rent and has not been prejudiced in any way.

APPEALS*

No 1—Form of Heading of Appeal from a Decree on Original Side (Calcutta)

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM CALCUTTA

In appeal from its original civil jurisdiction

Appeal No.....

Suit No.....19

(insert name).....Appellant and (plaintiff) or (defendant)

versus

(insert name).....Respondent and (defendant) or (plaintiff)

The appellant, named above, appeals against the (decree) or order of the Honourable Mr. Justice.....in the above suit passed on the.....day of.....19..... , for the following amongst other reasons.....

(1), (2), (3), etc. (here state grounds of appeal).

Appeal No.....(*By way of endorsement*).

Suit No.....of 19.....

.....Appellant.

versus

.....Respondent

**Forum* : So far as appeals from decrees in cases on original side of High Courts of Bombay, Madras and Calcutta are concerned, provision is made in their Letters Patent and Rules framed by them. Ordinarily an original suit is tried by a single judge and appeals against decrees therein lie to a Division Bench. This also applies to the Delhi High Court. For areas to which the Bengal, Agra and Assam Civil Court Act (XII of 1887) is applicable, the lowest court of civil jurisdiction is the court of the Civil Judge (Junior Division). Appeals from decrees passed by them lie to the District Judge but can be transferred by him for disposal to an Additional District Judge or Civil Judge (Senior Division) under him. From all decrees passed by District or Additonal District Judges appeals lie only to the High Court. From the

No. 2—Ditto (Madras)

IN THE HIGH COURT OF JUDICATURE AT MADRAS
APPELLATE JURISDICTION

Appeal No.....of 19.....

Between

1. AB and

2. CD.....appellants

And

1. EF and

2. GH.....respondents

On appeal from the judgment of the Honourable Mr. Justice..... dated the.....day of .....in the ordinary original civil (*or*, matrimonial, *or* admiralty) jurisdiction of this Court.

Suit No.....of 19.....

(*Or*, Original Petition No.....of 19.....)

Between

1. AB and

2. CD.....plaintiffs

And

1. EF and

2. GH.....defendants

Appellate decrees of Civil Judges, Additional District Judges or District Judges, second appeals lie to the High Court. Some Acts create courts of special jurisdiction and provision is made in them for filing of suits or petitions under the Act in specified courts, e.g., the Hindu Marriage Act, the Land Acquisition Act. The appeals against decrees passed by such courts lie to courts as provided for in those Acts. Since the definition of decree has been amended by the Amending Act of 1976, by deletion of the words 'section 47 or', any order passed under section 47 would not be treated as a decree and neither a first nor a second appeal would lie in respect of such an order (*Mohan Das* v. *Kamla Devi*, A 1978 Raj 127 DB).

Besides decrees, appeals lie against some orders of the civil courts also as

No. 3—Memorandum of Appeal from a Decree

IN THE COURT OF THE DISTRICT JUDGE, ALLAHABAD

... ... *Plaintiff-Appellant*

versus

... ... *Defendant-Respondent*

First Appeal No. of 1996

The above-named appellant appeals to the court of the District Judge at Allahabad, from the decree of Sri Shanti Narain, Civil Judge (Junior Division) at Allahabad in suit No.550 of 1992, dated the 4th day of November, 1992, dismissing the appellant's suit, and sets forth the following amongst other.

Grounds of Appeal

1. Because the finding that the payment of Rs.1,000 was not made on account of interest as such, is against the weight of evidence on the record and is incorrect.

2. Because the lower court erred in holding that the thumb mark of illiterate payer under an endorsement of payment is not a sufficient compliance with the requirements of section 19 of the Limitation Act.

3. Because the respondent's evidence of the alleged satisfaction of the bond is partial and unreliable, and should not have been believed.

4. Because there is no evidence on the record to support the finding that the interest clause was entered in the bond under undue influence.

5. Because the lower court did not act rightly in rejecting the appellant's application for permission to file certain documentary evidence (*particulars to be given*)on the date of hearing.

Value of Appeal : Rs.5,250.

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mentioned in O.43, R.1. Such appeals lie to court to which the decree passed by those courts would be appealable. No second appeals lie against decrees passed in appeal in such cases.

Court Fees : Appeals are included in the word "suit" for purposes of Court

Relief : To set aside the decree of the lower court and to decree the plaintiff's claim with costs in both the courts.

(Sd.) M. AHMAD

Advocate for the Apellant

No. 4—Memorandum of Appeal from an Order

The above-named appellant appeals to the court of the District Judge of Muzaffarnagar, from an order of Shri Rup Narayan, Civil Judge (Junior Division) at Muzaffarnagar, dated November 4, 1995, refusing to set aside the *ex parte* decree passed in suit No.502 of 1995, and sets forth the following amongst other—

Grounds of Appeal

1. Because the lower court erred in holding that the service of summons on the appellant was sufficient in law.

2. Because the lower court erred in disbelieving the appellant's evidence that he did not know of the suit before December 1, 1995.

Value of the Appeal : Rs.2,000

Relief : To reverse the order appealed from and to set aside the *ex parte* decree against the appellant.

The limitation for this appeal expired on.....which was a holiday. The appeal is, therefore, filed today, the next opening day.

(Sd.) A.C. BANERJI

Advocate for the Appellant

No. 5—Memorandum of Appeal from an Appellate Decree

The above-named appellant appeals to the Honourable High Court at Allahabad against the appellate decree of Shri A. Ashdown, Distirct Judge (Junior Division) at Meerut, dated July 14, 1995, confirming a decree of Shri Brindaban, Civil Judge at Meerut, in suit No.212 of 1992, dated

Fees Act (section 2, clause IV). Ordinarily the same court fee is payable in appeal as would be payable in a suit claiming the relief prayed for in the appeals.

Limitation : for appeals under C.P.C. is 90 days from the date of the decree or order, if the appeal is to the High Court and 30 days if to any other court

January 15, 1993, dismissing the appellant's suit, and sets forth the following amongst other—

Grounds of Appeal

1. Because there is no evidence on the record to support the finding of the courts below that the respondent had denied the plaintiff's title more than 12 years ago or at any time.

2. Because the lower appellate court has erred in law in holding that the onus of proving his possession within 12 years lay upon the appellant.

3. Because the lower appellate court erred in law in holding that section 11, C.P.C. barred the suit.

Value of the Appeal : Rs.5,250

Relief : That the Honourable Court will be pleased to set aside the decrees of the court below, and to decree the plaintiff's claim with costs.

(Sd.) F. CUMMING

Advocate for the Appellant

I certify that I have examined the record and that in my opinion ground of appeal No.1 is well founded in fact.

(Sd.) F.CUMMING

No. 6—Cross-Objection under O. 41, R. 22, C.P.C.*

IN THE COURT OF THE DISTRICT JUDGE AT AGRA

Ram Chandra ... ... *Plaintiff-Appellant*

versus

Kishori Lal ... ... *Defendant-Respondent*

The above-named respondent files this cross-objection against a

(Article 116). If the appeal is from the decree or order of the High Court to the same court, the period is 30 days from the date of the decree or order. For leave to appeal as a pauper, Article 113 provides that if the application is made to the High Court, the period is 60 days and if to any other court, it is 30 days.

For appeals from decrees or orders passed by courts of special jurisdiction the period of limitation is usually provided in the Act creating those courts.

*See Ch XVI.

part of the decree appealed from in this case and sets forth the following grounds of objection to the said part of the decree, viz. :

1. It is proved from the evidence on the record that the value of the 4 trees cut away by the respondent was only Rs.450, and the lower court erred in holding that it was Rs.1060.

2. The lower court has erred in law in allowing interest to the plaintiff on the value of the trees from the date of cutting to that of the suit.

Relief: That the amount of the decree be reduced to Rs.450.

REVISION[1]

Application for Revision (section 115 C.P.C.)

Petition of revision under section 115, C.P.C. against the decree of the District Judge of Varanasi dated 15th December, 1995, reversing the decree of the Civil Judge (Junior Division) of Varanasi dated the 25th July, 1995, passed in suit No.315 of 1995 valued at Rs.1,950.

Respectfully Showeth—

1. That the applicant was the plaintiff in the aforesaid suit which had been brought under section 6 of the Specific Relief Act.

2. That the suit was decreed by the Civil Judge (Junior Division) but the District Judge on appeal has reversed the Civil Judge's (Junior Devision) decree.

3. That under the law no appeal lay to the District Judge from the Civil Judge's (Junior Division) decree and the District Judge, therefore, exercised a jurisdiction which was not vested in him by law.

The applicant, therefore, prays that this Hon'ble Court will call for the record of the case and set aside the said decree of the District Judge and restore that of the Civil Judge (Junior Division) and award him cost in all courts.

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[1]Revision lies only on one of the three grounds mentioned in section 115 and only when no appeal lies, see *S. Venkatagiri Ayyangar* v. *The Hindu Religious Endowments Board, Madras*, A 1949 PC 156; *Jaychand Lal* v. *Kamala Kishan Chaudhry*, A 1949 PC 239; *Namita Dhar* v. *Dr. Amalendu Sen*, A 1977 Cal 187. In *Keshavdas Chamria* v. *Radhakissen Chamria*, A 1953 SC 23, the Supreme Court laid down that only errors relating to jurisdiction fall within the scope of section 115, which is concerned not so much with the decision itself as with the manner of arriving at it. In *Chaube Jagdish Pd.* v. *Ganga Pd.*, A 1959 SC 492, the court observed that where there are jurisdictional facts, the High Court can in exercise of its revisional powers, consider whether those facts were correctly decided. Revision does not lie from all interlocutory orders unless by that order a case is decided. "Case" is used in a very wide sense and is not confined to a suit or appeal only. It includes Civil Proceedings and parts thereof including decision of an issue (*Maj. S.S. Khanna* v. *Brig. F.J.Dillon*, 1963 ALJ 1068). Errors of fact cannot be corrected in revision and those of law only if they can be related to the Court's jurisdiction to try the suit (*Pandurang* v. *Maruti*, A 1966 SC 153; *D.L.F. Housing and Construction Pvt. Ltd.* v. *Swarup Singh*, A 1971 SC 2324). When a court

MISCELLANEOUS APPLICATIONS UNDER C.P.C.

No. 1—Objection about Compensatory Costs under section 35 A, C.P.C. (a)

(By defendant)

To the written statement, add, as the last paragraph— "The plaintiff's claim is false (*or*, vexatious), (*or*, is false and vexatious) to the knowledge of the plaintiff and the defendant, therefore, claims special costs by way of compensation."

No. 2—Ditto

(By plaintiff)

"The plaintiff begs to submit that the defence of payment put forward by the defendant is false and vexatious to the knowledge of the said defendant and, therefore, claims special costs by way of compensation."

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dismisses a suit for default due to a mistake of the court and on the same day recalls the order, the subsequent order does not suffer from lack of jurisdiction and no revision would lie (*Devi Dayal Textile Co.* v. *Nand Lal*, A 1977 Delhi 7). When the court sets aside an *ex parte* decree on condition of deposit of 2 lacs, revision can be filed against the order (*Raj Kumar* v. *Mohan Meakin Breweries Ltd.*, A 1979 All 370). An order setting aside an award amounts to a case decided (*Shambhu Dayal* v. *Basudeo Prasad*, A 1970 All 525 FB). Scope of expression "any case which has been decided" has become wider on account of the explanation added by Amendment of 1976 and court may interfere to secure the ends of justice (*Nagendra Nath Roy* v. *Ram Prasad Panda*, (1979) 1 Cut WR 159; *Sobha* v. *Bihari Lal*, A 1981 HP 18). An order, to amount to a case decided, need not decide the suit as a whole but must decide a vital matter in controversy (*Mohinder Nath* v. *Sandhran Rani*, A 1981 J &K 49). A revision against an interlocutory order would not lie unless such order, if it had been made in favour of the plaintiff, would have disposed of the suit or proceeding or unless the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the applicant (*Dohai Dei* v. *Rama Rauta*, A 1985 Ori 77).

(a) Section 35 A, C.P.C. empowers courts to allow special costs by way of compensation (*T. Arivandandam* v. *T.V.Satyapal*, A 1977 SC 2421). Such costs can be awarded even against the next friend of a minor (*Rajkumar* v. *Mangad Rai*, 1930 ALJ 1295), but cannot be allowed in revision (*Cohen* v. *Sirdar Sahib Iqbal Singh*, 42 CWN 658). Special costs may be awarded where a party has suppressed material

No. 3—Application for Transfer of Decree for Execution (section 39) *(b)*

1. The applicant is the holder of the decree passed by this court in suit No.293 of 1995.

2. The opposite party, against whom the said decree has been passed, actually and voluntarily resides (*or*, carried on business) (*or*, personally works for gain) at Jhajjar within the jurisdiction of the court of the Civil Judge (Senior Division) of Rohtak.

(*Or*, The opposite party against whom the said decree has been passed, has no property within the jurisdiction of this court and has property within the jurisdiction of the court of the Civil Judge (Senior Division) of Rohtak).

(*Or*, The said decree directs sale of property situate outside the jurisdiction of this court and within the jurisdiction of the court of the Civil Judge (Senior Division) of Rohtak).

(*Or*, The property of the judgment-debtor to the said decree has been attached and put to sale by the Civil Judge (Senior Divison) of Meerut in execution of his decree No.421 of 1993 and the applicant wishes to claim rateable distribution of the the sale-proceeds to be realised by the said execution sale by the Civil Judge (Senior Division) of Meerut).

The applicant, therefore, prays that his said decree be sent for execution to the court of the District Judge, Rohtak (*or*, to the court of the Civil Judge, (Senior Division) Meerut).

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facts (*Paras Nath Jaiswal* v. *State of AP*, A 1994 AP 68 DB).

(b) The practice of making such an application in the form of an execution application has no justification. The ground on which the transfer is sought (being one of those mentioned in section 39) should be mentioned, and the prayer should mention the name of the court to which decree has to be sent.

No. 4—Judgment Debtor's Objection under section 47 C.P.C.(c)

(Legal representative of the judgment-debtor) Objector

versus

(... ... ... Decree-holder) Opposite Party

Objection under Sec.47, C.P.C.

The objector begs to raise the following objections to the execution application :

1. That the former execution application, from the date of which the present application is the claimed to be within time, was not *bona fide* and was made simply for the purpose of limitation. The present execution application is, therefore, barred by limitation.

2. That the further interest claimed by the decree-holder has not been allowed by the decree.

(c) All objections by one who is a party to the decree must be filed under this section and no separate suit is maintainable. A party against whom a suit has been dismissed but whose name is retained is also a party (*Chhotelal* v. *Bhagwan Das*, A 1933 Nag 246), but one against whom a suit is given up or dismissed or who is exonerated by the plaintiff on the ground that he was wrongly joined is not a party (*U. Kala* v. *Ma Hnin*, 101 IC 749, 5 R 110; *Jujbishta Pande* v. *Lakshmana*, 143 IC 476, A 1933 Mad 435, 1933 MWN 527; *Parandhamayya* v. *Veerayya*, 1938 MWN 1252; *Kailasa Reddiar* v. *Ponnammal*, (1961) 2 MLJ 119; *Rajendra Prasad Sinha* v. *Karam Chand Thapar & Co.*, A 1975 Pat 265). A transferee of the decree-holder is decree-holder's representative (*Fakir Baksh* v. *Mt. Marian*, 168 IC 154, A 1937 Oudh 365) and so a purchaser of mortgaged property, pending suit on the mortgage, is judgment-debtor's representative (*Lakshmi Narain* v. *Hanumayya*, 171 IC 925, A 1937 Mad 580; *Prameshri Din* v. *Ram Charan*, 169 IC 657, 41 CWN 1130, 1937 AWR 834, A 1937 PC 260), and so also a transferee of the mortgagor after the mortgage decree (*Rashbehari* v. *Mahindi Pal*, 41 CWN 1162, A 1937 Cal 565), also a transferee of attached property *pendente lite* (*Annamalai Mudalir* v. *Kuppusami*, (1962) 2 MLJ 336), but a receiver of judgment-debtor's estate is not (*Ghanshamdas* v. *Shivaldas*, 30 SLR 288). A person sued in a representative capacity is a party even for the purpose of raising a claim in his personal capacity (*R.M.S.V. Chattyar* v. *Nayaing*, A 1940 Rang 27) and *vice versa* (*Shabaan* v. *Hemraj*, ILR 1941 Kar 474). *Inter se* dispute between co-decree holders is foreign to the scope of section 47 C.P.C. (*Bans Raj Singh* v. *Krishna Chandra*, (1981) 7 ALR 435).

Such an objection cannot be dismissed summarily on the ground of delay (*Musharfi* v. *Md. Mustaiabdullah*, 111 IC 837, A 1929 Oudh 1). An auction pur-

3. That a portion of the property attached, viz., *grove* No.16 in village Badam, is personal property of the objector and not that of Sohanlal, judgment-debtor. The said property should be released from attachment.

4. That the rest of the property belonged to the joint Hindu family composed of the objector and his deceased father, the judgment-debtor, and is not liable to be attached in execution of his decree, because the debt for which the decree was passed was contracted by the said father in order to pay off losses incurred in *badhni* or grain gambling transactions made by him with the decree-holder in June 1992.

The objector, therefore, prays that the above objections be allowed.

No. 5—Application under section 95, C.P.C. *(d)*

1. The plaintiff applied for, and obtained, an order for attachment before judgment of the property of the defendant applicant, in suit No.1370 of 1995, on December 20, 1995, and movable property of the applicant

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chaser is a party to the suit within the meaning of section 47 in respect of the property purchased by him.

When after a final decree was passed in a partition suit, defendants interfered with plaintiff's possession over allotted portion. Plaintiff filed suit for injunction against defendants for restraining them from interfering with possession and in the alternative for possession. It was held that such suit is not barred by section 47 C.P.C. as subsequent acts of defendants gave rise to fresh cause of action (*Ram Lakhan Tiwari* v. *Ram Samujh Tiwari*, A 1981 All 211). A mere formal defect in an execution application is curable and not necessarily fatal (*Farukh* v. *District Judge*, A 1984 All 393).

The detemination of any question falling within Sec. 47 is no longer a decree and hence appeal and second appeal do not lie against such determination (*Narmada* v. *Ram Nandan*, A 1987 Pat 33). The mere omission to mention Sec. 47 does not take out the objection from the ambit of section 47 (*S.V. Kankaraj* v. *Vijay Bank*, A 1987 Kant 252).

A decree which is a nullity, can be challenged even in execution proceedings (*Jaipur Development Authority* v. *Radhey Shyam*, (1994) 4 SCC 370). The pre-sale illegalities or irregularites committed in execution proceedings can be challenged by way of objection under Sec. 47 (*Desh Bnadhu Gupta* v. *N.L.Anand*, (1994) 1 SCC 131). Unless the decree is nullity, the executing Court cannot go behind the decree and is bound to execute the decree (*Hiralal Mool Chand* v. *Barot Raman Lal Ranchhoddas*, A 1993 SC 1449).

(d) An application can be made under this section even without first getting the order of attachment set aside, nor is an order making the conditional attachment absolute, a bar to such application (*Palanisami* v. *Kaliappa*, 1939 MWN 1084,

was attached, under the said order on December 26, 1995.

2. The said application was made on insufficient grounds. The allegation in the application that the applicant was going to dispose of the said property and that he had no other property were false.

3. The applicant had no intention of disposing of the said property and he had, and still has, a large property of the value of Rs.10,000.

(*Or, substitute the following for Nos.2 and 3.*)

2. The said suit has been dismissed by the court on March 14, 1996, on the ground that the bond on which it was based was a forgery.

3. The bond was a forgery and the plaintiff had no reasonable or probable ground for instituting the suit.

The applicant prays that Rs.1,000 may be awarded to him as compensation for the injury caused to him by the said attachment.

No.6—Application under sec. 144, C.P.C. *(e)*

1. On October 20, 1993, the opposite party obtained from this court a decree (being decree No.269 of 1993) against the applicant for possession of the house specified in schedule A annexed to this application, moveable property mentioned in Schedule B, and cattle detailed in Schedule C, for mesne profits and for costs of the suit.

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50 LW 640, A 1940 Mad 77). It should be proved that the attachment was applied for on insufficient grounds. It is not necessary to prove special damage. General damage can also be awarded (*Palanisami* v. *Kaliappa*, supra). The mere passing of an order without actual attachment does not furnish any cause of action (*Mohammad Ismail & Co.* v. *Ashghra & Co.*, 183 IC 174, A 1939 Rang 260). But actual damages, if proved, as well as general damages can be awarded (*Palanisami* v. *Kaliappa*, supra; *Rehmanbux* v. *Dhallo Mal*, A 1963 Raj 177). Application does not lie against the next friend of a minor plaintiff though a separate suit will lie against him for damages (*Satayanarayan* v. *Anjareddi*, A 1941 Mad 779). The remedy provided by section 95 is a special remedy. The person who makes the application cannot institute a suit for the same purpose. But a person who does not make an application can institute a suit for damages (*Basamma* v. *Peerappa*, (1981) 1 Karn LJ 286, A 1982 Karn 9).

(e) The court has, under this section, power to restore the parties to their original position, therfore, it can allow mesne profits also (*Tagore* v. *Mathurakant*, 173 IC 391, A 1937 Cal 478). It has been held that even an uncertified payment made to decree-holder outside the court can be recovered under section 144 (*Hanumanthappa* v. *Goolappa*, 48 LW 945). The application is one for execution

2. By execution of the said decree, the opposite party obtained possession of the said house on May 15, 1995, and of the said moveable property and the said cattle on June 20, 1995.

3. On February 25, 1996, the applicant deposited in court Rs.5,261 on account of mesne profits and Rs.2,565 on account of costs as directed by the said decree.

4. The said decree of this court was, on March 10, 1996, set side by the Hon'ble High Court at Patna in First Appeal No.351 of 1995.

5. The applicant claims by way of restitution-

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and is governed by the same rule of limitation (Article 137). Limitation willl be reckoned from the date of reversal of the decree. The time spent in preferring an unsuccessful second appeal will not be excluded(*Harimohan* v. *Parmeshwar*, 32 CWN 971). Appeal from an order under this section requires *ad valorem* court-fee. Interest is allowed on money refunded under this section (*Hanuman* v. *National Bank*, 7 L 232, 93 IC 954; *Surajmal* v. *Baniram*, A 1941 Nag 195; *Dalaram* v. *Ramanand*, A 1929 Pat 493; *Lucy Kochurvaree* v. *P.Mariappa Gounder*, A 1979 SC 1214). Resitutuion can be allowed not only when decree is reversed in appeal but also when it is reversed on review (*Tangatur Subbarayandu* v. *Yerraam*, 40 M 299: contra, *L.N. Banarji* v. *K.L.& S.Co.*, A 1941 PC 128; *Ashutosh* v. *Kundal*, 125 IC 645, 33 CWN 908, A 1929 Cal 814, 57 C 226 DB; *Chintamani* v. *Chunnil Sahu*, 1 PLJ 43, 34 IC 747; *Sarnalata Dasi* v. *R. Rathmanamal*, (1979) 2 MLJ 449). An application under this section can be made not only by the party on whose apeal the decree is reversed but also by any other party who is benefited by the decision in appeal (*Dhani Ram* v. *Sumer Chand*, 98 IC 1042, A 1927 All 182 DB; *Gurnath* v. *Venkatesh*, 168 IC 629, A 1937 Bom 101). It can be made by a transferee of the appellate decree (*Jamini* v. *Dharamdas*, 33 C 857), or against an attaching creditor of the decree varied (*Mangal Singh* v. *Jagat Ram*, A 1944 Pesh 44), but where surety is entitled, principal cannot apply (*Bai Krishan* v. *All Rasul*, 1938 AMWJ 127). There are conflicting decisions on whether restitution can be claimed even if possession was obtained, otherwise than by execution but under colour of the decree *(Yes; Suryadatta*, v. *Jamanadattt*, 18 ALJ 729, 42 C 568, 57 IC 148; *Narain Singh* v. *Bachu Singh*, 6 ALJ 551,99 IC 952; contra *Brij Mohan* v. *Rameshar* 183 IC 709, A 1939 Oudh 273 DB). Where the judgment-debtor to a decree for specific performance handed over the property to the decree-holder, he was held to be entitled to recover it under section 144 if the decree is set aside in appeal (*R.H.Shinner* v. *Lt. J.R.R Skinner*, A 1943 All 202).

The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case does not strictly fall within the ambit of section 144. (*Kavita Trehan* v. *Balsara Hygiene Products Ltd.*, 1994 A SCW 466 A 1995 SC 441:

(a) Possession of the house mentioned in Schedule A.

(b) Rs.____on account of the mesne profits of the said house as per account given in Schedule D annexed to this application.

(c) Recovery of the moveable property and cattle mentioned in Schedule B and C respectively or their value Rs.4,262 as detailed in the said schedule.

(d) Rs._____on account of damages for being deprived of the use of the said movables and cattle as per account given in Schedule E attached to this application.

(e) Refund of Rs.7,826, with interest at 6 per cent per annum from February 25, 1996 to the date of realisation.

Birendra v. *Surendra*, A 1940 Cal 260, 149 IC 581; *Ramanathan Chettiar* v. *V.R.Rathmnamal*, (1974) 2 MLJ 449; *Sahebgonda* v. *Sonubai*, (1981) 1 Kam LJ 151). Section 144 is not exhaustive but only enumeration and therefore, if there are cases where section 144 is not attracted, the principle can be borrowed and made applicable in the interest of justice (*Rakesh Singhal* v. *Vth Addl Distt and Sessions Judge*, A 1990 All 12). The Court of "first instance" in section 144 competent to execute the decree is the Court which passed the decree, the transferee Court is not competent to entertain application for restitution. (*Neelathupara* v. *Montharappalla*, A 1994 SC 1591). Restitution against the auction-purchaser *see-Chinnamal* v. *P. Arumugham*, A 1990 SC 1828).

Restitution must be granted if the decree is reversed. Right to retain possession (taken in execution) under another title arising during pendency of the litigation is no defence to an application under section 144 (*Chandra Krishna* v. *Radha Krishna*, 108 IC 111, 5 OWN 91; also see, *Binayak* v. *Ramesh Chandra*, A 1966 SC 948; *Khemchand Sharma* v. *Padmalochan Panda*, 1973 (1) CWR 530). Restitution is sometimes granted under the inherent power of the court even if the case does not fall under section 144 e.g., when decree is varied by compromise (*Sundarsana* v. *Gopala*, 1933 MWN 641; *Beni Prasad* v. *Kundanlal*, 150 IC 224, A 1934 Lah 322; *Sufal* v. *Surendra*, 60 CLJ 44; *Raghubanslal* v. *Solano*, 149 IC 365, A 1934 Pat 150; contra, *Mustaddi* v. *Sultan*, 1933 ALJ 724, A 1933 All 745) or where a decree was shown to be a nullity as it was passed against a dead person (*Rama* v. *Narasimhalu*, 146 IC 564, A 1933 Mad 888, [1]), or where the sale in execution of decree against father is set aside in a separate suit by the sons (*Jogendranath* v. *Hira Sahu*, A 1948 All 252, 1948 ALJ 25), or when the decree is set aside in a separate suit by a court of Subordinate jurisdiction (*Maqbool Alam* v. *Mt. Khodaijia*, A 1949 Pat 133; *Sarnalata Dasi* v. *Monimohan Modak*, (1971) 75 CWN 927), or where defendant has paid money due on account of court-fee in a pauper suit under an order of the court which was reversed (*Mahalakshma* v. *Ramayya*, 168 IC 717, A 1937 Mad 178). Where a decree is not binding on the plaintiff, he is entitled to the

No. 7—Application for Amendment of Plaint, Judgment and Decree (Secs. 151 and 152) *(f)*

1. The applicant instituted a suit No.293 of 1984 in this court for sale of certain mortgaged property.

2. The said property was described in the mortgage bond as plots Nos.476 and 477.

3. After the mortgage, the number of plots were altered at the settlement of 1985 and the corresponding numbers of the mortgaged-plots are 320 and 321 respectively.

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restitution of his property sold in the execution of the decree (*Bhanwar Lal* v. *Prem Lata*, A 1990 SC 623).

In an application under section 144 for possession and mesne profits, the deductions claimed by the court auction purchaser on account of payment of *kist* for agricultural lands, house-tax, and the amount paid in discharge of the mortgage on the suit property were allowed, but deductions for improvements and getting tap connections were disallowed (*Rattiram Pillai* v. *Gnanabaraman Pillai*, (1980) 1 MLJ 181).

The bar of suit under section 144 (2), C.P.C. applies to cases to which section 144 applies and not to cases of restitution under the inherent powers of the court (*Jokhu Mal* v. *Sudama Mal*, A 1955 All 526).

(f) A broad view must be taken of the provisions of sectons 151 and 152 as the object of procedural laws is to do justice between the parties. Hence when there are mistakes which are capable of being rectified and are covered by section 152, courts must rectify the mistakes (*Delta Products (P) Ltd.* v. *Industrial Credit and Investment Corp. of India*, 1980 Mah LJ 156). The Court is competent to correct clerical or arithmetical mistakes or accidental slip or omission at any time in the judgment, decree or orders passed by it, it is not necessary to require a party to file appeal or review (*B. Shivananda* v. *Andhra Bank Ltd.*, (1994) 4 SCC 368). Such clerical or arithmatical errors or accidental mistakes can be corrected at any time as there is no limitation (*Mt. Shanti* v. *Mulkh Raj*, A 1937 Lah 894; *Bawa Singh* v. *Babu Singh*, A 1979 Punjab 94). But inordinate delay may be a ground for rejecting an application for correction of the amount payable under a decree (*Nagendra* v. *Ambica*, 33 CWN 959, 50 CLJ 12, A 1929 Cal 676 DB). Decree-holder's acceptance of payment of decretal amount is no bar to an application for amendment (*Munuswamy* v. *Jagannatha*, A 1929 Mad 830, 1929 MLW 720). Such amendment can be made by the court under its inherent powers (vide section 151) even if section 152 does not apply, not only in the decree but in any other proceeding also. The error can be amended throughout the record (Sheo Balak v. Sukhdeo, 12 ALJ 285, 23 IC 344). Even consent orders can be rectified (*Karimunnissa Begum* v. *Kair Mir Jalaluddin Valde Mir Masum Ali Khan*, ILR 1937 Bom 837, 10 RB 252, 39 BLR 915, A 1937 Bom

4. By an accidental mistake the plaintiff copied out the description of the property to be sold from the mortgage deed and did not specify the new numbers in the plaint, and in the judgment and in the preliminary and final decrees the property ordered to be sold is described as Nos.476 and 477.

5. The mistake was detected at the time the applicant put in an application for execution.

The applicant prays that the plaint, the judgment, the preliminary decree and the final decree be amended by the substitution of Nos."320" and "321" for "476" and "477" respectively.

No. 8—Application under O.1, R. 8, C.P.C.

The humble petition of____ under O.1, R.8, respectfully showeth:

(1) That the applicants, are the members of the sect of Dasa Jains of Delhi.

(2) That there are about 150 persons of that sect in Delhi.

(3) That the plaintiffs want to bring a suit, on behalf of all the members of the said sect, for the assertion of their right to worship at the Jain temple at Roshanpura, Delhi, and pray for permission for the same.

457, 172 IC 170; *Maimun Nisa* v. *Md. Khodabin*, A 1985 Pat 55). The Court can allow amendment of the decree and the plaint schedule in case of misdescription of property (1991) I Cal LJ 550, (1990) 2 Cal LT 20).

But the court cannot by such amendment alter a decree substantially by taking into consideration a document produced after the decree (*Bal Chand* v. *Narain Das*, 1938 ALJ 1080, 1938 AWR(HC) 773). Nor can a decree be amended so as to allow future interest which was not allowed in judgment (*Thiruganana* v. *Venugopala*, 1939 MWN 1165, A 1940 Mad 29, 50 LW 719; *Gulabh Bai* v. *Ram Pratap*, A 1973 Raj 307). Application under Secs. 152 and 153 read with Sec. 151 when not maintainable see, *Scheduled Caste Co-op. Land Owning Society Ltd* v. *Union of Inda*, A 1991 SC 730. Where third parties have acquired rights, an amendment so as to affect those rights cannot be granted (*Laxman* v. *Maruti*, 184 IC 775, A 1939 Bom 389; *Joy Chandra* v. *Govinda Chandra*, 44 CWN 708). No application can to made by a purchaser of the decree (*Jai Bhagwan* v. *Om Prakash*, 182 IC 830, A 1939 Lah 255).

Application should be made to the court passing the decree and not to the executing court (*Krishnaya* v. *Meghraj*, A 1940 Bom 10). But where a court has ceased to exist and no successor court exists, the application may be made to executing court (*Gaya Singh* v *Mst. Ram Piari*, A 1955 All 622). If a decree capable

No. 9—Application for Amendment Praying for Substitution of Person as Plaintiff [O.1, R.10 (1)] *(g)*

1. The applicant is the guardian of Ramnath minor, appointed under the will of Amarnath, deceased father of the said Ramnath.

2. The applicant honestly believed that his appointment as guardian under the will, had the effect of constituting him the executor of the will by implication.

3. The applicant, in the above *bona fide* belief that he was executor, under the will, brought this suit in his own name, as such executor, for recovery of property belonging to the estate of the said Amarnath.

4. The defendant objected in his written statement that the applicant was not the executor of will by implication and was not entitled to sue in his own name.

5. On this objection, the applicant consulted some eminent lawyers and has been advised that the defendant's contention is right.

6. The said Ramnath minor, being owner of the property under the will, is entitled to sue.

7. The applicant's interest is in no way adverse to that of the said minor, and the applicant is in every way fit to act as the minor's next friend.

The applicant prays that the name of the said "Ramnath son of Amarnath, minor, through Chandra Kishore his next friend" be substituted for that of the applicant, as plaintiff.

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of execution has been passed by appellate court, application should be made to it and not to original court (*Zuleka* v. *Kulsum*, 1940 MWN 834; *Durga Singh* v. *Wahid Raja*, 1964 ALJ 817; *Chandrakala Devi* v. *Central Bank of India Ltd.*, A 1959 Cal 153; *Annappu Ramanna* v. *Panduri Sriramulu*, A 1958 AP 768; *Koraga Shetty* v. *Sheikh M. Latif*, (1967) 2 Mys LJ 317; *Bachan Singh* v. *Harbans Kaur*, A 1973 P &H 103), but when an appeal is dismissed as withdrawn the application for amendment can be filed only in the trial court (*Kale Gowda* v. *Akkoyannma*, A 1974 Kerala 107).

An application for restoration of an application under O.9, R. 13 (*Ramnath* v. *Ganeswar*, A 1986 Ori 26) or for recalling an order passed allowing the plaintiff applicant's own mistaken request for permission to withdraw from the suit (*Rameswar* v. *State*, A 1986 Cal 19) lies under section 151.

(g) The application should be supported by an affidavit.

No. 10—Application for Amendment Praying for Substitution of a Person as Defendant

1. After the institution of this suit the plaintiff came to know from the village *Patwari* that Raj Kishore defendant No.3 was already dead before the suit was filed.

2. The said Raj Kishore has left as his only heir a son named Ram Kishore. For adjudication of the plaintiff's claim it is necessary to implead the said Ram Kishore.

The plaintiff, therefore, prays that the name of Ram Kishore be substituted for Raj Kishore as defendant No.3 and leave be given to the plaintiff to make consequential amendments in the body of the plaint (*or*, the following amendments may be made in the body of the plaint viz.....)

No. 11—Application for Substituted Service (O. 5, R. 20)

1. In the above case, the defendant is keeping out of the way for the purpose of avoiding service of summons.

2. The applicant prays for an order for substituted service of the summons in any manner the court thinks fit.

Affidavit

1. I make oath and say that the summons in this case was first issued to the defendant Ram Narayan at his house in village Ramnagar, and was returned unserved with the report that he had gone to his son in village Salarpur.

2. I make oath and say that when the summons was taken out for Salarpur four days later, it was returned with the report that the said Ram Narayan had gone to his second son in village Amethi.

3. I make oath and say that when the summons was taken to Amethi, it was returned with the report that Ram Narayan had gone to his own house.

4. I make oath and say that summons sent by post was returned with the endorsement "Left without address."

5. I make oath and say that I believe that Ram Narayan is intentionally keeping out of the way to evade service of the summons.

No.12—Application for Striking out Pleadings (O.6, R.16)

1. The following allegations in the plaint are scandalous and irrelevant to the issue involved in the case.

(a) In para 1 of the plaint : "The defendant No.1 has an illicit connection with defendant No.2."

(b) In para 4 of the plaint : "The wife of defendant No.1 ran away with a servant, and that fact created a sensation in the village."

2. The following allegations are unnecessary for the decision of the issues involved in the case and are embarrassing to the defendant:

(a) In para 2 of the plaint : "The defendant is a man of loose character and has contracted heavy debts, the amount of his present liabilities being about one lac of rupees."

(b) In para 6 of the plaint: "The defendant No.1 has mortgaged most of his property."

The applicant prays the allegations specified above be ordered to be struck out from the plaint and the plaint amended accordingly.

No. 13—Application for Rejection of Plaint

1. This is a suit for setting aside a decree on the ground that it was obtained by fraud.

2. In para 2 of the plaint the plaintiff has simply stated that the defendant has obtained the decree by fraud and no particulars of the alleged fraud have been given as required by O.6, R.4. C.P.C.

The defendant prays that the allegation of fraud in para 2 of the plaint be struck out and that as the plaint will not, without that allegation, disclose any cause of action, it be rejected.

No. 14—Application for Amendment of Plaint (O.6, R.17)

1. The plaintiff is owner of the house in suit.

2. The plaintiff has brought this suit for possession of the said house on an allegation of the defendant's tenancy.

3. The defendant has denied his tenancy.

4. In the event of the issue of tenancy being decided against the plaintiff the suit is liable to be dismissed and the plaintiff will have to bring another suit on the ground of his title.

The plaintiff prays that he may be allowed to amend the plaint so as to make an alternative claim on the basis of his title as owner of the house. He is prepared to pay the necessary additional court-fee. The exact amendments which will be made in the plaint after leave is granted are set out in the annexure to this application.

No. 15—Another Application for Amendment

1. The plaintiff brought this suit for the price of certain trees cut away by the defendant from grove No.512.

2. The defendant denies plaintiff's ownership of the said grove, and the real question in controversy between the parties is, therefore, the rights of ownership of the said grove.

3. It is necessary for the final determination of this question and to avoid multiplicity of suits to have the plaint amended.

The applicant pray that he may be allowed to amend the plaint so as to add the following relief as relief (a), and renumbering reliefs (a) and (b) as (b) and (c).

"(a) A declaration that he is the owner of the grove described at the foot of the plaint.

No. 16—Application for Particulars (by defendant)

The plaintiff has not given in his plaint particulars of the following allegations and the applicant prays that he be ordered to give the necessary particulars specified below against each such allegation:

Para of the Plaint	*Allegation*	*Particulars required*
5.	Publication of the alleged libel.	When, where, to whom, how and before whom, the publication was made.
6.	The plaintiff lost his credit and thereby suffered a damage of Rs.20,000.	How did the plaintiff lose his credit and with whom. Particulars of the amount of damages claimed.

No. 17—Application for Particulars (by plaintiff)

The defendant has made certain allegations in his written statement filed on the.....,but without giving any particulars; and the plaintiff prays that he be ordered to deliver particulars as follows :

(1) *As to paragraph 8*, of the alleged payment of Rs.800 stating whether it was in one lump sum or instalments, and, when, where, by whom, and to whom was the payment made.

(2) *As to paragraph 10*, of the alleged agreement, stating whether oral or in writing, if in writing identifying the document, if oral with whom, when and where made.

No. 18—Application under O.9, R.4 or 9, *(h)*

1. One day prior to the date of hearing in the above case, the applicant was suddenly attacked by cholera and remained ill and unable to attend the court on the date fixed.

2. The applicant prays that the order of dismissal of the suit, dated January 4, 1996, be set aside.

No. 19—Application under O.9, R.13, *(i)*

1. That the applicant was one of the defendants in the above case and an *ex parte* decree has been passed against him on January 21, 1996.

2. That he was prevented by the reasons disclosed in the annexed affidavit, which he claims were sufficient, from appearing when the suit was called on for hearing.

The applicant prays that *ex parte* decree passed against him on January 21, 1996 be set aside.

Affidavit in support of the above application

1. I make oath and say that I had to join a marriage ceremony of my sister's son on January 22, 1996, at Jabalpur, and therefore I left my village on January 18, 1996 and returned from it on January 30, 1996.

(h) and *(i)*. An affidavit should generally be filed in support of this application. If an application, under O.9, R.13 is made more than 30 days after decree, the date of applicant's knowledge of the decree must be alleged in the application, otherwise the court has no jurisdiction to entertain it (*Karam Singh* v. *Barkat Ram*, 109 IC 82).

2. I make oath and say that, on January 16, 1996, I had given my papers to Sri Chaman Lal, Advocate, and had instructed him to file the *Vakalatnama* and written statement on my behalf on January 21, 1996, the date fixed for issues.

3. I am informed by Sri Chaman Lal, Advocate, and I verily believe it to be true, that, on January 21, 1996, when the case was called on, Sri Chaman Lal was engaged in a Sessions case, before the Additional Judge at Kanpur.

4. I am informed by Sri Chaman Lal, and, verily believe it to be true, that when Sri Chaman Lal came to the court a few minutes later, he found the case had been decreed *ex parte*.

No. 20—The like, on Another Ground

1. That the applicant was the defendant in above case, and an *ex parte* decree has been passed against him on November 30, 1995.

2. That the summons for final hearing issued against the applicant was not duly served upon him.

[If the application is made more than 30 days after the decree add-

3. That the applicant came to know of the said decree on March 10, 1996, (*this date should be one within 30 days next before the application*)].

The applicant prays that the *ex parte* decree be set aside.

Affidavit

1. I make oath and say that no summons was served on me in this case.

2. I make oath and say that I did not know of the institution of the suit or of the passing of the decree until March 10, 1996.

3. I make oath and say that it was on March 10, 1996, that I learnt for the first time on receipt of a notice of execution under O.21, R.22, that a decree had been passed against me.

If the decree is of a Small Cause Court, the applicant should deposit the decretal amount or security for it as required by section 17, Provincial Small Cause Court Act, at the time of making the application. It will be sufficient if the deposit is made within limitation (*Narain* v. *Rudan*, 5 Luck 294; *Qabul Singh* v. *Jai Prakash*, A 1939 503; *Sri Nivas* v. *Lala Durga Prasad*, A 1947 All 125).

No. 21—Application under O. 11, R. 1, for Leave to Deliver Interrogatories *(j)*

The plaintiff prays for leave to deliver the interrogatories annexed herewith for the examination of Ramchandra, defendant No.1, and Sham Kishan defendant No.2.

(*Or*, The plaintiff prays that the interrogatories annexed herewith be delivered to Ramchandra, defendant No.1, and Sham Kishan, defendant No.2, respectively, for being answered within 10 days of the receipt thereof).

No. 22—Application under O. 11, R. 12, for Discovery of Documents *(k)*

1. One of the questions at issue between the parties in this case is whether the plaintiff purchased the grain on his own account or on behalf of the defendant.

(j) The language of O.11, R.2, shows that a party should obtain permission from the court and should then himself deliver the interrogatories to the opposite party, and that the order of the court to answer interrogatories should be made only when the party interrogated neglects to answer the interrogatories or answers them insufficiently. But as direct service of notice is not in vogue in the *mufassil*, the practice is to file interrogatories in court with an application and then to leave the court to serve them. The same is the practice in the case of notices to admit facts and documents and to grant inspections. There is no express rule in the Code under which this assistance of the court to serve such interrogatories or notice is sought, but in practice the courts help them, though they should encourage the parties to serve their notices, etc., directly on the pleaders for the opposite parties. If a party is ordered to answer interrogatories he is not bound to answer personally in the absence of a specific direction to that effect and the affidavit may, therefore, be sworn by a recognised agent who knows the facts (*K.C.Majumdar* v. *Suraj Singh*, 193 IC 707, A 1941 Nag 205). The court cannot take *suo motu* action to strike off the defence of the defendant on its failure to comply with the order of the court to answer interrogatories or for discovery or for inspection of the documents, application by the opposite party for the purpose is necessary (*State of Punjab* v. *Jayter Singh*, 1995 AIHC 2464 (P & H).

(k) This is a very useful process, full advantage of which is not taken in the *mufassil*. A party can at once know the cards in the hands of his adversary and can then call upon him to grant inspection or to produce the documents if they are of help to him in advancing his own case or in damaging that of his adversary. The right is very wide and is not limited only to documents which will be relevant at the trial (*Nathulal* v. *Shantilal*, 1961 MPLJ Notes 237) and the other party is bound to disclose all documents in his affidavit (*United Bank of India* v. *Nederlandasche*

2. Another question at issue is whether the plaintiff paid any money to any body on account of loss on the *khatti* transactions on behalf of the defendant.

3. It is necessary for fair disposal of the case and to save costs to have a discovery of documents relating to these matters.

The defendant prays that an order may be made directing the plaintiff to make discovery on oath of the documents which are, or have been in his possession or power, relating to the questions mentioned in paras 1 and 2 of this application.

No.23—Application for an Order for Inspection under O. 11, R. 18 (1) *(l)*

1. The plaintiff applicant gave a notice, through his pleader, the defendant to produce for the applicant's inspection his *rokar and khata bahis* for 2034, 2035 and 2036 *Samvat*, and the notice was served on the defendant's pleader on October 20, 1995.

2. The defendant or his pleader has not sent any notice in reply fixing time and place for the inspection, though 10 days have expired since the service of the applicant's notice (*or*, the defendant has sent a notice to plaintiff's refusing to grant the required inspection).

Standard Bank, A 1962 Cal 325 DB). The Calcutta High Court insisted that no relevant document should be omitted from the affidavit of discovery and full description of each document must be given so that the order of production and inspection if made can be enforced, even though he may object to their production when required to produce them (*Gobinda* v. *Magneram*, A 1940 Cal 331, 190 IC 50). An application for discovery should precede an application for production (*Ghulam Mohiuddin* v *State*, A 1961 J & K 20).

(l) The rules provide that an attempt to get inspection should at first be privately made by serving a notice under Rule 15, on the other party, and, if this fails, an application can then be made to the court. To such application, acknowledgment of service of notice on the opposite party and his reply, if any, should be annexed and the application had better be supported by an affidavit (*Dhapi* v. *Ram Prasad*, 14 C 768). But this procedure is applicable to inspection of documents which are referred to in the pleadings or particulars or affidavits of the other party. If inspection is required of documents which are not so referred to, no previous attempt to obtain private inspection is necessary, nor can such private inspection be demanded, but an application should be made directly to the court for an order for inspection. The applicant will have to show by an affidavit, to be annexed to such application, that these documents are in the possession of the

3. The said inspection is necessary for the fair disposal of the case as the plaintiff cannot be prepared to meet the defendant's evidence at the trial without first getting a thorough acquaintance with the account-books on which the defendant will rely.

The plaintiff, therefore, prays for an order for the inspection of the said *bahis*.

No. 24—Application for an Order for Inspection under O.11, R.18 (2)

For the reasons given in the annexed affidavit, the plaintiff prays for an order for inspection of the documents referred to in para 1 of the said affidavit.

Affidavit

1. I make oath and say that the following documents are in possession of the defendant Raja Ram.

Rokar bahi for 1995.

Nakal bahi for 1995.

Khata bahi for 1995.

2. I make oath and say that I have received legal advice, which I believe to be true, that I am legally entitled to inspect the said documents.

3. I make oath and say that the transactions in dispute are entered in the said documents, and that it is necessary for the saving of costs and for a fair disposal of the case that inspection of the same should be granted to me.

No. 25—Application for Summoning a Record O.13, R.10 *(m)*

For reasons mentioned in the annexed affidavit, the applicant prays that the following records be sent for and inspected :

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other party, that the applicant is legally entitled to their inspection, and that the inspection is necessary for the fair disposal of the suit or for saving costs [O. 11, R. 18(2)].

(m) The affidavit supporting the application should clearly specify (i) how the record is material, and (ii) that a certified copy cannot serve the purpose, or (iii) that copies cannot be obtained without unreasonable delay or expense. It is not sufficient merely to state that the record is material or necessary for the ends of justice. The usual practice is to insist on production of certified copies of those

(1) Record of suit No.198 of 1958 *Ram Chandra* v. *Mohd. Ali*, decreed by the Civil Judge, Etawah, on December 20, 1958.

(2) * * * * * *

(3) * * * * * *

Affidavit

1. I make oath and say that I am the plaintiff in the above suit.

2. I make oath and say that production of the original record of suit No.198 of 1958 mentioned in the accompanying application is material as it contains a promissory note and several written receipts by the defendant, and the said promissory note and receipt will be required for comparison of defendant's handwriting, and, as the said papers were filed by other persons, they cannot be returned to the plaintiff.

3. I make oath and say that the plaintiff has filed certified copies of plaint and written statement from record of suit No.124 of 1953 mentioned in the accompanying application and that the defendant has not admitted the said papers.

4. I make oath and say that the said papers referred to in para 3 of this affidavit are relevant to the issue No.2 in this case, and the production of the original record is necessary to prove them.

5. I make oath and say that the record of suit No.965 of 1951 contains a long account extending over 290 pages filed by the defendant's father, and that I want to tender the same as my evidence on issue No.3 in this case.

6. I make oath and say that on my application for a copy of the said account mentioned in para 5, I have been ordered to deposit Rs.825 as copying charges, and I have been informed by the Head Copyist that it will take at least 20 days to prepare the copy, and the copy cannot, therefore, be ready before November 14, 1995, the date fixed for trial of this case.

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papers, the originals of which it is necessary to prove, before the originals are sent for. The original is sent for only if the other party does not admit the copy or there are any special reasons for production of the original.

No. 26—Certificate of Decree-Holder under O.21, R. 2 *(n)*

1. Ramlal, holder of the decree in the suit described above, hereby certify that the whole of my said decree has been satisfied by the judgment-debtor :

(1) paying Rs.200 to me in cash.

(2) giving me a cow for Rs.6000.

No. 27—Application under O. 21, R. 2(2)

1. The applicant is the judgement-debtor to decree No.502 of 1991 passed by this court.

2. On January 4, 1992, the applicant paid to the decree-holder, out of court, a sum of Rs.200 in part payment of the said decree.

The applicant prays that, after the usual notice to the decree-holder, the said payment be recorded.

(n) No court-fee is required on the certificate but the decree-holder should not make any prayer. It is not necessary that cash payment should have been made but a decree can be adjusted by any lawful agreement between the parties (*Satyabadi* v. *Mani Sahu*, 165 IC 940, A 1936 Pat 619; *Radha Krishna* v. *Mt. Bechni Devi*, A 1940 Pat 56). It is not necessary to specify the particulars of satisfaction, though the decree-holder may specify if he likes. When the decree-holder himself certifies adjustment, the court need not go into the question but must record the satisfacton (*Champi Bai* v. *Pearey Lal*, 1937 ALJ 1305, A 1938 All 116, 174 IC 254, 10 RA 555), and any error on the part of the court in refusing or neglecting to record the adjustment cannot prejudice the rights of the parties (*Swaminath* v. *Samba*, 174 IC 18, A 1937 Rang 507). But an adjustment under O. 21, R. 2 must be of an executable decree, and not, for instance of a preliminary decree for sale, adjustment of which would fall within the purview of O. 23, R.1 or 3, (*Ram Nivas* v. *Ram Dayal*, 1938 ALJ 1231, A 1939 All 174, 1931 AWR 859, 180 IC 244; *Raja Ram* v. *Allahabad Bank Ltd.*, A 1939 Lah 79). The application can be made to the court to which the decree has been transferred for execution (*Jagdish* v. *Saw Eo*, A 1940 Rang 236, 190 IC 680). There is no limitation for decree-holder to certify adjustment. Certification by a decree-holder is not an application and therefore it can be done at any time (*Raja Sri Prakash Singh* v. *Allahabad Bank Ltd.*, A 1929 PC 19; see also *Bhudeb Chandra Roy* v. *Satya Narain Trigunait*, A 1951 Pat 593). The Allahabad High Court has held that such a certificate cannot be filed by the decree-holder in execution proceedings after a controversy has arisen consequent on the judgment debtor's objection (*Joti Prasad* v. *Sri Chand*, A 1928 All 629 FB; *Ram Prasad* v. *Jadunandan*, A 1934 All 534). But the period of limitation for an application by the judgment-debtor is 30 days from the time payment or adjustment is made, vide Article 125 Limitation Act, 1963.

No. 28—Petition of Claim under O. 21, R. 58 *(o)*

The above-named claimant begs to state as follows :

1. The opposite party No.1 has attached the following (among other) property in execution of his decree No.128 of 1993, under execution in this court against opposite party No.2.

2. The said property belongs to the claimant.

3. The said property has been attached from the claimant's possession for, it was, at the time of attachment, in possession of the opposite party No.2 as hirer (*or*, tenant of the same on behalf of the claimant).

The claimant prays that the said property be released from attachment.

No. 29—Application under O. 21 R. 89, *(p)*

1. The applicant is the judgment-debtor and owner of the property

(o) In a claim under this Rule the claimant must allege and prove that he had an interest in the attached property on the date of the attachment (*Saceda Begum* v. *Sabir Ali*, A 1962 All 9). The judgment-debtor ought to be impleaded as proforma party to the objection (*Thomman Mathai* v. *Ithendan Konjukochu*, A 1963 Ker 236), for if he is not impleaded the adjudication will not affect his rights. As a claim or objection under this rule can be summarily dismissed on the ground of delay, the cause of delay should be explained in the petition if it is filed with any appreciable delay. If the judgment-debtor claims the property in a capacity different from that in which a decree has been passed against him, it has been held in some decisions that he must come under section 47 (*Shah Naim* v. *Girdhar Lal*, 100 IC 464, 4 OWN 102; *Rangan* v. *Lakshmi*, 14 MLJ 137; *Karimunissa* v. *Alfuddin*, A 1960 MP 76; *Nabi Bakhs* v. *Udho Ram*, 28 PLR 121, 100 IC 786; *Chettiar* v *Teo*, 104 IC 121, 6 Bur LJ 107, 5 R 393), while most other decisions have taken a contrary view (*Fateh Chand* v. *Mahant Ganeshgir*, A 1930 Nag 293; *Somwar Gir* v. *Goswami Mayanand*, A 1928 All 392 DB; *Barari Co-operative Bank* v. *Singheshwar*, A 1936 Pat 256; *Abdurabiman* v. *Kunhammed*, 10 MLJ 85; *P.Mammad Haji* v. *Ibran Haji*, A 1916 Mad 789 (1) DB; *Kartik* v. *Ashutosh*, 39 C 298 FB, 12 IC 163, 14 CLJ 425, 16 CWN 26). If sale has been held no claim under this rule can now be entertained after the 1976 Amendment. A regular suit will then lie. An order refusing to entertain an objection under this rule is not appealable, while an order of adjudication on merits is appealable like a decree (*B.M. Aishabi* v. *Yakub*, A 1984 Ker 237). An application by a simple mortgagee for having his charge notified is one under rule 58 (*Debi Das* v. *Rup Chand*, 102 IC 792, 25 ALJ 609; *Jagannadham* v. *Padayya*, 134 IC 809, 1931 MWN 902, A 1931 Mad 782, 61 MLJ 884).

(p) The application must show the right under which the applicant claims to be entitled to make the application under this rule. A lessee, subject to whose lease

which has been sold by auction in the above execution case (*or*, the applicant is a mortgagee of the property sold in this case on behalf of the judgment debtor).

2. The said sale took place on November 20, 1995.

3. The applicant begs to deposit.

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the property is sold, can apply (*Bodapati* v. *Bodapati*, 51 M 777, A 1928 Mad 1191, 109 IC 168 DB).An interim receiver of judgment-debtor's estate can also apply (*Ankayya* v. *Official Receiver, Kistna*, 171 IC 220, A 1937 Mad 589). Both the decree-holder and the purchaser should be impleaded as parties to this application though this is not absolutely necessary (*Jit Singh* v. *Daulatia*, 124 IC 32, A 1930 All 167 and also *see* next note). A purchaser after attachment can apply (*Jamna Das* v. *Jalaluddin*, A 1936 Lah 561), but not after auction sale (*Baghunath* v. *Hari Ram*, A 1940 Sindh 181). Even a person with whom judgment debtor has penditng attachment, made a contract of sale can apply (*Mundrika* v. *Nand Lal*, A 1941 Pat 204) and so also such judgment debtor (on the ground that he is owner of the property until the auction sale is confirmed) joining in the application with the transferee (*Fatima-ul-Hasna* v. *Baldeo Sahai*, A 1926 All 204(2) FB). When share of one member of a Joint Hindu Family is sold, others have a right to apply (*Ramachandra* v. *Srinivas*, 51 M 246, A 1928 Mad 399, 109 IC 297).

The deposit required by the rule is a condition precedent to the making of an application to set aside a sale. The money referred to in the rule should be deposited along with the application or, in any case, before the period of limitation (30 days from the sale) which cannot be extended by court (*Maung Lal* v. *Kyow*, A 1933 Rang 8; *Nasiruddin* v. *Hakim Md.*, 161 IC 26, A 1936 Pat 119; *Munni Lal* v. *Sona*, A 1982 All 29; *P.K. Unni* v. *Nirmala Industries*, A 1990 SC 993), but if the deposit was short owing to miscalculation of office, the applicant should get another opportunity to make it good (*Gopinath* v. *Hiraman*, A 1933 Pat 515, 146 IC 971; *Rangini* v. *Hiralal*, 33 CWN 1170; *Suresh* v. *Janendra*, 68 CLJ 273), but there can be no condonation if the shortage was due to applicant's own miscalculation (*Kalidasa* v. *Dodda Suddhra*, A 1947 Mad 165, (1946) 2 MLJ 371; *Amritlal* v. *Sadashiva*, A 1944 Bom 233). The Calcutta High Court has allowed the deposit of only 5% in court when the decretal amount was said to have been satisfied out of court. In such cases, it has been further held that alleged satisfaction out of court can be challenged only by the decree-holder and not by the purchaser (*Mahendra* v. *Parasmani*, A 1938 Cal 252, 68 CWJ 264, 11 RC 232; *National Insurance Co.* v. *Ezekiel*, 41 CWN 998). In a case where the decree itself had been set aside in appeal, the judgment-debtor was permitted to apply for setting aside the sale on deposit of 5 per cent only, as no money remained due to the decree-holder (*Vithola* v. *Dhanaj*, A 1948 Nag 126).

In some decisions it has been held that a formal application under this rule is not necessary and a *challan* or tender of the amount required is sufficient (*Mahboob* v. *Majid*, A 1939 All 241; *Durga Prasad* v. *Ram Lakhan*, 1995 LCD 209, 1995 (I) ARC

(a) For the purchaser, opposite party No.2—Rs. 1050.

(b) For the decree-holder, opposite party No.1, Rs.30,900, the amount entered in the sale proclamation.

The applicant prays that the said sale be set aside.

No. 30—Application under O. 21, R. 90 *(q)*
(On the Ground of Irregularity)

1. The applicant was, on the date of sale, owner of the property specified at the foot of this application and sold in the above execution case.

2. The property was worth Rs.10,000 but it has been sold for Rs.2,000.

3. The low bid was due to irregularities in publishing and conducting the sale.

Particulars of irregularities

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26 (All); *Jyotish Chandra* v. *Surendra Nath*, A 1939 Cal 153), but the rule itself requires a formal application (*Dhari* v. *Gauranga*, A 1940 Pat 87). If a part of the decree is satisfied out of court, it is sufficient to deposit the balance only (*Muthin Venkatapathad* v. *Kuppur*, A 1940 Mad 42; contra *Ado Das* v. *Bansi Das*, A 1940 Pat 612). But unless the decree has been satisfied out of court or by deposit in court, even decree-holder's consent will not satisfy the requirement of the rule (*Ramchandra Rao* v. *Maddi Kutumb Rao*, A 1967 SC 1637; *Tribhuwan Das* v. *Rati Lal*, A 1968 SC 372). Notice to auction-purchaser is sufficient and he need not be made a party (*Vithola* v. *Mahadeo*, A 1948 Nag 303).

There should be a prayer for setting aside the sale, though omission of such prayer has been held not to invalidate the application (*Banarsidas* v. *Ramchandra*, A 1933 Lah 210). A sale cannot be set aside in part under this rule (*Laxmansingh* v. *Laxminarayan*, A 1948 Nag 127).

(q) Both the decree-holder and the purchaser should be impleaded (*Ali Gauhar* v. *Bansidhar*, 15 A 407; *Karamat Khan* v. *Mir Ali*, 11 AWN 121; *S.V.Kanakraj* v. *Vijaya Bank, Mangalore*, A 1987 Kant 252) but even if either of them is not impleaded it is not a serious defect as all that it is required by law is a *notice* to both and not that they should be shown as parties to the application (*Kirpa* v. *Nandlal*, 107 IC 494; *Ganesh Bob* v. *Vithal Vaman*, 37 B 387; *Raj Chandra* v. *Kali Kanto*, A 1923 Cal 394, 82 IC 776 DB; *Sain Das* v. *Punjab National Bank*, A 1928 Lah 418, *Dip Chand* v. *Sheo Prasad*, 27 ALJ 769, A 1929 All 593 DB; contra, *Ajuddin* v. *Khoda*, 50 IC 5; *Sumitra* v. *Damrilal*, 62 IC 61 Pat). But where an application was refused and an appeal was preferred without impleading the purchaser, court refused to implead the purchaser after the expiry of the period for appeal and dismissed the

(i) The sale proclamation was not affixed to any conspicuous part of the property sold.

(ii) The sale was not proclaimed by beat of drum on, or adjacent to, the property or at any other place.

(iii) The amount of the encumbrance of Ramlal was Rs.1,000 but it was wrongly mentioned in the proclamation as Rs.4,000.

(iv) The time fixed for sale in the proclamation was between 12 and 4 in the day but the Amin conducted the sale at 6 p.m.

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appeal (*Ramlal* v. *Kidar Nath*, 163 IC 698, A 1936 Lah 478). The applicant must show his right to apply. Any person whose interests are affected by the sale can apply, e.g., a judgment-debtor or an attaching creditor (*Raja Ram Raja Saheb* v. *Bhawani Shanker Joshi*, 1938 MWN 1225, 1938 (2) MLJ 940). It is not necessary that he should be the owner of the property. Where a decree provided for sale of item 1, and sale of item 2 only if proceeds of sale of item 1 proved insufficient, it was held that the owner of item 2 could apply (*Narayan* v. *Pappayi*, 103 IC 499 M). The auction-purchaser himself can also apply (*Subramaniam* v. *Chettyar*, 5 R 516, 105 IC 465; *Sangidas* v. *Chahadu*, 168 IC 970, A 1937 Nag 140; *Penmatsa Jankiamma* v. *Atchanta*, A 1985 AP 234). A purchaser after sale cannot apply, but judgment debtor can still apply (*Shankar Prasad* v. *Md. Taqi*, 1936 OWN 344, 161 IC 424; *Kiranbala* v. *Suniti*, 173 IC 693, A 1939 Cal 146). A judgment-debtor can apply in spite of his having been adjudged insolvent (*Manthiri* v. *Arunachala*, A 1940 Mad 569), but a monthly tenant cannot (*Brij Gopal Bhatia* v. *Union of India*, A 1963 All 445).

A third person who claims the property but does not perfer the claim under rule 58 cannot apply under rule 90 (*Jagat Narayan* v. *Khator Singh*, 195 IC 173, A 1941 PC 45; *Cherruppan* v. *Shankare*, A 1941 Mad 680). Persons entitled to rateable distribution under section 73 can apply but not all creditors proving insolvency (*Official Receiver* v. *A.L.R.Veorappa*, A 1943 Mad 199).

A decree-holder attaching property after sale cannot apply (*In re Govindasami, In re*, 184 IC 166, A 1939 Mad 501). Inclusion of property not included in the decree is also a fraud in publishing sale and the remedy is by application and not by a suit (*Piare Lal* v. *Kishan Lal*, 110 IC 876, A 1928 All 704; *Baru* v. *Amir Singh*, 1939 ALJ 1015, 1939 AWR 867, A 1940 All 78). A false representation which dissuaded bidders has been held to amount to fraud (*Jagdish* v. *Kunja*, 171 IC 822, A 1937 Cal 273).

The irregularity or fraud must be specifically alleged with particulars and a vague and general allegation will not be sufficient. The applicant must allege the injury he has suffered and must also allege a direct relation between the alleged irregularity or fraud and the alleged injury. This latter is absolutely necessary, as irregularity and injury alone are not sufficient unless it is shown that injury resulted from the irregularity (*Harindranath* v. *Bholanath*, 1937 AWR 262, 170 IC 559,

Particulars of their consequences

1. As a result of irregularities Nos.(i) and (ii) Abdur Rahman, Ramadhar, Lotan Singh and other persons whose names are unknown to the applicant, who would have bid at the sale, did not receive any information of the sale.

2. As a result of irregularity No.(iii) those who were present did not bid so high as they would have, had the amount of the encumbrance not been wrongly overstated.

3. As a result of the irregularity No.(iv), Ram Prasad, Maula Baksh, and Chatar Lal who had gone to the spot to purchase the property left the place at 4 p.m., and very few purchasers were present when the sale was held.

The applicant prays that the said sale be set aside.

No. 31—The like on Ground of Fraud

1. and 2. *Same as in previous precedent.*

3. The low bid was due to the fraud of the decree-holder.

Particulars of Fraud

On the morning of the date fixed for sale (January 14, 1996) the decree-holder told Ramjilal, Ram Pratap, Chatar Singh and Lalmandas who were intending purchasers, that the sale had been postponed to

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A 1937 All 407; *Sri Raja Bommadevma Najanna Naidu* v. *Sri Rajah B.V. Naidu*, A 1945 PC 178; *T. Venkataparthasarathi* v. *T.Ramchandra Rao*, A 1984 AP 398). Sale can be set aside on the ground of material irregularity and not on mere irregularity (*Desh Bandhu Gupta* v. *N.L.Anand*, (1994) ISCC 131). If a sale is intended to be set aside, not on the ground of irregularity or fraud in publishing or conducting the sale but on ground of an illegality, e.g., a sale made after an order of postponement by the court or sale of ancestral property as non-ancestral or *vice versa*, an application must be made under section 47 and not under O. 21, R. 90. So also, if the ground is fraud, otherwise than in conducting or publishing (*Bhan Kumar* v. *Lachmi Kant*, A 1941 Pat 566).

Where an application has been made for setting aside a sale under O. 21, R. 90 and is pending, it is not competent to the judgment-debtor to make or present another application under O. 21, R. 89 (*Gourdhandas Kanhayia Lal* v. *Ranchhoddas Bikhari Lal*, A 1949 Bom 271; *Shiv Prasad* v. *Durga Prasad*, A 1975 SC 957). Some High Court have added additional provisions to the Rule, which may be seen with advantage.

another date, and this prevented them from going to the place of sale and bidding at the sale. The said statement was false and the decree-holder knew that it was false, and he made it fraudulently. The result was that only 4 persons attended the sale, and the decree-holder purchased the property at a low price.

No. 32—Application under O. 21, R. 91 *(r)*

1. The applicant was purchaser of the property specified at the foot of this application at an auction sale held by the Collector of Meerut on May 20, 1996, in execution of decree No.256 of 1994 of this court.

2. The judgment-debtor Abdul Ali had by a sale-deed dated _____, sold the said property to his wife in lieu of dower debt and had therefore no saleable interest in it on the date of the said sale.

The applicant prays that the said sale be set aside.

No. 33—Application under O. 21, R. 97 *(s)*

1. The applicant is the decree-holder in the above-mentioned case (*or*, the applicant is an auction-purchaser of the house mentioned below in execution of the decree in the above case).

(r) This application can be made only when the judgment debtor has no saleable interest at all. If he has some interest, though very small the sale cannot be set aside, nor is a suit for compensation for loss of the property maintainable, but if a part of the property is lost, the auction-purchaser can sue the decree holder for refund of the proportionate price within 3 years under Articles 24 and 47. The purchaser will, on sale being set aside, be entitled to refund of his purchase money under Rule 94. The application should be made within 30 days of the sale (Article 127). It is important to note that this is the only remedy of the auction-purchaser. If he does not make an application under Rule 91 and the sale is confirmed he cannot sue the decree-holder for refund of the purchase money even if he is dispossessed by the real owner (*Idia* v. *Lachmi Narain*, 1936 AWR 982, 1936 ALJ 1196; *Amal Chandra* v. *Ram Swarup*, 184 IC 453, A 1939 Cal 310; *Abinash Ch.* v. *Motilal Mukerji*, A 1961 Cal 172; *Tadavalli* v. *Maddi Patta*, A 1965 AP 239; contra *Thakurlal* v. *Nathulal* A 1964 Raj 140).

(s) An application under O.21, R.97 or under section 151 is not maintainable for challenging the decree; a separate suit would be necessary for the purpose (*Mohfooz Ali* v. *A.D.J.*, 1985 ALJ 281, following, *Usha Jain* v. *Manmohan*, A 1980 MP 146). A third party claimant cannot insist on an investigation under O.21, R. 97 even before his dispossession; he may either file a separate suit for injunction or wait for his dispossession and then apply under O.21. R. 99 (*Usha Jain*, supra;

2. The applicant took out a warrant for delivery of possession of the said house.

3. On January 14, 1996, the Amin went to execute the said warrant, but the opposite party No.1 (the judgment-debtor) and also opposite party No.2, at the instigation of the opposite party No.1 obstructed the said Amin in delivering, and the applicant in obtaining possession of the said house.

The applicant prays for an order under O.21, R.97, directing the applicant to be put in possession.

No. 34—Application under O. 21, R. 99

1. The applicant is owner of the house described below and was, on the date hereinafter mentioned, in possession of the same on his own account (*or*, one Ramkishen is the owner of the house and the plaintiff was, on the date hereinafter mentioned, in possession of the same as tenant on behalf of the said Ramkishen).

2. The opposite party obtained a decree No.300 of 1990, from this court for delivery of possession of the said house, (*or*, the opposite party purchased the said house in execution of decree No.300 of 1990 of this court).

3. The applicant was no party to the said decree.

4. On January 14, 1996, the opposite party, in execution of a warrant of delivery of possession obtained from this court, dispossessed the applicant.

The applicant prays that he may be put into possession of the said house.

Madanlal v. *Hansraj*, A 1985 Raj 19; *K.A.Prabakaran* v. *Kuttien*, A 1985 Ker 204; *Mahfooz Ali*, supra; *Harijan Wood Workers Cooperative Society* v. *Maya Wati*, A 1985 P&H 181; contra *Ramchandra* v. *Manmal*, A 1983 Sikkim 1). Persons in possession under permission from licensee or tenant whose licence or tenancy stands terminated are also bound by the decree for possession passed against licensee or tenant (*Lucy George* v. *Nagpur R.C.Diocesan Corporation*, A 1986 MP 7).

No. 35—Application for Substituting the Heirs of a Deceased Plaintiff (O.22, R.3) *(t)*

1. Ram Prasad, plaintiff in this civil suit has died on January 13, 1980.

2. The said Ram Prasad's right to sue in this suit survives, and the applicants being his sons are his legal representatives.

The applicants pray that the court may be pleased to substitute the names of the applicants as plaintiffs in place of the deceased Ram Prasad and to proceed with the suit.

No. 36—Application for Substituting Heirs of a Deceased Defendant (O.22, R.4)

1. Allauddin, one of the defendants in this suit, has died on June 3, 1995.

2. The right to sue in this suit does not survive against the surviving defendants.

(t) Such application should be accompanied by an affidavit. It should be made within 90 days from the date of death (Article 120), but if a plaintiff brings on record all the heirs then known to him and leaves out one of whom he had no knowledge, his application to implead the latter can be made within 3 years under Article 181 [*Abdul Baki* v. *Bansilal*, A 1945 Nag 53 (now Article 137)]. If the legal representatives of a deceased plaintiff or defendant are already on the record no formal application within the fixed period need be made but plaintiff may make a statement to the court at any stage of the suit and get the fact noted on the record (*Achuthan* v. *Manavikra-Man*, 51 M 347, 109 IC 372, 54 MLJ 675; *Punyabrata* v. *Monmolia*, A 1934 Pat 427; *Sankru* v. *Bhoju*, 165 IC 612, A 1936 Pat 548; contra *Santoolal* v *Champalal*, 150 IC 915, A 1934 Nag 165; *Bhudeb* v. *Bhikshanker*, 196 IC 837; *Khodadad* v. *Bai Jerbai*, 39 BL R 1156; *P.P.K. Gopalan Nambiar* v. *P.P.K. Balakrishnan Nambiar*, A 1995 SC 1852). An application is necessary for bringing legal representative on record (*Union of India* v. *Ram Charan*, A 1964 SC 215). In the absence of fraud or collusion some heirs of a deceased appellant applying to be brought on record can represent the estate (*Dobai Mabico* v. *Krishna Chandra Patnaik*, A 1967 SC 49). But if appeal abates against one appellant court cannot pass decree in favour of all under O. 41, R. 4, nor in favour of remaining appellants if it results in two inconsistent decrees (*Sri Chand* v. *Jagdish Pal Krishan Chand*, A 1966 SC 1427; *Narain Prasad* v. *Naresh Chand*, ILR (1979) 1 Delhi 723). An order of substitution under O. 22 R. 5 does not operate as res-judicate in a title suit between rival claimants to succession (*Mohinder Kaur* v. *Piara Singh*, A 1981 P & H 130, FB).

3. The names and addresses of the legal representatives of the said Allauddin are given below :

The applicants pray that the court may be pleased to substitute the persons mentioned in para 3 above as defendant in place of Allauddin deceased and may proceed with the suit.

No. 37—Application to Set Aside an Abatement of Suit by Reason of Defendant's Death (O.22, R.9) *(u)*

1. Khuda Baksh, defendant in the above case died on January 16, 1996,and no heirs of the said Khuda Baksh having been brought on the record within the period prescribed by law, the suit abated on April 16, 1996.

2. The applicant was prevented by the sufficient cause disclosed in the annexed affidavit from applying for substitution and continuing the suit.

The applicant prays that the said abatement be set aside and the name of Maula Baksh be substituted for that of Khuda Baksh as defendant.

Affidavit

1. I make oath and say that I did not know of the death of Khuda Baksh defendant in this case until January 14, 1998.

2. I make oath and say that I learnt of the death of the said Khuda Baksh for the first time on January 14, 1998.

3. I make oath and say that Maula Baksh is the son and the only heir of the said Khuda Baksh.

No. 38—Application to set Aside Abatement of Suit by Reason of Plaintiff's Death (O. 22, R. 9)

1. Ram Lal, plaintiff in the above case and the deceased husband of the applicant, died on October 16, 1995, and no heirs having been brought on the record within the period prescribed by law, the suit abated on January 16, 1996.

(u) Such an application should be accompained by affidavit. *Bona fide* ignorance of death is sufficient cause for setting aside an abatement. But mere allegation of belated knowledge is not sufficient. Reasons for late knowlege must be stated (*Union of India* v. *Ramcharan*, A 1964 SC 215). Courts, however, take a liberal view in condoning delay (*Sital Prasad* v. *Union of India*, A 1985 SC 1). The suit abates automatically on expiry of the period fixed for substitution of heirs

2. The applicant was prevented by the sufficient cause disclosed in the annexed affidavit from continuing the suit.

The applicant prays that the said abatement of the suit be set aside and the name of the applicant be substituted for that of Ram Lal as plaintiff.

Affidavit

1. I make oath and say that I am the widow of Ramlal, plaintiff in the above mentioned case.

2. I make oath and say that, on March 14, 1996, my brother Indra Narayan, who manages my property, found papers of the said case amongst the papers of the said Ram Lal.

3. I make oath and say that, on the 4th day of March, 1996, the said Indra Narayan told me of the said case and then for the first time I came to learn of the said case.

4. I make oath and say that before the date mentioned in para 3 of the affidavit I was not aware of the above mentioned suit.

No. 39—Application under O. 23, R. 1, for Withdrawal of a Case with Liberty to bring a fresh suit *(v)*

1. There is a plea of misjoinder of defendants and causes of action in this suit and the suit must fail by reason of this formal defect.

(*Ala Bhai* v. *Bhure*, A 1937 Bom 401). Formal order of abatement is not necessary (*Chunnilal* v. *Amorichand*, A 1933 Lah 356). An application to have the abatement set aside must be made within 60 days of the abatement, i.e., from the date on which the abatement takes place under the law, and not from the date on which the order of abatement is recorded by the court (*Churya* v. *Rameshwar*, 24 ALJ 360; *Fazal Rahim* v. *Hussaina*, A 1939 Lah 572). If a party to a decree under O. 34, R. 4, dies before passing of the final decree. O. 22, R. 3 or 4 does not apply as there is no suit which can abate; the suit having culminated in a decree, an application for substitution of legal representatives in such cases can be made under O. 22, R.10 (*Eknath* v. *Hanmant Ram*, A 1947 Nag 75; *Daworali* v. *Boi Jodi*, A 1940 Bom 318, 192 IC 405; *Nazir Ahmmad* v. *T.Tamiyaddi*, A 1929 Cal 430, 57 C 285 DB; *Mt. Lakhpati* v. *Daulat Singh*, A 1927 Oudh 156, 2 Luck 464 DB; *Mt. Bholia* v. *Alidas Shankur*, A 1931 Pat 57; *Perumal Pillai* v. *Perumal Chetty*, A 1928 Mad 914 FB; *Allauddin* v. *Biran*, A 1949 Pat 259).

(v) Non-joinder of necessary party or bar of section 69, Partnerships Act are not formal defects as they go to the root of maintainability of the suit (*Khatuna* v. *Ramsevak*, A 1986 Ori 1).

2. The plaintiff prays that permission be granted to him to withdraw the claim in respect of house No.1 against defendant No.2, with liberty to bring a fresh suit in respect of the said house against the said defendant No.2.

No. 40—Application for having a Decree Passed in Accordance with an Alleged Compromise not Admitted by the Other Party (O.23, R.3) *(w)*

1. After the institution of this suit, on April 14, 1996, the claim was adjusted wholly by a compromise between the parties, which was in writing and signed by the parties.

2. The following were the terms of the said compromise: (i) That the plaintiff should withdraw his suit about house No.1, and the claim about house No.2 be decreed, (ii) that the defendant should pay Rs.200 on account of damages to the plaintiff within three months but if the defendant failed to pay the said amount within the said time, the plaintiff should get a decree for the whole amount claimed, viz., Rs.3,000, and (iii) that the parties should bear their own costs.

3. The plaintiff now refuses to file the said compromise in court.

(w) The compromise should be in writing and signed by the parties. Before recording a compromise the court is not only entitled but bound to examine it and determine whether it embodies a lawful agreement or compromise (*Syed Abdul Ali* v. *Mirza Viqar Ali Beg*, 1947 OWN 595, 23 Luck 77).

The word "lawful" in Order 23, Rule 3 means agreements which in their terms are not unlawful (*Puttulal* v. *Dhiraj Sumer*, A 1963 Raj 63) and includes agreements which are voidable at the option of one party. If the court is satisfied that the agreement was in fact made, it must record it. It is not open to the court to enter into an enquiry as to whether it was brought about by fraud, misrepresentation, coercion or undue unfluence (*Union of India* v. *Raghbir Saran*, A 1957 All 120; *Quadri Jahan Begum* v. *Fazal Ahmad*, A 1928 All 494 DB; *Hasan Yar Beg* v. *Radha Kishan*, A 1935 All 137; *Suraparaju* v. *Venkataratum*, A 1936 Mad 347; *Kuppu Swami* v. *Pavarnambal*, A 1950 Mad 728; *Western Electric Co.* v. *Kailash Chand*, A 1940 Bom 60; *Harbans Singh* v. *Bawa Singh*, A 1952 Cal 73; *Ram Asrey* v. *Rameshwar Prasad*, A 1961 All 529).

If any party denies having entered into the agreement, the court must enter into this question and give its finding (*Mst. Kalpa* v. *Sita Ram*, A 1955 All 187). The court has no power, except when a party is a minor, to inquire into the fairness or unfairness of the terms (*Surapparaju* v. *Venkatarathnam*, 161 IC 728, A 1936 Mad 347, 1936 MWN 199).

The defendant prays that the said compromise be recorded and a decree be passed in accordance therewith.

No. 41—Application for Security for Costs [O.25, R.1](x)

For the reasons disclosed in the annexed affidavit, the applicant prays that the plaintiff be ordered to furnish security for the payment of all costs incurred, and likely to be incurred, in the defence of this suit by the applicant.

Affidavit

1. I make oath and say that the plaintiff is resident of Pakistan.

2. I make oath and say that the plaintiff has no property in India, except some furniture in the house which he has rented for his temporary residence at Agra.

3. I make oath and say that the said furniture is worth about Rs.200, while the costs already incurred by the defendant amounts to Rs.470.

4. I make oath and say that the plaintiff's claim is frivolous and is without any merits.

5. I make oath and say that the suit has been filed at the instigation of Chandra Kishore and Lachmichand of Agra, simply to harass the defendant. The said persons are financing the plaintiff.

(x) Security for costs can be demanded (1) when the plaintiff or plaintiffs reside out of India and have no sufficient property in India other than the one in dispute. A party who leaves India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India for this purpose. Security cannot be demanded in all such cases but can be demanded only in exceptional cases, e.g., when the real plaintiff is some one else and he has brought the suit in the name of person who has no means, or when it is shown that such order is essential for the protection of the defendant (*Cellular Clothing Co.* v. *Sen Abdool & Co.*, ILR (1938) 1 Cal 688, 42 CWN 270). The court is entitled to look into the *prima facie* merits of the case before passing such an order, and no order will be passed if the plaintiff has a good *prima facie* case and the defendant has apparently no defence. If the suit appears to be frivolous and not to have been filed *bona fide*, e.g., when it is filed with the sole object of delaying another suit or execution proceeding, an order for security will be passed if the other conditions of the rule are fulfilled.

No. 42—Application for Appointment of a Guardian *ad litem* of a Minor Defendant (O.32, R.3) *(y)*

For the reasons disclosed in the annexed affidavit, the plaintiff prays that Bishan Lal, son of Ramlal, resident of 10, Civil Lines, or some other fit and proper person, be appointed as the guardian *ad litem* of Kishan Lal minor defendant in the case.

Affidavit

1. I make oath and say that Kishan Lal defendant is a minor, his age being about 10 years.

2. I make oath and say that the said Kishan Lal has no guardian appointed or declared by any authority.

3. I make oath and say that the father of the said Kishan Lal is the mortgagor under the mortgage which is the basis of this suit and is himself a defendant as such mortgagor, and his interest in the matter of controversy in this suit is, therefore, adverse to that of the said Kishan Lal.

4. I make oath and say that the said Kishan Lal has no other natural guardian.

5. I make oath and say that the said Kishan Lal lives in the care of his father.

(y) A court is bound to appoint a guardian for a minor defendant and the absence of such appointment nullifies the decree (*Baraik Ram* v. *Chowra*, A 1938 Pat 97, 173 IC 644, 19 PLT 259; *Tajuddin* v. *Khambatta*, A 1938 Lah 515, 40 PLR 857; *Talib Ali Shah* v. *Piarey Lal*, 1930 ALJ 938), and an application by the plaintiff is not absolutely necessary, though one is usuallly made; and becomes necessary, so as to inform the court about the proper person to be appointed as a guardian. An affidavit should be filed with such an application, in which the following points should be stated:

(1) That the defendant is a minor and his age, as that is required to determine whether the notice should or should not be issued to him;

(2) The name and address of any person appointed or declared by any authority to be the guardian of the minor;

(3) If there is no such person, a statement to that effect, and the names of natural guardians;

(4) If there is no natural guardian, a statement to that effect, and the name of the person with whom the minor actually lives;

(5) That the proposed guardian is a fit and proper person to act as guardian;

(6) That he has no interest in the matter in controversy in the suit adverse to that of the minor.

6. I make oath and say that Bishanlal is the elder brother of the said Kishan Lal and is a fit person to be appointed as the guardian of the said Kishan Lal.

7. I make oath and say that the said Bishanlal has no interest in the controversy in this suit adverse to that of the said Kishan Lal.

No. 43—Application to Sue as Indigent Person O. 33, R. 2 *(z)*

Draw up the plaint in the usual form, and add the following as the last paragraph before prayer for relief :

The plaintiff is not possessed of means sufficient to enable him to pay the court-fee prescribed by law for this suit (other than property exempt from attachment in execution of a decree and the subject matter of the suit) and therefore prays for permission to sue as an indigent person. The immovable and movable property owned and possessed by the applicant is specified in schedule A and B respectively at the foot of the plaint.

(z) A list of movable and immovable property owned by the applicant with estimated value should be annexed to the plaint. If it is not annexed but the inventory is given in the plaint itself, it has been held to be sufficient compliance (*Lachmi Narain* v. *Bahadur Lal*, A 1942 Oudh 239). There is no separate application as in appeal, but the plaint itself is the application. A company or its liquidator can sue as a pauper i.e., indigent person (*Unioin Bank of India* v. *Khader International Construction*, A 2001, SC 2277; *Kundan Sugar Mills* v. *India Sugar Syndicate*, A 1959 All 540 FB; *Mathew* v. *Kerala United Corporation Ltd.*, A 1961 Ker 180; *Nagpur Elec. L & P Co.* v. *Shreepathirao*, A 1958 SC 658, para 14, approving the view in *Perumal* v. *Tirumdarayapuram*, A 1918 Mad 362 45 IC 164 DB. On rejection of the application, the plaintiff may pay the court-fee and the suit will be deemed to have been instituted on the date the application for permission to sue as indigent person was made (*Bhushan* v. *Kanai Lal*, 41 CWN 537, 170 IC 758, A 1937 Cal 241; *Lalta* v. *Avadh N. Singh*, 184 IC 443, 1939 AWR 222, 1939 OWN 920, A 1940 Oudh 59), but it has been held in Nagpur that if the plaintiff had not acted in good faith and had filed the application simply to gain time to arrange for court-free, the advantage of section 149 cannot be allowed to him (*Seth Ghasi Ram* v. *Mt. Acharaj Kuar*, 166 IC 796, A 1937 Nag 36). The Allahabad High Court has held that during the pendency of the pauper application or at the time of its rejection, court can grant time to pay court-fee. If no such order is passed, pauper application is, on rejection completely disposed of and court-fee cannot be paid so as to turn that application into a suit. Court cannot grant time after rejecting the application (*Devendra Kumar* v. *Raghuraj Bharti*, A 1955 All 154).

No. 44—Application for a Final Decree for Foreclosure *(aa)*

1. A preliminary decree for foreclosure in terms of O.34, R.2, was passed by this court in the above case on January, 14, 1995.

2. The said decree declared Rs.45,200 to be the amount due to the plaintiff on July 14, 1995, the date fixed for payment.

3. The defendants have not paid the said amount or any part thereof.

The plaintiff prays for a final decree directing that the defendants be debarred from all rights to redeem the mortgaged property, and ordering the defendant to put the plaintiff in possession of the said property, and for cost of this application.

No. 45—Application for a final Decree for Sale *(bb)*

1. A preliminary decree for sale in terms of O.34 R.4, was passed in the above case on December 15, 1994.

2. The said decree declared Rs.42,300 as the amount payable to the plaintiff on June 15, 1995, the date fixed for payment.

3. The defendant has not paid the said sum or any part thereof.

4. Rs.44,838 is now due to the plaintiff.

If during the pendency of the application the pauper dies, his legal representatives may either pay the court-fee or continue the application by proving that they themselves are paupers (*Mst. Latifunnissa* v. *Mst. Khairunissa*, A 1955 All 53).

(aa) The practice is to give a fresh list of mortgaged property, but it is not necessary to give it (*Chandra Shekhar* v. *Amir Begum*, 49 A 592), nor can such an application be rejected for wrong calculation of interest (*ibid*). Under O. 34, R. 3, even the defendant has to make an application without which final decree cannot be passed in his favour if he pays off the decree. Final decree is passed on the basis of preliminary decree and court cannot go behind the latter. For example, if a defendant dies and his sons are added, the latter cannot challenge the preliminary decree on the ground that the mortgage was without legal necessity (*Ram Ugrah* v. *Ganesh Singh*, A 1940 All 99).

(bb) A written application is not necessary but court may pass a final decree on the oral application of the decree-holder (*Sitaram* v. *Lakshman Rao*, A 1926 Nag 152). Adjustment or payment after preliminary decree can be pleaded by defendant even though not certified (*Madan Theatres* v. *Din Shah*, A 1945 PC 152).

Particulars :

	Rs.
Amount entered in the preliminary decree	42,300
Interest from June 15, 1995 up-to-date	2,538

The plaintiff prays for a final decree for sale of the property in terms of O.34, R. 5(2) for Rs. 44,838, with further interest from the date of this application to the date of realisation, and costs of this application.

No. 46—Application under O. 34, R. 6 *(cc)*

1. In execution of the decree for sale under O.34, R.5, in the above case the whole of the property directed to be sold has been sold.

2. The net proceeds of the sale of such property have been found insufficient to pay the amount due to the applicant and Rs._____, is still due to him as per account given below.

3. The suit on which the decree for sale was obtained was instituted by the applicant on September 20, 1995 on foot of a mortgage of May 15, 1990.

4. Of the two executants of the said mortgage-deed Ram Prasad is dead, and opposite party Nos.2 to 4 are his sons.

The applicant prays that a decree for Rs._____ be passed against opposite-party No.1 and the assets of Ram Prasad deceased in the hands of opposite party Nos.2 to 4.

(cc) This application can be made only if the suit had been brought within limitation for a personal decree, but a personal decree for costs can always be made (*Dost Md.* v. *Miraj Din*, 163 IC 100, A 1936 Lah 387). The whole of the mortgaged property must be exhausted before applying for a personal decree, but if the property is not available for sale, a personal decree can be applied for (*Makhan Sahu* v. *Kumarunnissa Bibi*, A 1938 Pat 525, 17 Pat 538, *Ganeshwar* v. *Harish*, A 1940 Pat 616), but not if the part of the property is not available by reason of the decree-holder's own act of releasing it in favour of one of the heirs of the mortgagor (*Ulfat Husain* v. *Girdhari Lal*, 166 IC 673, A 1937 Oudh 252). An application under the rule will lie even when defendant's sons have got the mortgage decree and consequent sale set aside and purchase money has been returned to the auction purchaser (*Badal Singh* v. *Debi Saran*, 49 A 506). The question whether the plaintiff

No. 47—Application for a Final Decree for Redemption by the plaintiff under O.34, R.8 (1)

1. A preliminary decree for redemption was passed by this court in the above case on January 14, 1995 directing the plaintiff to pay Rs.42,345 on or before July 14, 1995.

2. The plaintiff has paid into court the said sum on July 10,1995.

The plaintiff prays that a decree be passed in terms of O.34, R.8 (1) ordering the defendant to deliver up the documents referred to in the preliminary decree (namely, ...) and to put the plaintiff in possession of the mortgaged property.

No.48—Application by Defendant for Decree under O.34, R.8 (2)

1. *Same as in the previous precedent.*

2. The plaintiff has not paid the said amount or any part thereof.

The defendant prays that a decree for sale of the mortgaged property for the realisation of the said amount and costs of the application be passed in terms of O.34, R.8 (2) (*or*, that a decree be passed that the plaintiff and all persons claiming through him be debarred from all rights to redeem the mortgaged property and ordering the plaintiff to put the defendant in possession of the mortgaged property and to pay the costs of this application).

No. 49—Application for Arrest Before Judgment O.38, R.1 *(dd)*

1. The facts disclosed in the annexed affidavit afford a reasonable probability that the plaintiff will, or may delay the execution of any decree

should get a decree under O. 34, R. 6 is to be considered when such an application is made and not during the pendency of the original suit as the preliminary decree only reserves to the plaintiff a right to make an application for a personal decree. In fact, even if there is no such reservation in the preliminary decree in the orginal suit, that will not bar the plaintiff's right to apply after the sale of the mortgaged property (*Gopalswami* v. *D.Narayanaswami*, A 1944 Mad 65, 211 IC 630) But if a claim for personal decree is made and rejected on merits a subsequent application for it will not lie (*Md. Huzabar* v. *Abdul F. Khan*, 1936 ALJ 1228, 1936 AWR 1033). Limitation is 3 years under Article 137 and time runs from the date of final confirmation of sale of mortgaged property (*Jagrup* v. *Ram Gati*, 168 IC 673, A 1937 All 285).

(dd) Arrest before judgment cannot be granted except on a very strong case being made out by the plaintiff. The case should fall under O. 38, R. 1. An intention

that may be passed against the defendant in this case.

2. The plaintiff prays that a warrant be issued for the arrest of the defendant, and on the defendant being brought to court, such order about deposit of money or security or imprisonment of the defendant in the civil prison may be passed as may appear to the court to be just and sufficient to safeguard the plaintiff's interest in the suit and under the decree that may be passed.

Affidavit

1. I make oath and say that the defendant was served with summons in the above case on July 10, 1995.

2. I make oath and say that, on the night of the same day, July 10, 1995, the defendant sent all his household effects, jewellery and cash, with his family, to London.

3. I make oath and say that I am informed by Babu Lal, Head Clerk of Messrs Green and Co., in whose office the defendant is employed, and I verily believe it to be true, that the defendant has given a notice to his said employers to leave their service at the end of the month of July, 1995

4. I make oath and say that I am informed by Bodhu, son of Jhamu employed as the defendant's cook, that the defendant is intending to leave India and to go to London at the end of this month.

No. 50—Application for Attachment before Judgment O.38, R.5 *(ee)*

1. For reasons disclosed in the annexed affidavit, the plaintiff prays that the defendant be ordered to furnish such security as the court thinks proper and, on his failure to do so, following property be attached.

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to delay the plaintiff or to avoid any process or to obstruct or delay the execution of the decree is essential in a case under Clause (a) and a reasonable probability that the plaintiff will or may be obstructed in the execution of his decree is a necessary element of a case under Clause (b). Such intention or probability must be clearly shown by facts and, unless this is shown, no application for arrest can be granted.

An application for arrest should be supported by an affidavit, as generally there are no other materials on the record, which may show these facts.

(ee) This is also granted only on very strong grounds, and an intention to delay or obstruct the execution of any decree that may be passed must be estab-

2. As there is a danger that the said property may be soon disposed of by the defendant, the plaintiff further prays that, pending final orders of the court, the said property may be conditionally attached.

Details of property *Value*

* * * *

Affidavit

1. I make oath and say that the summons in this case was served on the defendant on June 10, 1995.

2. I make oath and say that the defendant has no other property except that specified below:

Property

* * * * *

3. I make oath and say that the defendant has, after the receipt of summons, made negotiations with Ramlal of Karori village, for the sale of the said property.

4. I make oath and say that I am informed by Santlal patwari of village Karori, and I verily believe it to be true, that Ramlal has paid Rs.10,000 as earnest money to the defendant and the latter has agreed to execute a sale-deed in favour of the said Ramlal in the course of a week.

5. I make oath and say that I am informed by the said Santlal, and I verily believe it to be true, that the defendant had told the said Santlal to have the sale-deed executed without unnecessary delay and that on being asked the cause of the haste, the said defendant told the said Santlal that the plaintiff had instituted a suit against him, and that he apprehended that the whole property would be swallowed up by the decree of the plaintiff.

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lished before an attachment order can be obtained. The bare fact that the defendant has transferred a portion of his property or is about to transfer some property is no ground, for that may have been done to pay off his other debts or to meet his immediate or necessary expenses. Unless the motive of a proposal to transfer his property is shown to be delay or obstruct the plaintiff's decree, no order for attachment can be passed. The remarks about the necessity of an affidavit made in the last note apply here also (see also *Palghar Rolling Mills* v. *V.I.Steel Ltd.*, A 1985 Karn 282).

No. 51—Application for Temporary Injunction *(ff)*

For reasons disclosed in the annexed affidavit, the plaintiff prays that the defendant No.1 be restrained by a temporary injunction from selling the property specified below in execution of his decree No.140 of 1995 passed by the Subordinate Judge, First Class, of Ahmedabad.

List of Property

* * * *

Affidavit

1. I make oath and say that I am the owner of the property which is put up to sale in execution of decree No.140 of 1995 passed by the Subordinate Judge, First Class, of Ahmedabad, and that Anand Chand, judgment-debtor, has no right or interest in the said property.

2. I make oath and say that November 14, 1995, is the date fixed for sale.

3. I make oath and say that the property consists of my favourite furniture and some rare pictures.

4. I make oath and say that no amount of money can compensate me for the loss of the said property.

(ff) O. 39, R. 1 and 2 lay down the cases in which a temporary injunction can be granted. It does not, however, follow that an injunction will, as a matter of course, be granted in all cases, but it must be understood that the grant of an injunction being always discretionary, it cannot be granted unless it is shown that a substantial, serious, immediate and almost irreparable injury will result if it is not granted. A person seeking temporary injunction must satisfy the court on the follwing three points viz. (i) prima facie case (ii) irreparable injury and (iii) balance of convenience. (*Priya Rubber & Plastic Industries* v. *Bajrangobati Industries*, 1995 AIHC 3680 (All) (DB); *Shyama Kishore Bal* v. *Kishore Talkies*, 1995 AIHC 3096; *Dalpat Kumar* v. *Prabulal Singh*, A 1993 SC 278).

In no case will an injunction be granted to prevent a breach of contract, unless the contract is one which can be specifically enforced or the case is one for perpetual injunction. But it does not follow that in all cases in which specific performance or injunction can be granted by the decree, a temporary injunction will always be granted, for, to justify an injunction not only must the case be one in which an injunction is an appropriate relief, but there must be the further ingredient that unless the defendant is restrained forthwith by a temporary injunction, irreparable injury or incovenience may result to the plaintiff. Mere inconvenience cannot be said to be irreparable injury (*Secretary, Civil Stn. Sub-Commitiee, Nagpur*

No. 52—Application for Punishment for Disobedience or Breach of Injunction (O. 39, R. 2 A)

1. The plaintiff-applicant instituted suit No. 232 of 1994 *Ram* v. *Shyam*, pending in this court.

2. On the applicant's application, on January 2, 1996 the court granted temporary injunction restraining the defendant from proceeding further with the constructions on the land in suit. The said order has been passed by the court after hearing both the parties.

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v. *Govindrao*, 170 IC 239, A 1937 Nag 137). In a suit for declaration of title merely and neither for possession nor for perpetual injunction, a temporary injunction restraining defendant from interfering with plaintiff's possession will not be granted (*Sachindra* v. *Panchanon*, 94 IC 871, 30 CWN 214, A 1926 Cal 604 DB). An argument which is often advanced in support of an application for injunction is that the injunction will cause no harm to the defendant. That is no consideration and can be no ground for the grant of an injunction (*Gopalji Jha* v.*Gajendra*, 162 IC 210, A 1936 Pat 226). The applicant must, therefore, make out from his application or affidavit, not only a case within the scope of rule 1 or 2 but also a strong case of some substantial and irreparable injury to him. Plaintiff must come with clean hands, before injunction can be granted (*Shajuddin* v. *Nagar Palika*, A 1985 MP 252; *Penguin Books* v. *India Book Distributors*, A 1985 Del 29; *Gujrat Bottling Co. Ltd.* v. *The Coco Cola*, JT 1995(6) SC 3, A 1995 SC 2372). Normally interim injunction is not granted so as to award substantially the same claim as claimed in the suit, e.g., possession, but there is no absolute bar to it (*Indian Cable Co.* v. *S. Chakeraborty*, (1985) 89 CWN 559). The courts should not pass an interim order the effect of which is to grant a relief which can be granted by the court only at the time of final disposal of the case (*P.R.Sinha* v. *Inder Krishan Ram*, (1996) 1 SCC 681)

An injunction will never, unless in very exceptional cases which must be rare, be granted to restrain a public functionary from doing his duties. A pleader should refuse to apply for a temporary injunction unless there are very substantial grounds for the application. It is also his duty to warn the client of the provisions of section 95 C.P.C. before making an application which does not appear to him to be fully justified. No injunction can be granted against the true owner at the instance of a person in unlawful possession. 'Public interest, is one of the material and relevant consideration in either exercising or refusing to grant an interim injunction (*Khimjibhai Haribhai Bharwad* v. *State of Gujarat*, 1995 AIHC. 2142 (Guj.) DB). The Courts, in the cases where injunctions are to be granted to restrain public projects, should necessarily consider the effect on public purpose thereof and award suitable damages (*Mahadeo Savlaram Shelke* v. *Pune Municipal Corpn.*, (1995) 3 SCC 33 at pp. 41, 42).

Apart from O. 40, the court has inherent power to pass an order for providing for protection and security of the suit property. Therefore the court can, under this

3. Inspite of the court's injunction order, the defendant has further raised the constructions and thus has disobeyed the court's injunction order and is liable to be punished under O.39, R.2A.

It is, therefore, prayed that the defendant be punished for disobeying the court's injunction order, his property detailed below be attached and he be also detained in civil prison.

No. 53—Application for Appointment of a Receiver in a Suit for Possession *(gg)*

For reason disclosed in the annexed affidavit the plaintiff prays that a receiver of the property specified below be appointed, that the defendant be removed from possession of the said property, and that the same be committed to the charge of the receiver, to be managed by him under the directions of the court until the final disposal of the case, or until further orders and that such further and other orders be made as the court think just and proper.

Details of Property

* * * *

Affidavit

1. I make oath and say that one Sant Lal was the owner of the property in dispute in the above noted case.

2. I make oath and say that the said Sant Lal executed a will on July 24, 1984, bequeathing the said property to me and deposited the said will in the office of the District Registrar of Agra.

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power, issue an injunction before the question of pauperism is decided and the suit is registered (*Matuki Mistry* v. *Kamakshaya Pd.*, A 1958 Pat 264; *Ram Khelawan* v. *Sudama Devi*, A 1964 All 366). Court has also inherent power to stop abuse of process, e.g., to issue an injunction to restrain defendant from prosecuting a suit instituted in a court different from that agreed in the contract (*Firm Bicharam* v. *Firm Baldeo Sahai*, A 1940 All 241).

(gg) See O. 40, R.1. This is also an order which can be passed only in very exceptional cases. If the defendant is in possession of property claimed by the plaintiff, he cannot be dispossessed unless it is shown that the plaintiff has a *prima facie* title as against the defendant, that the defendant is mismanaging the property, and that there is a danger that the value of the property will be reduced by the time the suit is decided (*Bidurramji* v *Kehoramji*, 1938 AWR 127, 1938 OWN 1153, 178 IC 725 PC; *Amar Nath Gupta* v. *Om Prakash Verma*, 1994 LCD 1154 (All) DB).

3. I make oath and say that the said Sant Lal died in November, 1995.

4. I make oath and say that I was in England from September, 1995 to September, 1996, studying for the bar.

5. I make oath and say that on the death of the said Sant Lal, the defendant obtained possession of the said property on the ground of his being a distant kinsman of Sant Lal.

6. I make oath and say that since the defendant has obtained possession, he is mismanaging the property and reducing the value of the *corpus* of the said property.

7. I make oath and say that I have learnt from the copies of the *pattas* and of village papers, and I verily believe that the information contained in them is true, that the defendant, in July 1996, granted 24 years's *pattas* to the following tenants at half the generally prevalent rents : Achbal, Badam, Hukmi, Sattar and Subhan.

8. I make oath and say that I have been informed by Chaudhri Lalsingh, *mukhia* of the village Rekra, and I verily believe it to be true, that the defendant has cut down trees worth Rs.6,000 in the said village Rekra.

9. I make oath and say that I have been informed by my advocate, and I verily believe it to be true that it is likely to take about two years to dispose of the case in this court and another three years to dispose of the appeal in the High Court.

Specific acts of mismanagement should be alleged, and *prima facie* established (*Manavedan* v. *Manavedan*, 164 IC 857, A 1936 Mad 817). Mere existence of an apprehension in the mind of the plaintiff is not sufficient (*Hari Kishan Lal* v. *Peoples Bank of Northern India*, A 1935 Lah 102). Mere poverty of the defendant is no ground for dispossessing him of the property of which he has been in long possession (*Shivaji* v. *Aishwaryanandji*, 29 MLT 209, 29 IC 485), but if disputes arise between the parties immediately on the death of the owner, and something can be said in support of the claim of each party, it is a good case for appointment of a receiver. The criterion is whether the appointment is convenient *as well as* just. The main object should be the preservation of the property, but no order should be made if injustice would be caused to the other party (*Har Gopal* v. *Deomiti*, A 1945 Pat 404). Receiver can be appointed in case of a suit on a simple mortgage, either before or after the preliminary decree (*Damodar* v. *Radhabai*, 40 BLR 1266; *B.Banerji* v. *S.S.Singh Deo*, 1947 ALJ 10; *J. Kishanlal* v. *A Rathan Singh*, A 1954 Mys 162;

No. 54—Ditto, In a Suit for Partition

Alternative form, in which allegation's are made in detail in the petition

1. That the above-mentioned suit is for partition of the joint family properties of the plaintiff and defendants.

2. That the defendant No.1 is the uncle and defendants 2 and 3 are the cousins of the plaintiff.

3. That ever since the death of the applicant's father, defendant No.1 has been managing all the joint family properties as *Karta* of the family.

4. That the average net annual income of the said properties is about Rs.1,25,000.

5. That in April last, owing to certain differences arising from defendant No.1 refusing to allow proper clothing and pocket expenses to the applicant and ill-treating his wife, the applicant had to remove himself from the family dwelling house to a rented house at .....and has since been living separately from the defendants.

6. That the applicant has no other source of income except the joint family property which is in the exclusive possession of defendant No.1.

7. That the defendant No.1 has refused to allow the applicant anything for his maintenance and the applicant is living on money borrowed from other relations.

8. That the partition suit is likely to take several years in disposal.

9. That in the circumstances stated above it is just and convenient that a receiver should be appointed of the said joint family properties.

It is, therefore, prayed that:

(a) A receiver be appointed of the joint family properties detailed in

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Muniammal v. *Pagadala Gurwayya Naidu*, A 1960 Mad 195; *Onkarlal Radha Kishan* v. *V.S.Rampal*, A 1961 Raj 179). It can , however, be granted only by the court in which the proceeding is pending and cannot, therefore, be granted by the court passing a preliminary decree when an appeal is pending against that decree in another court (*Chidambaram* v. *Perthaperumal*, 168 IC 80, A 1937 Mad 163).

For authorities and case law on appointment of Receiver in case of partnership disputes see *Saroj Rani* v. *Krishna Swarup*, 1984 ALJ 1003; *Tilak Chand* v. *Darshan Lal*, A 1985 J& K 50.

the plaint pending the disposal of the suit or until further order;

(b) Defendant No.1 be directed to hand over to the receiver all the said properties and such other joint family property as may be found in his possession, together with all documents, books of accounts and papers relating to the said joint properties.

(c) The receiver be directed to pay to the applicant a sum of Rs.1,000, to liquidate the debts incurred by the applicant for his maintenance and expenses of the suit.

(d) The receiver be directed to pay to the applicant monthly Rs.500 on account of house rent and Rs.750 on account of expenses or such other sums as the court may think fit and reasonable until the disposal of the suit.

(e) Such other orders be made as the court thinks fit and reasonable.

No. 55—Application for Stay of Execution Pending Appeal (made to the Court Passing the Decree) under O.41, R.5 (2)

1. The applicant wishes to file an appeal from the decree in the above case.

2. The applicant is ready to give security to the satisfaction of the court for the due performance of such decree or order as may ultimately be binding upon him.

For the reasons disclosed in the annexed affidavit the applicant prays that the execution of the decree be stayed pending disposal of the appeal from the said decree.

Affidavit

1. I make oath and say that I have applied for copies of judgment and decree in this case for appeal, but the same have not yet been delivered to me.

2. I make oath and say that the plaintiff has put his decree in execution and has prayed for demolition of my house in execution of the said decree.

The affidavit accompanying an application for appointment of receiver should make out a strong case, and should give full particulars, with instances, if necessary, of all charges laid against the opposite party.

3. I make oath and say that a reconstruction of the house will cost at least Rs.5,000 and the materials of the demolished house will be worth not more than Rs.1,500.

4. I make oath and say that I shall be rendered homeless and it will be very difficult for me to procure another house before the next rainy season is over.

No. 56—Application for Stay of Execution Pending Appeal (made to the Appellate Court) under O. 41, R. 5 (1)

For reasons given in the annexed affidavit, the appellant prays that execution of the decree appealed from be stayed pending disposal of this appeal. The appellant is prepared to furnish security to the satisfaction of the court for the due performance of such order or decree as may ultimately be binding upon him.

Affidavit

1. I make oath and say that the respondent has put the decree appealed from in execution in the court below five days ago and has prayed for demolition of my house.

2. I make oath and say that the lower court has issued an order to the Amin to demolish my house.

No. 57—Application for the Review of Judgment *(hh)*

The above-named defendant begs to present this application under O.47, R.1, for review of the judgment, dated November 14, 1995, in the above case for which no appeal is allowed by law (*or*, from which no appeal has been preferred) and sets forth the following grounds for review, namely:

1. That the applicant has, on May 12, 1996, discovered among the papers of Ram Ratan deceased, new and important evidence, to wit, a

(hh) Such application shall be in the form of a memorandum of appeal (O. 47,R. 3). An affidavit is generally filed in support of the ground of review. The application need not be verified. Fraud or undue influence, unaccompanied by the discovery of new matter is no ground for review of even a compromise decree (*Nathu Lal* v. *Raghubir Singh*, 23 ALJ 1029, A 1926 All 50 DB).

A party, who was not impleaded in a proceeding, can file a review application on the ground that he was not heard before passing of the order adverse to him (*Surendra Kumar* v. *XIth Addl. District Judge, Kanpur City*, 1995 (1) ARC 313 All).

diary kept by the said Ram Ratan deceased containing an entry about the birth of the applicant.

2. That the said diary was not, in spite of the exercise of due diligence, within the knowledge of the applicant at the time the decree was passed.

3. That the said diary would have altered the finding of the court about the legitimacy of the applicant, on which finding the decree, sought to be reviewed, had been passed.

(*Or*, 1. That the plaintiff had, on the date of issues, (i.e., June 16, 1995), admitted that Saruplal's share in the house mentioned at No.12 in the list of the property in suit was only one-half and the other half belonged personally to the defendant-applicant.

2. That on the finding that the plaintiff was, and the defendant-applicant was not, the heir of the said Saruplal, the court passed a decree for possession of the whole of the said house against the applicant.

3. That this is a mistake which is apparent on the face of the record).

(*Or*, 1. That the decree sought to be reviewed was passed on the ground that the Revenue Court of an Assistant Collector had passed a decree for the applicant's ejectment and the applicant's tenancy had thus been determined.

2. That the said decision of the Assistant Collector has on Appeal been set aside by the Additional Commissioner of the Allahabad Division, by an order passed after the decree of this court, that is, on February 25, 1996.

That relief sought by this application is to have the said decree set aside and the case re-heard and determined.

Where there is an error appparent on the face of the record, whether the error occurred on account of the Counsel's mistake or it crept in by reason of an oversight on the part of the court, is not a circumstance which can affect the exercise of jurisdiction of the court to review its decision (*Jamna Koer* v. *Lal Bahadur*, A 1950 FC 131). But rehearing of arguments cannot be claimed in the garb of review (*Thungabhadra Ind.* v. *Govt. of A.P.*, A 1964 SC 1372).

Limitation : Period of Limitation is 30 days from the date of judgment sought to be reviewed under Article 124 in cases other than judgments of Supreme Court.

No. 58—Application for Permission to Appeal as an Indigent Person (Pauper) (O.44, R.1) *(ii)*

1. The applicant begs to prefer an appeal from a decree passed against him in suit No.136 of 1996 by the First Class Subordinate Judge of Surat.

2. The applicant is not possessed of means sufficient to enable him to pay the court-fee prescribed by law for the memorandum of the said appeal.

3. The whole of the movable and immovable property owned and possessed by the applicant (other than property exempt from attachment in execution of a decree and the subject matter of the suit) with the estimated value thereof, is specified at the foot of this application.

The applicant prays that he may be allowed to appeal as an indigent person.

APPLICATIONS UNDER GUARDIAN AND WARDS ACT

No. 59—Application for the Appointment of Guardian of a Minor *(jj)*

1. The applicant desires to be appointed guardian of the person and property of the minors hereinafter named and described.

(ii) See Chaps. XVI and XVII, *ante*, for appeals generally and cf. precedent No. 43 ante if the applicant was plaintiff and had been allowed by the trial court to sue as indigent person that fact and the averment that he has not ceased to be indigent person since the date of decree should be added.

(jj) See section 10, Guardians and Wards Act (Act 8 of 1890). The application should be signed and verified as a plaint. A declaration of the willingness of the proposed guardian to act should be filed with the application. It should be signed by the declarant and attested by at least two witnesses. When the application did not bear attestation by two witnesses as required by section 10 (3), it deserves to be rejected *in limine (Rabindra Nath Mukerjee* v. *Abinash Chandra Chatterjee*, (1971) 76 CWN 48). The application may be made by the person desiring to be appointed or by any relative or friend of the minor or by the Collector. An application by the Collector may be in the form of a letter and may be sent by post. In a joint Hindu family the manager is the guardian and no other guardian can be appointed (*Raja Ram* v. *Rameshwar*, 161 IC 605, A 1936 Cal 270; *Jagannath* v. *Chunilal*, A 1940 All 416, 1940 ALJ 511), except for separate property of the minor (*Sadhuram*

2. The particulars required by section 10 of the Guardians and Wards Act are as follows :

(a) Name of the minors	1. Rameshwar Singh 2. Km. Rajkali
Sex	1. Male 2. Female
Date of birth	1. June 8, 1988. 2. August 10, 1990.
Ordinary Residence	Village Rupa, Tahsil Shahgunj, District Jaunpur

(b) The petitioner, Ram Prasad, is the younger brother of the deceased father of the minors.

(c) The nature, situation and approximate value of the minor's property is shown is Schedule A, annexed to this application.

(d) Smt. Shama of village Rupa has the custody of the person of Rameshwar Singh and Raj Kali minors. The said Smt. Shama is in possession of the property of the minors.

(e) Names and residence of the near relatives of the minors	1. The applicant. 2. Smt. Shama, mother's sister of the minors, resident of village Rupa. 3. Ram Kishen, mother's brother of the minors, resident of Shahgunj, District Jaunpur.

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v. *Prithi Singh*, 161 IC 861, A 1936 Lah 220). If a guardian has been appointed, court cannot appoint another without the former's removal (*Abdul Qadir* v. *Mt. Fatima*, 41 PLR 12). Section 17 of the Guardian and Wards Act gives the court a very wide discretion. Whenever the court finds that it is for the welfare of the minor that certain person should be appointed gruadian the court can exercise its jurisdiction and appoint such a person as guardian (*Haliman Khatoon* v. *Ahmadi Begum*, A 1949 All 627). The welfare of minor is paramount consideration before the court for appointing a guardian for the person of the minor (*Thrity Hoshie Dolikuka* v. *Hoshiam Dolikuka*, A 1982 SC 1276); *Ahmad Shareef Khan* v.

(f) No guardian of the person or property of the minors has been appointed.

(g) So far as the applicant knows, no application for such appointment has ever been made before.

(h) The application is for the appointment of a guardian of the person and property of the minors.

(i) The applicant is the uncle (father's brother) of the minors. He is the only male relative of the minors in the village. He is an educated man and looks after and manages his own property also, which is of considerable value. He can personally manage the property of the minors with advantage to the minors. He can look after the education of the minors much better than their old aunt, Smt. Shama.

(j) The application has been made because the education of the minors is being neglected and the property is managed by Smt. Shama through her *Karinda*, Abdul Karim, who has not been properly managing

Farhat Sultana Begum, 1995 ALR 266 (All); *Joyce Mauria Jacobs* v. *Basil Genald Jacobs*, 1996 (2) CCC 21 (Cal) DB; *Meera Devi* v. *Shyam Sundar*, A 1985 Ori 65; *Kumar v. Jahgirdar* v. *Chetana K. Ramatheertha*, A 2001 SC 2179). The mere fact that mother has contracted a second marriage after the death of minor's father with a stranger should not stand in the way of her appointment as guardian provided the welfare of the minor so demands (*Sundari* v. *Mohd. Fato*, A 1971 J & K 43). The court should act consistently with personal law of the parties and with due regard to welfare of minor. On the death of father of the minor who is a Muslim, the grand father is the most suitable person although the grand father had three wives and a number of children (*Syed Sadmir Ali* v. *Syeda Chandubanu Begum*, A 1973 Gauhati 103). Even dictates of personal law must be subordinated to consideration of the welfare of the minor (*Kalimunnisa* v. *Shah Salim Khan Rehmankhan*, 1976 MPLJ 621). Under Mohamedan Law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor is the legal guardian (*Mustt. Rahima Khatoon* v. *Mustt. Saburjanessa*, (1995) 3 GLR 201 Gauh). Unless there is evidence to show that the natural guardian is not a fit person to be appointed as guardian of minor, the court would ordinarily accept his claim in preference to the claim of any other person (*C.Madhavan Nair* v. *M. Viswanathan*, 1977 KLT 479). Under proviso to section 6, Hindu Minority and Guardianship Act, a person forfeits his right to be legal guardian if he ceases to be a Hindu (*Onkar* v. *Urmila*, A 1985 HP 100). So long a guardian can provide a comfortable and a happy home for the minor, she can be given custody of the minors even though she has become convert to a different faith (*Sheila Umesh*

it, and profits have decreased since the death of the minors' father. Besides, there are some debts due from the said father, interest on which is increasing. The applicant wants to pay up these debts by selling a portion of the property.

The applicant prays that he be appointed guardian of the person and property of the said minors.

No. 60—Application for Appointment of Guardian for Inter-country Adoption under section 7

The petitioners beg to submit as follows—

1. The petitioner No.1 is a Social and Child Welfare agency, recognised and licensed by the Government of India, having its premises at Lucknow. The petitioner society is busy in looking after the welfare of the abandoned and destitute children and also offer the child for adoption, including the one for inter-country adoption.

2. One child named Km. Savita in the care and custody of the petitioner society, was born on 23.3.1993 out of wedlock (illegitimate). The child was, therefore, handed over to the first petitioner to be brought up.

3. The petitioner No.2, Mr. Armando Francesetti, a citizen of the United States of America, was married with Petitioner No.3 Mrs Entrice Munini Francessetti in the year 1985. Unfortunately, out of the marital relations no child has been born to the petitioners No.2 and 3.

Tahiliani v. *Soli Phirozshaw Shroff*, A 1981 Bom 175). The welfare of the minor is the paramount consideration (*Thrity Hoshili* v. *Hoshiam*, A 1982 SC 1276; *Veena* v.*V.K.Kapoor*, A 1982 SC 792). The main and paramount consideration is the welfare of the child, and not the legal right of a particular party (*Veena Kapoor* v. *Varinder Kumar*, A 1982 SC 792; *H.S.Dolikuka* v. *T.C.Dolikuka*, A 1984 SC 410; *Pushpa Singh* v. *Inderjit Singh*, 1990 (Supp) SCC 53;*Chandrakala Menon* v. *Vipin Menon*, (1993) 2 SCC 6; *Gopal Prasad* v. *Angoori Devi*, 1991 ALJ 1041 All). Where the father has re-married, in spite of the better financial position of the father, the real mother was given the custody of the child (*Gopal Prasad* , supra).

A father being the natural guardian has a preferential right to the custody of his minor children. Where the mother had died, the children were soar about the ill-treatment meted out by their father to their mother, the minor children were allowed to remain with their natural uncle (*Kirti Kumar Maheshankar Joshi* v. *Pradip Kumar Karuna Shanker Joshi*, A 1992 SC 1247).

4. The petitioners No.2 and 3 desirous of adopting a child and for that purpose approached the petitioner No.1. Out of several children found in the said Society, the petitioners No.2 & 3 want to take child Km. Savita aged 3 years in adoption. The biological parents of the child are not known.

5. The home study report of the petitioners No.2 and 3 prepared by one Child Welfare Society situated in town Boston, United States of America and recent photograph of the family of the petitioners No.2 and 3 are also being filed. The petitioners No.2 and 3 have enough means to maintain the child, and in case of reapprochement, between the petitioners No.2 and 3 a suitable arrangement for the replacement of the child would be made.

6. The petitioners No.2 and 3 are eligible to take the child in adoption according to the law of the United States of America.

It is, therefore, prayed that the petitioner No.2 Mr Armando Francessetti be appointed guardian of the person of Km. Savita and be permitted to take the child to United States of America. Within a period of one year the petitioners No.2 and 3 would take the child in adoption. The petitioners shall be bound by such other directions as may be imposed by this Hon'able Court.

In matter of appointment of guardian of a minor welfare of the minor is the paramount consideration. The consent of the minor is not the sole guiding factor (*Mahadeorao* v. *Kisanrao*, A 1996 Bom 221). Ordinarily, custody should go to the natural guardian. It is only in extreme cases of illiteracy, poverty or delingency of the father that his claim to the custody of the child should be disregarded (*Lekhraj Kukreja* v. *Raymon*, A 1989 Delhi 246). Where the father adopts Muslim religion and marries a Muslim girl, he ceases to be a natural guardian as a matter of legal right (*Vijayalashmi* v. *Inspector of Police*, A 1991 Mad 243 DB).

In India, specially abandoned and destitute children are adopted by foreign couples. To check the malpractices indulged in by special organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents, the Supreme Court took up the matter in *Lakshmi Kant* v. *Union of India*, A 1984 SC 469; *Laxmi Kant Pandey* v. *Union of India*, A 1984 SC 272; *Laxmi Kant* v. *Union of India*, A 1987 SC 232; *Laxmi Kant Pandey* v. *Union of India*, A 1992 SC 118; *K.S.Council for Child Welfare* v. *Society of Sisters of C.S.A Convent*, A 1994 SC 658; *S.C.Kamdar* v. *Asha Trilokbhai Saha*, A 1995 SC 1892, and laid down certain procedural safeguards in this regard. See discussion under Chapter XVIII-Applications or petitions, headnote "Guardianship of Unclaimed Children-Adoption. ante.

No. 61—Application for an Order Declaring the Applicant to be a Guardian *(kk)*

1. The applicant desires to be declared guardian of the minors hereinafter named.

2. The particulars required by section 10 Guardians and Wards Act, are as follows:

(a), (b) and (c) as in application No.59.

(d) The applicant has the custody and possession of the person and property of the minors.

(e), (f), and (h) as in application No.59.

(i) The applicant is the legal guardian of Km. Raj Kali, minor, under the Hindu law, and he has been appointed guardian of the person of Rameshwar Singh and of the property of both the minors by the will of the father of the minors, dated June 14, 1993. The applicant has been managing the said property and has been looking after the bringing up and education of Rameshwar Singh since the death of the said father of the minors in July, 1993.

(j) The property of the minors is under a mortgage, interest on which is increasing day by day, therefore, the said applicant wants to make some arrangement to pay it off by selling a small portion of property hence a certificate from the court is required.

The applicant prays that he may be declared to be the guardian of the person and property of the said minors.

In cases of inter-country adoption, in application by a foreign national for appointment as guardian of Indian child, the State Council for Social Welfare is a necessary party. The State should also be arrayed as party in such proceedings (*Society of St. Gerose Convent* v. *Kant State Council for Child Welfare*, A 1992 Kant 263 DB).

(kk) When a person is either the natural and *de facto* guardian of the minor as a father, or has been appointed by the will of minor's father, he may obtain a declaration by the District Judge that he is a guardian and then he will be in the same position as a guardian appointed by the District Judge, though in the case of a natural guardian, it is not necessary, as such declaration will not enhance his powers (*Sivasankar* v. *Radha Bai*, A 1939 Mad 611). He need not obtain a probate of the will before making the application (*Ganesh Ji* v. *Mt. Bhagirathi*, 163 IC 242, A 1936 All 368). Under Section 8 (3) of Hindu Minority and Guardianship Act 1956,

No. 62—Application for Temporary Protection of Minor's Property under section 12 *(ll)*

1. The applicant has made an application for his appointment as guardian of the property of Subhan Ali minor, and May 12, 1996 is fixed for hearing the said application.

2. Qurban Ali, the deceased father of the said Subhan Ali, has left, besides other property, a standing wheat crop which is quite fit for being reaped, and there is a danger of its being damaged if it is not reaped and stored without delay.

3. The applicant wanted to reap and store the crop for the benefit to the said minor but was obstructed by Karim Baksh and Qadar Baksh who are distant cousins of the said Qurban Ali.

4. The estimated value of the produce or the said crops is about Rs.8,000. The said Karim Baksh and Qadar Baksh are men of no means, and if they cut away the crops, as they intend doing, it will be impossible to realise the value of the produce from them.

The applicant prays that the said crop be placed in the temporary custody of the applicant or some other suitable person, so that it may be reaped and stored without unnecessary delay.

No. 63—Application under section 12 for Interim Protection of a Minor

1. The applicant is the mother's brother of Km. Jamna Kaur minor and has made an application for appointment of a guardian of the person of the said Km. Jamna Kaur.

2. The said Km. Jamna Kaur is a girl of 14 years of age and is at present living with her step-mother, Smt. Shama at village Raju Nagar.

3. The said Smt. Shama has betrothed the said Km. Jamna Kaur to one Rati Ram, son of Hari Ram, of village Kasora, and the marriage has been fixed for January 20, 1996.

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any agreement of sale concerning the property of a minor is voidable. The guardian has to obtain permission from the Court under Section 8 of the Act. (*V. Lakshmanan* v. *B.R.Mangalagiri*, JT 1995 (2) SC 105).

(ll) An application under this section can be made only after an application for appointment of guardian has been filed as the power under this section is

4. The said Rati Ram is an old man of 53 and is suffering from asthma and is in no case a fit and proper match for the said Km. Jamna Kaur.

5. Unless the said Km. Jamna Kaur is taken out of the custody of the said Smt. Shama, she will be married to the said Rati Ram on January 20, 1996, in violation of the provisions of the Child marriage Restraint Act.

The applicant prays that Smt. Shama be ordered to produce the said Km. Jamna Kaur before the court or at such place and time as the court considers proper, and be placed in the temporary custody of the applicant or some other near relation or other person as the court thinks fit, pending final orders for the appointment of a guardian of her person.

No. 64—Application by a Guardian for Permission to Sell the Property of the Ward

1. The applicant has been appointed guardian of the property of Ram Krishen Singh and Smt. Raj Kali by order of this court, dated November 24, 1995, in miscellaneous case No.400 of 1995.

2. The said property in subject to the debts specified in Schedule A at the foot of this application and the said debts are binding on the minor.

3. Interest of Rs.2,000 per mensem is accruing due on the said debts.

4. One of the creditors, Janki Prasad, is threatening to sue for the sale of the property mortgaged to him.

5. Of the three houses owned by the minors, one is sufficient for their residence and the remaining two are lying in a ruined condition and the minors have no income from them.

6. One Himmat Singh, son of Jaswant Singh, of Jaunpur offers Rs.3,15,000 for the said two houses and the price offered is fair and reasonable.

7. By the sale of these houses all the debts due from the said minors will be satisfied.

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ancillary to the appointment of guardian and the section does not give summary power to any court, where no application for appointment of guardian has been made.

The applicant prays permission to sell the said houses to Himmat Singh or to any other purchaser who might offer more than Rs.3,15,000.

APPLICATIONS UNDER INDIAN SUCCESSION ACT

No. 65—Application for a Succession Certificate *(mm)*

1. Jan Muhammad, son of Sher Muhammad of Lucknow, died on November 14, 1994.

2. The said Jan Muhammad ordinarily resided at the time of his death, at Varanasi, within the local limits of this court (*or*, the said Jan Muhammad owned a house and 2 shops in Dal-ki-Mandi in the city of Varanasi).

3. The following are the members of the family and near relatives of the deceased.

Names of relatives and members of family	*Address*
*	*
*	*
*	*

The applicant is the son and one of the legal heirs of the deceased.

5. There is no impediment to the grant of the certificate or to the validity thereof if it were granted, either under section 370 or any other provision of the Indian Succession Act or any other law.

6. The following are the debts and securities for which the certificate is applied for :

(mm) Such applications should be signed and verified as plaints (section 372). If the applicant is a minor, he must apply through a next friend (*Ram Kuar* v. *Sardar Singh*, 20 A 352; *Mahadeo* v. *Gangadhar*, 29 B 344; *Periah* v. *Lakshmi Devi*, 61 IC 797). No certificate can be granted for part of a debt (*Ghafur Khan* v. *Kalandari*, 8 ALJ 79, 33 A 327, 9 IC 127). A joint certificate may be granted to several claimants (*Daw Ohn Burnt* v. *Daw Saw*, A 1937 Rang 336, 172 IC 54). The right is a personal one and does not survive to the legal representatives (*Hamida* v. *Rabia*, 1937 AMLJ 40). Necessary fee prescribed by the Court-fees Act must be paid in cash along with the application (seciton 379). The court-fee need not be paid at the time of filing application for preparation of succession certificate, it can be paid at the time of issuance of certificate (*Usha* v. *State*, A 1993 MP 41 case-law discussed).

Debts

Serial No.	Name of debtor	Amount due on date of application	Description and date of instrument by which debt is secured
1	*	*	*
2	*	*	*
3	*	*	*

Securities

Serial No.	Distinctive No.	Name, title or class	Amount of par value	Market value on the date of the application
1	*	*	*	*
2	*	*	*	*
3	*	*	*	*

The applicant prays that a succession certificate be granted to him for collection of the debts and securities specified in para 6 above, (and the petitioner may further be empowered by the said certificate to receive interest or dividends on, and to negotiate or transfer, the said securities).

No. 66—Application for Extension of a Succession Certificate

1. The applicant was granted a succession certificate dated January 14, 1994, by this court in miscellaneous case No.54 of 1993.

2. The applicant prays that the said certificate may be extended to the following debts and securities.

Particulars of Debts and Securities

(To be given as in Precedent No.65)

In, application for grant of succession certificate the provision regarding disclosure of near relatives of the deceased is mandatory provision (*K.P.Narayana Reddy* v. *Alla Nagi Reddy*, A 1996 AP 198).

An application for succession certificate is made under section 372, Indian Succession Act (Act XXXIX of 1925). It should be made to the District Judge within whose jurisdiction the deceased ordinarily resided at the time of his

No. 67—Application for Revocation of Succession Certificate under section 383

1. In miscellaneous case No.41 of 1995, one Sher Muhammad was granted a certificate under part X of the Indian Succession Act of 1925 to collect the debts due to the deceased Jan Muhammad.

2. The case was decided *ex parte* on August 22, 1995.

3. The deceased, at the time of his death, left behind him the following relatives, namely

(i)

(ii)

(iii)

4. At the time of making the application the said Sher Mohammad fraudulently concealed the names and particulars of the relatives named above.

5. In the petition the said Sher Mohammad described himself as the sole surviving heir of the deceased.

6. The deceased was a Shia Mohammedan and according to Mohammedan Law of the Shia School your petitioner is a preferential heir to the estate of the deceased.

7. With the intention of keeping your petitioner in the dark, the said Sher Monammad fraudulently suppressed all the process of this court and made untrue allegations in his petition.

Your petitioner prays that the said certificate granted to Sher Muhammad be revoked.

No. 68—Application for Probate *(nn)*

1. The writing annexed is the last will and testament of Gopal Chandra

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death or if at that time he had no fixed place of residence, the District Judge within whose jurisdiction any part of the property of the deceased may be found.

The definition of the expression, "District Judge" as given in the Succession Act does not include a High Court which has not got original civil jurisdiction (*In re Rajendra Chandra Sen*, A 1934 All 958 DB; *in the matter of Sailendra Krishna Roy, A 1949 Pat 318*). It however includes an inferior court notified in this behalf by the State Government (section 388).

(nn) No probate is necessary for a Hindu unless the conditions mentioned

Chatterji, son of Shri Girish Chandra Chatterji and was duly executed by him in the presence of the witnesses named in the said will.

2. The testator died on January 4, 1994.

3. Your petitioner is the executor named in the said will.

4. The said testator have a fixed place of abode (*or*, has a house) at Hoogly within the jurisdiction of this court.

5. The amount of the assets which are likely to come to the hands of your petitioner is Rs.1,25,000, an account of which is given in Schedule A annexed to the affidavit filed with this petition. The amount of the liabilities and other lawful deductions of the said testator is Rs.1,11,000, an account of which is given in Schedule B annexed to the said affidavit.

Your petitioner prays that probate of the annexed will, may be granted to him.

No. 69—Application for Probate to have effect Throughout India

1-4. *Same as in the previous precedent.*

5. *Same as in the previous precedent-Then add-*

Of the assets aforesaid, assets of the value of Rs.1,20,000 are situate in the State of West Bengal within the jurisdiction of this court, and

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in section 57 Indian Succession Act exist; it is however obligatory in case of Christians (*Srinivasa* v. *K.V.S. Rao*, A 1986 Karn 9). The application for probate is made under Section 276, Indian Succession Act. It is to be signed and verified as a plaint and shall also be verified by one of the witnesses to the will in the form given in section 281, of the Act. The applicant should annex to the petition the will or in the cases mentioned in sections 237, 238 and 239, a copy, draft or statement of the contents thereof. Probate can be granted even if a part of the will is lost, provided evidence of its contents is forthcoming (*Kedar Nath* v. *Raj Kumar*, 185 IC 17, A 1939 Cal 674). Where the will does not name any executor or a legatee, universal or residuary, no probate can be granted. The proper course is to grant letters of administration with the will annexed to any legatee (*Soundararaja* v. *Florence Chellaiah*, A 1975 Mad 194). An affidavit shall also be filed with the application in the form given in Schedule III to the Court-fees Act. In Probate Court the validity of the provisions of the will cannot be questioned (*Mt. Laso Devi* v. *Mt. Jagatambha Devi*, 163 IC 656, A 1936 Lah 378). Probate Court has power to construe will in order to decide whether applicant has right to maintain application under sectoin 218 (as heir), section 232 (as universal or residuary

assets of the value of Rs.15,000 are situate in Uttar Pradesh within the jurisdiction of the Allahabad High Court and the District Judge of Varanasi.

6. To the best of your petitioner's belief, no application has been made to any court for a probate of the said will intended to have effect throughout India (*or*, in July 1994, application was made to the court of the District Judge of Varanasi by one Ram Lal Chatterji for grant of the probate of the said will to him, and the same was on November 15, 1995, dismissed on the ground that the said Ram Lal Chatterji was not appointed executor by the said will).

Your petitioner prays that probate of the annexed will, to have effect throughout the whole of India, may be granted to him.

No. 70—Application for Probate of Copy of a Will

1. Ram Lal of Calcutta, deceased, died on July 4, 1995, at Calcutta having made and duly executed his last will and testament bearing date July 20, 1992, whereof he appointed his sister, your petitioner, sole executrix.

2. At the time of the death of the said Ram Lal, the said will was whole and unrevoked and was in the same state as when executed but since the death of the said Ram Lal, the said will has been lost and cannot be found.

3. That during the lifetime of the said Ram Lal and at his request a copy of the said will was made by Ram Chandra Nag of Calcutta, Solicitor, and the same was examined by him with the original will and found to agree therewith.

4. Your petitioner believes the paper hereto annexed to contain the true last will and testament (being the copy thereof as aforesaid) of the said Ram Lal and your petitioner is the executrix named in the will.

5. *As in precedent No.68.*

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legatee) or section 334 (as other legatee: *Durgacharan* v *Bhudibala*, A 1985 Cal 264). Merely because natural heirs have been debarred under a will does not render a will suspicious but when a close relative of the executrix has played active part in the execution of the will, a hallow of suspicion is created about the voluntry character of the Will. However, if there is certificate of Sub-Registrar that the will was read over and the executant admitted the contents thereof, the circumstance that the witnesses are interested, loses significance

Your petitioner prays that the probate of the copy of the said will be granted to her limited until the original or a properly authenticated copy of the same is produced before the court.

No. 71—Application for Probate of Draft of a Will

1-2. *Same as in precedent No. 70.*

3. The said will was prepared by Amarnath Nag, Solicitor, who has preserved a draft of the same, which your petitioner has obtained from the said solicitor and annexes to this petition.

4. Your petitioner believes that the said draft contains a true last will and testament of the said testator, and your petitioner is the executrix named in the said will.

Prayer—*Same as in previous precedent, substituting the word "draft" for "copy".*

No. 72—Application for Probate of Copy of a Will when Original is Abroad

1. *Same as in precedent No. 70.*

2. That the said will was executed by the said Ram Lal when he was at London and the same was deposited by the said Ram Lal after execution thereof with Saunders & Co., Solicitors of London who still retain possession of the said will.

3. That on August 20, 1995, a copy of the said will was sent to your petitioner by the said Saunders & Co., the same having been compared by them with the original and found to agree therewith. The said solicitors have, inspite of repeated request from the petitioner, neglected to deliver up the original to him.

4. So far as your petitioner is aware there is not now in India, a more authentic copy of the said will than the aforesaid copy and it is necessary for the interest of the estate that probate should be granted without waiting for the arrival of the original.

Under Section 300 (1) of the Succession Act, the High Court shall have concurrent jurisdiction with the District Judge in the matter of grant of probate or letters of administration. The court proceedings relating to the grant of probate are to be regulated by the provisions of Code of Civil Procedure (*V. Prabha* v. *State*, A 1995 Delhi 128).

5. *Same as in precedent No.68.*

Your petitioner prays that probate may be granted of the copy of the said will, limited until the will or authenticated copy of it is produced.

No. 73—Application for Probate of the Contents of a Lost Will

1-2. *Same as in precedent No.70.*

3. The said will was executed in the presence of your petitioner and no draft of it was made and so far was your petitioner knows no copy of it has ever been prepared.

4. The purport of the said will, to the best of the recollection of your petitioner, was that the testator gave the whole of his agricultural property to your petitioner, his house at No.13 Cotton Street, Calcutta, to his widow, Smt. Ram Kali and the whole of his cash in deposit in the State Bank of India, Calcutta Branch, to his nephew, Ram Das.

5. *Same as in precedent No.68.*

Your petitioner prays that probate of the contents of the said will as stated above may be granted.

No. 74—Application for Revocation of probate under section 263

1. Your petitioner is the executor of the last will, dated March 14, 1994, of late Atul Chandra Bose, of Hooghly, who died on April 22, 1994.

2. One Krishna Das Bose obtained from this court probate of pretended will of the said Atul Chandra Bose dated April 14, 1993, after concealing all the processes of this court.

3. The said Atul Chandra Bose did not execute the will, the probate of which has been obtained by the said Krishna Das Bose from this court on July 20, 1995.

4. Alternatively, the said will was impliedly revoked by the later will mentioned in paragraph (1) of this petition.

Your petitioner prays that the grant of probate to Krishna Das Bose of the pretended will of Atul Chandra Bose be revoked and such orders may be passed as may be deemed necessary.

No. 75—Application for Letters of Administration under section 278

1. The late Atul Chandra Bose died intestate on February 10, 1995 at Alipore.

2. The said Atul Chandra Bose had, at the time of his death, a fixed place of abode (*or*, had a shop at Alipore) within the jurisdiction of this court.

3. The following are the members of the family and relatives of the said Atul Chandra Bose :

Names of family members and relatives			*Address*
*	*	*	*

4. Your petitioner is the son of the said Atul Chandra Bose and his legal heir.

5. The amount of assets, etc., (*as in para 5 of application No.68*).

Your petitioner prays that letters of administration to the estate of the said Atul Chandra Bose be granted to him.

No. 76—Application for Letters of Administration with Will Annexed

1-2. *Same as in precedent No.68.*

3. Ram Chandra Chatterji, the son of the deceased and sole executor named in the said will, survived the said deceased but has since died without having taken the probate of the said will.

4. Your petitioner is the grandson of the said deceased and one of the residuary legatees named in the said will.

5. Your petitioner will administer according to law all the assets which by law devolve on or vest in the personal representatives of the said deceased.

6. The said testator had, at the time of his death, a fixed place of abode (*or*, had a shop) at Hoogly within the jurisdiction of this court.

7. The following are the members of the family and representatives of the said Gopal Chandra Chatterji :

(i)

(ii)

(iii)

8. *Same as para 5 in precedent No. 68.*

Your petitioner prays that letters of administration with will annexed to the estate of the said Gopal Chandra Chatterji be granted to him.

No. 77—Application for Appointment of a Curator under section 192

1. Ganesh Prasad of Kaimganj, district Farrukhabad, died on the 20th day of July 1995, at Kaimganj within the jurisdiction of this court.

2. The said Ganesh Prasad died being possessed of movable and immovable property situate within the jurisdiction of this court.

3. The said deceased was not a member of a joint Hindu family and your petitioner is the lawfully married wife of the said deceased and is, according to Hindu Law, his only heir.

4. One Sheo Prasad falsely alleging himself to be the adopted son of the said Ganesh Prasad , deceased, has forcibly and illegally taken possession of the residential house of the deceased and all his movable property and threatens to take forcible possession of immovable property also.

5. The said Ganesh Prasad also carried on a money lending business on an extensive scale and large amounts of money are due to his estate on bonds and pronotes and your petitioner has been informed that the said Sheo Prasad is realising monies of these bonds and pronotes.

6. The said Ganesh Prasad has also an extensive business of sugar manufacture at Kaimganj and the said Sheo Prasad has also taken possession of the said business and your petitioner has been informed that he is removing various articles of the said business including the account-books.

Your petitioner will be materially prejudiced and will not get any effective relief by a regular civil suit if a curator is not appointed at once.

Your petitioner prays that a curator may be appointed to the estate of Ganesh Prasad, deceased.

PETITIONS UNDER INSOLVENCY ACT

No. 78—Petition for Insolvency, by Debtor

1. Your petitioner has become heavily indebted owing to certain business losses and is unable to pay his debts.

2. Your petitioner ordinarily resides at Varanasi within the jurisdiction of this court (*or*, the petitioner is imprisoned in the Civil Jail at Varanasi).

3. An order for attachment of the property of your petitioner in execution of decree No.104 of 1995 passed by the Court of Civil Judge (Junior Division) at Varanasi has been made by that court (*or*, your petitioner has been arrested and imprisoned in the Civil Jail by order of the Civil Judge (Junior Division) at Varanasi, in execution of decree No.104 of 1995 passed by him).

4. The amount and particulars of all pecuniary claims against your petitioner, with the names and addresses of his creditors, so far as they could be found, are specified in Schedule A, annexed to this petition.

5. The amount and particulars of all your petitioner's property together with its value and place at which it is to be found, are fully specified in Schedule B, annexed to this petition and your petitioner is willing to place all the said property at the disposal of the court.

6. Your petitioner has not, on any previous occasion, filed a petition to be adjudged an insolvent (*or*, the petitioner made a petition to be adjudged an insolvent on October 1, 1995 in the court of the District Judge at Ghazipur, but the same was dismissed as the court then held that petitioner's assets were enough for his debts).

Your petitioner prays that he may be adjudged insolvent.

No. 79—Petition for Insolvency, by a Creditor *(oo)*

1. Ramnath, son of Shamlal, resident of village Pachenda, Tahsil Khurja, District Bulandshahr, is indebted to your petitioner in the sum of Rs.4,300 due on a bond, executed by him on February 4, 1993.

(oo) It is necessary for the petitioning creditor to allege the acts of insolvency complained of by him in the petition and specify particulars as to the time and place of their commission. It is, however, not necessary for him to aver that the debtor is unable to pay his debts (*Jagannath* v. *Badri Prasad*, A 1949 EP 359). In

2. The said Ramnath ordinarily resides in the said village Pachenda within the jurisdiction of this court.

3. The shop of the said Ramnath in the village Pachenda has been sold on January 5, 1994 in execution of a money decree No.503 of 1992, passed by the Civil Judge (Junior Division) at Khurja for payment of Rs.5,354 and costs.

Your petitioner prays that the said Ramnath be adjudged insolvent.

No. 80—Application for a Protection Order under section 31 *(pp)*

1. The applicant has been adjudged insolvent by an order of this court, dated December 10, 1994.

2. One Ram Bilas, son of Ram Kumar Vaish, of Kanpur, holds decree No.154 of 1994 passed against the applicant by the court of the Civil Judge (Senior Division) at Kanpur.

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view of the doctrine of relation back, vide section 28 (7), Provincial Insolvency Act, it is enough if debt was not time barred on date of application (*Allampati Gopalareddy* v. *P.Raghava Reddy*, A 1985 AP 12).

An insolvency petition by one of Joint-creditors is maintainable (*Elbrose Textiles Ltd.* v. *Surendra Kumar Harkishore Jain*, A 1993 Bom 381, *Anuradha Kumar* v. *Sadhu Chandra*, A 1926 Cal 234 DB dissented from). The words "debts" in section 10 of the Provincial Insolvency Act should be construed as "debt", hence an insolvency petition in respect of single "debt" is maintainble (*S.Damodaran Pillai* v. *K. Nanthedu Bava*, A 1992 Ker 212). At the time of admission of the insolvency petition, hearing to the debtor is not necessary, the Court may in its discretion issue notice to the debtor or the person filing caveat under section 148A C.P.C. (*Radheshyam Agrawal* v. *Hariom Trading Co.*, A 1992 MP 168). In an insolvency petition filed by the creditor, the plea that the debtor has means to pay the debts is open to the debtor and not to the debtor's transferee (*V.Rosaiah* v. *P.Subramanyam*, A 1989 AP 204). Where in the transfers made there is no intention to defeat or delay the creditors, the act of the debtor does not constitute act of insolvency (*Maneklal Kantilal & Co.* v. *Shavarlal Harjivadas*, A 1991 Guj 143).

Where Civil Judge has been invested with insolvency jurisdiction under section 3 of the Provincial Insolvency Act, he does not become Principal Civil Court of original jurisdiction, appeal from his orders lie to the District Judge and not to the High Court (*Kewal Singh* v. *Ram Chander*, A 1990 All 99).

(pp) This application will be necessary only about debts in respect of which suits and proceedings are pending on the date of adjudication as no proceeding

3. The said Ram Bilas has applied to the court of the Civil Judge (Senior Division) at Kanpur for execution of the said decree by the arrest and detention of the applicant, and the said court has, by an order, dated March 24, 1995, refused to stay the execution proceedings and has passed an order for the issue of a warrant for the applicant's arrest.

The applicant prays that an order for his protection from arrest and detention in execution of the said decree be passed.

No. 81—Application for Discharge under section 41

1. The applicant was adjudged insolvent by an order of this court, dated April 24, 1994.

2. The applicant was directed by the said order to apply for his discharge within one year from the said order.

3. The debts of the applicant entered in the schedule have been paid off by the Receiver to the extent of two-thirds.

The applicant prays for an order of his discharge.

No. 82—Application for Annulment of Adjudication (Section 43)

1. The opposite party was adjudged insolvent by an order of this court, dated March 23, 1993.

2. By the said order, the opposite party was directed to apply for his discharge within two years.

3. The said period of two years has expired and the opposite party has not yet applied for his discharge. The applicant prays that the said order of adjudication, dated March 23, 1993, be annulled.

No. 83—Application under Section 53 for Avoidance of a Transfer

1. The opposite party No.1 was adjudged insolvent by this court by an order dated October 25, 1995, and the applicant was appointed Receiver of his property.

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can legally be taken in respect of other debts after the date of adjudication [section 28 (2)]. The insolvent can move the court in which proceedings are pending against him for an order staying the proceedings (under section 29), and if the order for stay is not made, he will have to obtain the protection.

2. The opposite party No.1 has on December 30, 1993 transferred by a deed of gift the property detailed at the foot of the application in favour of the opposite party, No.2.

(*Or*, the opposite party No.1 has made various transfers of portions of his property in favour of the opposite parties Nos.2 to 9. Full particulars of the said transfers with their dates are mentioned in Schedule A annexed hereto and which should be treated as part hereof.

3. The opposite party No.1 was adjudged insolvent on a petition presented by him within two years after the date of the said deed of gift (*or*, within two years after the dates of the said transfers) that is, on June 10, 1995.

The applicant prays that the said deed of gift (*or*, the said transfers) may be declared void as against him and may be annulled.

No. 84—Application by Receiver under section 54 (1) for Avoidance of Fraudulent Preference

1. *Same as in previous precedent.*

2. The opposite party No.1 transferred his house by a deed of sale dated May 20, 1996, in favour of opposite party No.2 in consideration of a private debt due to the latter from opposite party No.1.

3. The opposite party No.1 was indebted to a large number of persons, and, being unable to pay his debts as they became due from his money, has executed the sale deed in favour of the opposite party No.2 with a view to giving him preference over the other creditors.

4. That the opposite party No.1 has been adjudged insolvent on a petition presented by some of his creditors within three months after the date of the transfer specified in para 2, that is on June 10, 1995.

The applicant prays that the said transfer may be declared void as against the applicant and may be annulled.

No. 85—Application of a Third Person for Release of His Property Attached by Receiver (Section 86)

1. The applicant is the owner of the house described at the foot of this application.

2. The official receiver has, on August 21,1995, wrongfully

attached the said house as the property of one Khuda Baksh insolvent.

The applicant prays that the said attachment of the said receiver be reversed and the said receiver be ordered to release the said property.

No. 86—Application under section 83, Transfer of Property Act *(qq)*

1. On January 4, 1990, one Ram Rattan made mortgage in favour of Janki Prasad deceased, now represented by the opposite party.

2. Under the terms of the said mortgage-deed, the mortgage is redeemable in the month of *Jeth* any year.

3. The said Ram Rattan has sold a portion of the mortgaged property to the applicant by a sale-deed, dated May 4, 1994.

4. Rs.26,350 is due to the opposite party on the said mortgage.

5. The applicant deposits the said sum in court, and prays that a notice of the said deposit be issued to the opposite party.

No. 87—Reply to the Above

1. The opposite party is willing to accept the money deposited by the applicant in full discharge of the mortgage money due to him.

2. The opposite party deposits the mortgage-deed in the court.

(qq) The applications cannot be dismissed. If the tender is not accepted, the application will be simply shelved or deposited. If it has been shelved for non-appearance of the mortgagee, and the mortgagee appears at any time afterwards, the money cannot be paid out to him, except with the consent of the applicant. With the consent of both the parties, the case can be revived and money paid out to the mortgagee. It is not necessary that, on the date fixed for the return of notice to the the mortgagee, the mortgagor should be present. Even if he is absent and the mortgagee accepts the tender, an order will be passed that the money be paid out to him.

If the mortgagee is a minor, the applicant should make an application for appointment of a guardian *ad litem* for him, but if a curator of the property or guardian of the minor's property has already been appointed under the law (e.g., under the Guardians and Wards Act), the tender can be made to him, and no proceedings for appointment of a guardian need be taken. If proceedings for appointment of guardian are not properly taken the tender will not save the running of interest (*Phoolkuer* v. *Rewari*, 1930 ALJ 1020). If the applicant himself is a minor, he must apply through a guardian and should make an application for the formal appointment of the guardian for the purpose of the proceeding (section 103,

APPLICATIONS UNDER THE ARBITRATION AND CONCILIATION ACT, 1996 *(rr)*

No. 88—Application for Appointment of an Arbitrator (section 11 of Act of 1996)

1. By an agreement executed by the parties on the 23rd January, 1997 the applicant agreed to sell to the opposite party from time to time such quantity of silver as the opposite party wanted to purchase on the terms and conditions embodied in the said agreement.

2. Clause 15 of the said agreement provided that if any difference arose between the parties regarding any transaction of sale of silver made under the said agreement, it should be decided by arbitrator.

3. Several differences have arisen regarding several transactions of sale made by the applicant under the aforesaid agreement.

Transfer of Property Act), unless the guardian has been appointed by court. If the mortgagee is dead, the tender should be made in favour of all the heirs and if it is made in favour of some only, interest will not cease to run (*Ram Gopal* v. *Lachmandas*, A 1938 All 423, 1938 ALJ 617). If the money deposited falls short of the total dues under the mortgage even by a small amount, the mortgagee is not liable to accept the amount tendered and the interest on the mortgage money continues running (*Debi Prasad* v. *Kedar Singh*, A 1921 All 280 DB; *Sagar Mal* v. *Jwala Sahai*, 1946 ILR 97; *Pushparani* v. *Ram Chandra Panda*, A 1977 Orissa 23). The reply of the mortgagee must clearly state that he accepts the money in full discharge of the mortgage and the money will not become his until such consent has been signified (*Kunjunni* v. *Sankarnarain*, 28 TLJ 633). It is not open to the court to decide or pass any order on any points of dispute in case the mortgagee does not file a verified petition accepting the money deposited but files objections. In such a case the court should simply order that the application be filed (*Suryanarayana Rao* v. *Srinivas Rao*, (1949) 54 Mys HCR 136). Section 83 will not be applicable once a suit is filed (*Raj Krishna Menon* v. *Sundaram Pillai*, 1963 Ker LJ 1031).

(rr) The Arbitration has traditionally been considered as an efficacious alternative to litigation. However, the Arbitration Act, 1940 containing the substantive law of arbitration had become increasingly outmoded and discredited. Therefore, the new Arbitration and Conciliation Act, 1996 has replaced the Act of 1940 and is in force since 25.1.96. The new Act has eliminated the core weakness in the earlier Act i.e. the numerous provisions which provided for court intervention at almost every stage of conduct of arbitral proceedings. The new law provides for only two occasions when court intervention can be sought at the pre-arbitral and award stage.

4. The applicant desired that the opposite party should concur in the appointment of an arbitrator for settlement of the aforesaid differences but the opposite party always puts him off and never agreed to the appointment of an arbitrator.

5. On the 18th June 1997, the applicant sent a notice by registered post calling upon the opposite party to concur in the appointment of an arbitrator for settlement of the aforesaid difference under clause 15 of the said agreement and the said notice was served on the opposite party on the 25th June 1997, and thus 30 clear days have passed and the opposite party has not sent to the applicant any reply nor has he appointed or concurred in the appointment of an arbitrator.

Maximum freedom has been given to the parties in the matter of composition and appointment of the arbitral tribunal. The parties may either agree on the number and procedure for appointment, all by themselves or agree to abide by an existing procedure for appointment. Section 11 empowers the Chief Justice of a High Court or the Chief Justice of India, as the case may be, to appoint the arbitrator. The Chief Justice is also empowered to designate any person or institution to take the necessary steps for the appointment of arbitrator.

Section 12 (3) of the Act gives power to the parties to challenge the appointment of an arbitrator, before the Arbitral Tribunal, on specific grounds. This is an important departure from the provisions of the 1940 Act which required the parties to approach the court for removal of an appointed arbitrator. The new law also confers competence on the arbitral tribunal to rule on its own jurisdiction and to consider objections with respect to the existence or validity of the arbitration agreement.

Section 19 of the Act provides that the arbitral tribunal will not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. However, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. They may also agree that the arbitral tribunal may follow the procedure under the rules of arbitration of established arbitral bodies. This is an instance of the new law promoting institutional arbitration.

Section 31 of the Act requires the arbitral award to contain reasons unless the parties have agreed that no reasons are to be given. This is also a significant departure from the provisions of the Arbitration Act, 1940, which contained no such mandatory provision requiring the arbitrator to record reasons. Doubts have been expressed as to the wisdom of making it mandatory under the law to give reasons for the award. It has been contended that giving of reasons in the award will make it vulnerable to judicial scrutiny and thereby affect the finality of the award. It may, however, be pointed out that by virtue of the provisions in sections 5 and 34 of the Act, the scope of judicial scrutiny of the award is quite restricted.

The applicant, therefore, prays that the court will be pleased to appoint an arbitrator for settlement of the aforesaid differences between the parties.

No. 89—Application of Substitution of an Arbitrator

1. By a deed of agreement of reference dated 5th October, 1996, the parties appointed A, B and C arbitrators for making a partition of joint family property of the parties.

2. The arbitrators entered on the arbitration on the 25th October, 1996, but before they could complete the arbitration, arbitrator A died on the 2nd November, 1996, (*or*, arbitrator A, by a notice sent by him to the applicant on the 2nd November, 1996, intimated his unwillingness to act as an arbitrator), (*or*, arbitrator A has on the 2nd November, 1996 been convicted of a criminal offence and sentenced to seven years rigorous imprisonment and has thus become incapable of acting as an arbitrator), (*or*, arbitrator A ceased to attend arbitration proceedings and to proceed with the reference, though requested by the applicant and by the other arbitrators several time to do so, the last of such request was made by the applicant by means of a registered notice served by post on the.....).

It is a settled principle that no court can sit in appeal over an award given by an arbitrator. The provisions of section 34(2) clearly define the grounds on which an application for setting aside an award can be entertained by a court. **These grounds are confined to lack of capacity of a party, invalidity of the arbitration agreement under law, violation of principles of natural justice and the arbitrator exceeding his terms of reference.** The scope of judicial scrutiny, therefore, even when the award is a speaking order is limited. It will be reasonable to assume that the court will not interfere with an arbitral award merely on the ground of a wrong interpretation of the law by the arbitrator or an inadequate appreciation of facts or evidence by him. Section 36 of the Act confers on the award the status of a decree. This provision, again, is a departure from the provision of the Act of 1940, which provided the filing of the award in court and obtaining a judgment in terms of award.

Though the new law repeals the Arbitration Act, 1940, from the date of commencement of the Act, the provisions of the repealed enactments will continue to apply in relation to arbitral proceedings which commenced before the Act came into force (unless the parties have agreed otherwise). In other words, all arbitral proceedings pending on 24-1-1996, will continue to be governed by the repealed enactment by virtue of the saving provided by section 85.

Section 85 also saves the validity of all rules and notifications issued prior to 24-1-1996 under the repealed enactment to the extent they are not repugnant to

3. On the ....., the applicant sent by registered post a notice calling upon the opposite party to concur in the appointment of another arbitrator in place of the said A, and the said notice was served on him on the ..... but though more than 30 clear days have passed the opposite party has not done so.

The applicant, therefore, prays that the court will be pleased to appoint another arbitrator in place of A.

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the new law. Such rules or notifications would be deemed to have been made or issued under the new law. In view of this provision, all rules, notifications etc., made under the earlier enactments will still be valid so long as they are not inconsistent with the provisions of the new Act. However, it would appear that the rules made by the various High Courts under section 44 of the Arbitration Act, 1940 may require a fresh look since some of the provisions and the forms in the earlier rules, such as those relating to statement of special case to the courts, filing of award, etc. may no longer be required under the new law.

Under the Act, the High Courts have been given power to make rules with relation to proceeding before the court (section 82). The Central Government has also been given power to make rules for carrying out the provisions of the Act (section 84). The power given to the Central Government under section 84 is a residuary power to enable it to fill the gaps in the law, if any, by subordinate legislation.

Part III of the Act has also, for the first time in India, provided a detailed statutory frame work for the conduct of independent conciliation proceedings outside Court. It is for the parties to agree to refer a dispute to conciliation. The conciliator has to be a person who is not only impartial and independent, fair and objective, knowledgeable and tactful, but also to be a man who can influence the parties by his personality and persuasive skills. A noteworthy principle incorporated into law by the Act is that a settlement agreement reached by the parties and signed by them with the help of the conciliator will be final and binding on the parties and the persons claiming under them. Such a settlement agreement will have the same status and effect as if it is an arbitral award on agreed terms [Section 30 (3)].

The Arbitration and Conciliation Act is a new and bold initiative. It is based on the assumption that many disputes can be resolved without resort to litigation in court. It also assumes that there are fora other than courts where disputes can be resolved.

The provisions of the old Arbitration Act, 1940 may continue to apply to the arbitration proceedings pending on the commencement of the Act of 1996, hence apart from giving certain model applications under the new Act of 1996, the model petition relevant under the repealed Act of 1940 have also been retained and the relevant case law also discussed.

No. 90—Application for Appointment of Third Arbitrator

1. By a deed of agreement dated 8th February, 1996 the parties referred certain disputes between them to the arbitration of A and B.

2. By clause 7 of the said deed it was provided that the arbitrators should appoint a Third Arbitrator.

3. By a notice sent by registered post and served on the said arbitrators on the 28th June, 1996 the applicant called on them to appoint the Third Arbitrator but they have not yet done so.

The applicant, therefore, prays that the court will be pleased to appoint the third arbitrator.

No. 91—Application for Removal of Arbitrator

1. By a deed of agreement dated 15th February, 1996, the parties referred certain disputes between them to the arbitration of A.

2. The said arbitrator did not enter on the reference for a long time, though requested several times to do so and the applicant served a notice on him by registered post on the 8th August, 1996 calling upon him to enter on and proceed with the reference but though more than five months have expired he has neglected to do so.

(*Or*, the said arbitrator entered on the reference on the 15th March, 1996 and examined the parties but has done nothing further although he

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Law prior to encatment of Arbitration and Conciliation Act, 1996

The Arbitration Act 1940 is self-contained and no proceeding otherwise than under the Act can be taken for a decision upon the existence, effect or validity of an arbitration agreement or award (section 32). A suit to enforce an award in which the defendant denies the existence or validity of an award, is barred by section 32, Arbitration Act (*Ram Chandra Singh* v. *Munshi Mian*, A 1950 Pat 48; *Shri Ram* v. *Shripat Singh*, A 1957 All 106). Conversely, if award is not filed in court, suit on original cause of action is not barred by section 32 (*Ram Sahai* v. *Babu Lal*, A 1965 All 217). The person who is already working as an Arbitrator for one of the parties, can be directed to act in place of person who has refused to work (*Kasturba Health Socy.* v. *National Building Construction Corpn. Ltd.*, A 1995 Bom 267).

In the absence of contrary agreement, an arbitrator is bound to finish the arbitration within 4 months (Sch.1, Cl. 3) and if he does not, it is neglect. Particulars of neglect should be specified in the application. If the award is delivered beyond 4 months it is invalid and can be avoided (*Abdul Hakim Khan* v.

fixed several dates for hearing and the parties were ready with their evidence and account books, always postponing the case for one reason or another, which were all equally inadequate. The said arbitrator has thus failed to use reasonable dispatch in proceeding with the reference.)

For the above reasons the applicant prays that the said arbitrator be removed.

No. 92—Application for filing an award [Section 14 (2) of Arbitration Act, 1940]

1. On the 14th day of January 1994, the applicant and the opposite party having a difference between them, concerning the partition of their family property, agreed in writing to submit the said difference to the arbitration of Sri Radha Charan, Advocate.

2. The said Sri Radha Charan entered upon the arbitration and made an award in writing on 20th April 1995.

3. The said arbitrator was requested by the applicant to file in court the award or a signed copy of it with depositions taken by him and

Dominion, Lahore Improvement Trust, A 1950 Lah 132). Now under the Act of 1996 no such period for making the award has been prescribed.

An applicant who raises no objection in respect of a biased arbitrator knowing him to be partial all the time and takes the chance of the award turning out to be favourable to him in spite of such partiality cannot be permitted to put forward such grounds if ultimately the award turns out against him (*National Fire & General Isurance Co.* v. *Union of India*, A 1956 Cal 11; *Dhar Pvt. Ltd.* v. *Union of India*, 68 CWN 927).

Under section 14 of the Arbitration Act the parties have been given a right to require the arbitrator to file the award in court. The arbitrator is bound to file the award if directed by the court. Application for direction of the court will presumbly be necessary only if the arbitrator fails to file the award at the request of the parties. The "court" is the court having jurisdiction in the subject-matter of the suit; but no application can be made in a Small Cause Court (section 23). The court may, if the award has been filed, modify or correct it under section 15 or remit it for reconsideration under section 16 or set it aside on a ground mentioned in section 30 and in all such cases the order will be appealable (section 39). An application for setting aside or remitting an award can be made by any party including the one on whose application the award was filed. If the court does not pass any such order, it shall pronounce judgement in terms of the award (sec. 17), and a decree shall follow which will not be appealable. Decree can be passed on an award which is partly valid, if the part invalid is separable (*Md. Mustafa* v. *Md. Yar*, A 1940 Lahore

documents proved before him but he has not complied with the request.

4. The applicant prays that the said arbitrator be directed to file in court the award with full record of depositions and all the documents proved before him by the parties, and upon his filing the same, further proceedings be taken according to law.

No. 93—Application to Modify an Award under section 15 of Arbitration Act, 1940

1. The parties referred their dispute to the arbitration of A, who made his award and filed it in this courtand the court has issued a notice of filing the said award to the applicant.

2. The applicant submits that the award is defective in the following respects.

(a) The question of any maintenance allowance being paid by the applicant to his step-mother B was not referred to the arbitrator and therefore, the portion of the award directing applicant to pay Rs.1,000 per month, as maintenance to B is invalid.

(b) It is stated in the award that the applicant is entitled to get a sum of Rs.10,000 from the opposite party but the award is imperfect in so far as it does not specifically direct that the opposite party should pay that sum to the applicant.

(c) It is stated in para 4 of the award that the applicant's share in the grove is 1/4th and in house 1/3rd but in the last paragraph the arbitrator has awarded to the applicant a 1/3rd share in the grove and 1/4th share in the house which is an error arising from an accidental slip.

(d) The applicant's half share in a shop has been recognised by the arbitrator in para 9 of the award but by an accidental omission this has not been mentioned in the last para, where the final award has been made.

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24). This is now the only remedy of a party to an award wishing to enforce it, as a suit for a decree on the basis of an award is barred by section 32.

Where in such a proceedings, the other party filed a written statement challenging the reference and award, it was held that the written statement should be treated as an application under section 33 and therefore the other party could appeal under section 39, even though a decree was passed in terms of the award (*Gauri Singh* v. *Ram Lochan*, A 1948 Pat 430.

A guardian mother of a minor is entitled to enter into an agreement to refer to

The applicant, therefore, prays that the aforesaid defects in the award be removed by suitably modifying or correcting the same.

No. 94—Application for Remitting an Award (section 16 of Arbitration Act, 1940)

1. *Same as in the previous precedent.*

2. In para 3 of the agreement of reference dated.....the parties had also referred to arbitration, the question of the applicant's right of way to the well through the grounds of house No.4, but the award has left this matter undetermined.

3. There was no dispute about house No.5 which was in possession of the applicant and the question of partition of houses Nos.1,2,3 and 4 only was referred to arbitration but the arbitrator has partitioned all the five houses by putting them in one hotch-potch, and the award about houses Nos.1 to 4 is not separable from that about house No.5.

4. The award is indefinite in so far as it directs that the opposite party should give possession of house No.1 to the applicant whenever he can conveniently shift to another house.

5. The award is illegal on the face of it in so far as it had awarded to the opposite party against the applicant, a sum of Rs.500 on account of a contract which on the arbitrator's own finding was illegal and therefore void.

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arbitration on behalf of the minor (*Raghupati* v. *Ram Gopal*, A 1939 Cal 557), and so a manager of a joint Hindu family on behalf of other members (*Kanshi Ram* v. *Harman Das*, A 1940 Lah 73). An agreement to which minor is a party is not void.

Where arbitration is made during the pendency of a suit, the reference should be made through court, otherwise, the award cannot be enforced (*Ramdayal* v. *Sheodayal*, 183 IC 128, A 1939 Nag 186; *I.G.H. Ariff* v. *Bengal Silk Mills*, A 1949 Cal 350; *Maung Hlay* v. *U.Ge*, 183 IC 343, A 1939 Rang 300). An Appellate Court can make the reference (*Nachiappa* v. *Subramaniam*, A 1960 SC 307), but an execution court cannot (*Mordhwaj* v. *Bhudar Das*, A 1955 All 353 FB). However, if during pendency of execution proceedings an arbitration takes place and award is given, it can be given effect to under the proviso to section 47 Arbitration Act, if all parties agree to it after the award (*Mordhwaj*, supra). Insolvency court is not a Civil Court, therefore, no arbitration can be made in insolvency proceedings (*Mangilal* v. *Deo Chand*, A 1949 Nag 110).

The applicant prays that the said award be remitted to the arbitrator for reconsideration within such time as the court may fix.

No. 95—Application for Reference to Arbitration

1. The applicants are the parties interested in this suit.

2. The applicants agree that the following matters in difference between them be referred to the arbitration of Budh Singh, Niha Chand and Ram Prasad, resident of village Qudauli, Tehsil Hapur, District Ghaziabad.

(a) Whether the defendant executed the pronote in suit ?

(b) Whether the bond in suit was executed as security against losses on *badhni* transactions and not for a cash loan ?

(c) Whether the defendant purchased any grain for the plaintiff in 1991 ?

(d) How much, if anything, is now due to the plaintiff from the defendant ?

3. The applicants further agreed that in case of difference of opinion, the decision of the majority of the arbitrators shall prevail, that all sittings of the arbitrators shall take place at Hapur, and that the parties shall not be entitled as of right to produce any evidence before the arbitrators, but that the arbitrators may take any evidence they think necessary.

The applicant, therefore, pray for an order of reference accordingly.

No. 96—Application for correction/interpretation of Award

The petitioner submits as under :

1. In pursuance of the arbitration clause contained in the agreement entered into between the parties, the matter was referred to the Arbitral Tribunal which has made the award on 1st May, 1996.

The application should be made by all the parties *interested in the subject matter of reference* though not necessarily by *all* the parties to the suit (*Hoassamal* v. *Kodanmal*, 104 IC 342; *Abdul Kadir* v. *Madhav Prabhakar*, A 1962 SC 406). If a party does not give his consent, reference and award are vitiated (*Sammiti* v. *Yallialwar*, 102 IC 2; *Tej Singh* v. *Ghosi Ram*, 102 IC 236; *Ahmad* v. *Sardara*, 114 IC 712, A 1929 Lah 171); but if the non-joining party is represented before the arbitrator, the proceeding will not be vitiated (*Jaisil* v. *Tel Ram*, 122 IC 100, A 1930 Lah 523).

2. In the said arbitral award, a clerical error has crept in. A perusal of para 2 of the award shows that the Tribunal has awarded interest amounting to Rs.12,000/- to the petitioner against the opposite party, but in the operative part a sum of Rs.1,200/- is awarded as interest. The said mistake is a mere clerical error.

It is, therefore, prayed that the aforesaid error in the award be corrected and the figure of Rs.1,200/- be rectified as Rs.12,000/-

No. 97—Application for Additional Award (section 33 (4) of Act of 1996)

The petitioner submits as under :

1. In pursuance of the arbitration clause contained in the agreement entered into between the parties, the matter was referred to the Arbitral Tribunal which has made the award on 1st May, 1996.

A *pro forma* defendant cannot be said to be a party interested (*Raminder* v. *Mohinder*, A 1940 Lah 186, 190 IC 399), but an absent defendant against whom the plaintiff wants a decree is a person interested (*Girja* v. *Kanai*, 43 IC 169, 27 CLJ 339; *Parasuram* v. *Muthu Swamy*, A 1925 Mad 1209, *Sabta* v. *Dharmakirti*, 35 A 107; contra *Ajudhia* v. *Badrul Hasan*, 15 ALJ 427, 29A 489, 41 IC 357). In a case, A sued B and C for partnership accounts alleging that C had retired and was not liable. C was absent, but B pleaded that C was liable. It was held that C was not a party interested (*Mahadev* v. *Narayan*, 30 BLR 530, 110 IC 343, A 1928 Bom 248 DB). An important test is to consider whether a person is a necessary party or such that if not orginally impleaded, the court would direct him to be joined under O.1, R.10 (*Sharafat Ali* v. *Mst. Bhagvati*, A 1929 All 763, 1930 ALJ 239 DB). Either the parties themselves or their agents specially authorised to make such application should join. A partner in a firm cannot refer a case to arbitration on behalf of the firm though he can prosecute or defend the suit (*Gopal Das* v. *Baij Nath*, 24 ALJ 235, A 1926 All 238 DB). If some of the parties are interested in a part of the subject-matter, they can refer to arbitration their dispute about this part, and the rest of the suit will continue (section 24). The application should mention the matter sought to be referred, and the items and conditions of reference which may be agreed upon. The application should be made by all parties but need not be signed by them (*Umed Singh* v. *Sobhagmal*, 43 C 290; *Gudipoodi* v. *Kattapalli*, 105 IC 1051; *Sharafat Ali* v. *Mst. Bhagwati*, A 1929 All 763, 1930 ALJ 239 DB). The guardian of a minor party requires permission of the court (*Seth Ramgopal* v. *Lala Shantilal*, A 1942 All 85; *Kedar Nath* v. *Basant Lal*, 183 IC 422, A 1939 Pat 278; *Shripada* v. *Datta Traya*, 183 IC 753, 41 BLR 485, A 1939 Bom 296; *Umargul* v. *Abdulmanan*, A 1940 Pesh 12, 187 IC 860; *Ramanatham* v. *Kumarappa*, A 1940 Mad 650, 1940 MWN 191). If more powers are desired to be given to arbitrators than those given in the order of reference, the parties should apply to the court for a fresh order of

2. In the claim put forward by the petitioner, the petitioner also claimed Rs.5,000/- damages or any such other amount as may be determined by the Arbitral Tribunal on account of the failure of the opposite party to execute the sale deed in favour of the petitioner. But the Tribunal has not given any finding on the petitioner's claim and has not awarded any damages under the said claim.

It is, therefore, requested that the Arbitral Tribunal may make an additional award as to the claim of the petitioner for damages aforesaid.

No. 98—Application to Set aside an Award

1. In a case referred by the parties to arbitration, the arbitrator has filed an award in this court, notice of which has been issued by the court to the applicant.

2. The applicant prays that the said award be set aside on all or any of the following grounds and the said arbitration be superseded, viz.

(1)

(2)

(3) etc.

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reference and cannot themselves by agreement give such power to the arbitrator (*Sherbanubhai* v. *Hosseinbhai*, A 1948 Bom 292, 50 BLR 89). If there is no valid reference the award will be a nullity and can be challenged in any appropriate proceeding apart from section 30 (*Chhabha Lal* v. *Kullulal*, A 1946 PC 72; *Shukrulla* v. *Rahmat Bibi*, A 1947 All 304). Until the award has been filed, an application for setting it aside cannot be made (*Ratanji* v. *Dhirajlal*, A 1942 Bom 101; *Bengal Jute Mills* v. *Jevraj*, A 1944 Cal 304), but if award is filed soon after the application, the latter can be considered (*I.G.H. Ariff* v. *Bengal Silk Mills*, A 1949 Cal 350). If a party is dissatisfied with an award he may wait till the award is filed and he receives notice.

Limitation : An application under section 20 of the Arbitration Act is governed by Art. 137 of the Limitation Act, 1963, and has to be filed within 3 years (*Union of India* v. *Momim Construction*, A 1995 SC 1927). In arbitration proceedings under the same arbitration agreement, successive references of various disputes arising from time to time are not barred (*International Airports Authority of India* v. *Mohinder Singh*, A 1996 Bom 167). Limitation for filing objection against the award is 30 days from the date of award [Article 119 (a)]. On setting aside the award, court may supersede the reference (section 19). Application should be made within 30 days of the service of notice of the filing of award [Article 119 (b) Limitation Act]. The notice may be formal, informal or constructive, but must emanate from the court and not from the other party (*State of West Bengal* v. *A. Mondal*, A 1985 Cal 12).

PETITIONS UNDER
THE INDIAN DIVORCE ACT OF 1869 *(ss)*

No. 99—Petition, by Husband, for Dissolution of Marriage

(*In the Court of the District Judge at Agra*)

Between Samuel Robinson, by profession a sculptor, residing at Etmadpur, District Agra... ... ... *Petitioner.*

Catherine Robinson, residing at Drummond Road, Agra ... ... *Respondent.*

and

Henry Jackson, by profession a photo artist, residing in Partapura, in the town of Arga ... ... *Co-respondent.*

To the District Judge at Agra

The 14 the day of October, 1995.

The Petitioner, the said Samuel Robinson, showeth :

1. That your petitioner was, on February 5, 1991, lawfully married to the respondent, Catherine Robinson, then Catherine Bray, spinster, at Calcutta.

2. That, after his said marriage, your petitioner lived and cohabited with his said wife at Calcutta from 1991 to 1993 and then at Etmadpur within the jurisdiction of this court, from 1994 up to the month of June 1995, and that, your petitioner and his wife have had two issues of the said marriage, one son, Henry Robinson, aged four years and one daughter, Sarah Robinson, aged two years.

(ss) This Act applies only to Christians. Though proceedings under this Act are spoken of as suits and are conducted very much like original suits, they are commenced not by plaint but by petition, and the parties are not spoken of as plaintiffs and defendants but as petitioners and respondents.

If the petitioner is an idiot or a lunatic, the petition should be brought by the committee or other person entitled to his or her custody (section 48). If the petitioner is a minor, he or she shall sue through a next friend approved by the court, but it is essential in this case, that the next friend should file an undertaking in writing to be answerable for costs (section 49). A form of this undertaking is given at No. 14 of the Forms in the Act. The following are the reliefs which can be claimed by such petitions :

3. That during the two years immediately preceding June 21, 1995, the co-respondent Henry Jackson was constantly, except for a few short interruptions, residing in the house of your petitioner at aforesaid Etamdpur, and that, on diverse occasions during the said period, the dates of which are unknown to your petitioner, the said Catherine Robinson committed adultery with the said Henry Jackson in your petitioner's said house.

4. That, at the time of the said marriage your petitioner and his said wife were, and still are, Christians.

5. That your petitioner and the said Catherine Robinson are domiciled in India.

6. That no collusion exists between your petitioner and his said wife for the purpose of obtaining a dissolution of their said marriage or for any other purpose. Nor has your petitioner connived at nor condoned the respondent's conduct.

Your petitioner, therefore, prays that this court will decree a dissolution of the said marriage, and that the said Henry Jackson do pay Rs.15,000 as damages in respect of the said adultery, such damages to be paid to your petitioner or otherwise paid or applied, as this court deems fit.

Verification

No. 100—Petition, by Wife, for Dissolution of Marriage

1. That on April 14, 1980, your petitioner was lawfully married to Samuel Robinson at Tehran in Iran.

2. That, after the said marriage, your petitioner lived and cohabited with her said husband at Tehran up to 1988, at Bombay from 1988 to the end of 1989 and since 1990 at 90, Chowringhee Road, Calcutta and that your petitioner and her said husband have had issues of their said marriage,

(1) Dissolution of marriage.

(2) Nullity of marriage.

(3) Judicial separation.

(4) Order of protection of wife's property against her husband or his creditors.

(5) Restitution of conjugal rights.

(6) Damages for adultery.

During the pendency of such proceedings, interlocutory orders for alimony,

four children of whom two only survive, viz. Sarah Robinson, a daughter aged 15 years, and Henry Robinson a son aged 13 years.

3. That, at the time of their said marriage, your petitioner was, and is still a Christian.

4. That the said Samuel Robinson has on July 2, 1995 renounced the Christian faith and embraced Islam under the guidance of Maulana Abdul Jalil of Dacca, and on the same day, July 2,1995, at Dacca, the said Samuel Robinson went through a form of marriage according to Mohammedan rites with one Musammat Bashiran, daughter of the said Maulana Abdul Jalil.

(*Or*, that on or about July 3, 1995, the said Samuel Robinson, at his house at 90, Chowringhee Road, Calcutta committed incestuous adultery with his own daughter, the said Sarah Robinson).

(*Or*, that on July 3, 1995, at Patna, while the marriage of your petitioner with the said Samuel Robinson was still in force, a ceremony of marriage was duly performed between the said Samuel Robinson and one Laura King, whereby the said Samuel Robinson committed bigamy, and

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settlement of profits or custody of children may also be obtained on petition made for the purpose. The petitions should be drafted with the same care as a plaint. The facts on which they are founded should be alleged with the same precision and definiteness as in a plaint, avoiding all matters of evidence, law and unnecessary details. But no vague allegations or charges can be permitted and full particulars of all charges of misconduct should be given. The statements contained in every petition should be verified in the same way as allegations in a plaint (section 47). The same rules apply to written statements of the respondents, excepts that they are not required to be verified. The petition should allege :

(1) The marriage, with its necessary particulars of date and place.

(2) Whether there has or has not been any issue of the marriage, and the issue, if any, living at the time of the petition.

(3) That the petitioner or the respondent professess the Chirstian religion (section 2).

It is not necessary that he should have been a Christian at the time of marriage or his wife should be a Christian at all (*Dalal* v. *Dalal*, 32 BLR 1046). Even a Hindu marriage can be dissolved on the application of the husband after his conversion to Christianity (*Gobardhan* v. *Jasodamoni*, 18 C 252).

(4) That the husband and wife actually reside within the jurisdiction of the court or that they last resided together within the jurisdiction of the court [section 3 (3)].

that from and after the said date, the said Samuel Robinson and the said Laura King, cohabited adultery together at house No.40 Railway Road, Patna).

(*Or*, that on July 2, 1995, at his house 90, Chowringhee Road, Calcutta, the said Samuel Robinson committed rape upon the person of one Smt. Nasiban, widow of Karim Baksh of 36, Colootola Lane, Calcutta, then in employment of the said Samuel Robinson and your petitioner).

(*Or*, that on diverse occasions between January 1 and June 4, 1995, the said Samuel Robinson at his house No.90, Chowringhee Road, Calcutta, committed sodomy with Baqar Ali, son of Amir Ali of 25, Masjid Vari Lane, Calcutta, a boy servant then in the employment of the said Samuel Robinson and your petitioner).

(*Or*, that on diverse occasions from January 1, 1995 to June 1995, the said Samuel Robinson committed adultery with Smt. Nasiban, widow of Karim Baksh of 36, Colootola Lane, Calcutta, who was then in the service of the said Samuel Robinson and your petitioner; and on the Good Friday, 1995, at the house of Henry Jackson, a photographer, at Patna, where the said Samuel Robinson, and your petitioner were then temporarily staying as guests, the said Samuel Robinson struck your petitioner in the face with his clenched fist and knocked her down and dragged her from the drawing room to the verandah);

If they reside within the jurisdiction of the court it is not necessary that they should do so together. This condition is necessary only when jurisdiction is sought to be given to the court, not on the ground of present residence of the husband and wife, but on the ground that they *last resided* within the jurisdiction of the court. The word "together" governs only the words "last resident" (*Henrieta* v. *Frank Gale*, 10 IC 487, 171 PLR 1911: *Robert Leadon* v. *Ethel*, A 1926 Oudh 319, 13 OLJ 236, 94 IC 952; *Edith Walsh* v. *Edward Walsh*, 101 IC 388, 29 BLR 308; *Eates* v. *Eates*, A 1949 All 421, 1947 ALJ 670)."Reside does not mean having sexual intercourse (*Edith Walsh* v. *Edward Walsh*, 101 IC 388, 29 BLR 308). Where a suit for dissolution of marriage and damages is filed in the court of a District Judge within whose jurisdiction the petitioner and his wife were not proved to have last resided, that court has no jurisdiction to try the case and hence where a decree for dissolution is passed by that judge it would be a nullity and cannot be confirmed (*Barret* v. *Barret*, 1949 ALJ 494 FB).

These are the general requirements of all petitions under the Divorce Act. In a petition for any relief except dissolution of marriage, it should further be alleged

[*Or, (allegation of adultery)*; and, on that July 4, 1993, the said Samuel Robinson deserted your petitioner against her wish, without reasonable excuse, and from that time down to the present, being for the space of two years and upwards, has continued to desert your petitioner].

[N.B - In the last case of desertion, the following shall be substituted for the words "since 1990" in para 2: "from 1990 to July 4, 1993"]

5. That the said Samuel Robinson came to India in the year 1988, and settled there with the intention of making it his permanent home, and is now residing at Calcutta.

6. That your petitioner and the said Samuel Robinson last resided together at 90, Chowringhee Road, Calcutta within the jurisdiction of this court.

7. That no collusion exists between your petitioner and her said husband for the purpose of obtaining dissolution of their marriage or for any other purpose, nor has your petitioner connived at nor condoned his conduct.

Your petitioner, therefore, prays that this court will decree a dissolution of the said marriage of your petitioner with the said Samuel Robinson.

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that the petitioner resides in India (section 2). In the majority of cases the allegation will be implied in allegation No.4 mentioned above and need not be separately made but when the parties had last resided within the jurisdiction of the court and have since left it, it is necessary to allege that the petitioner still resides in India. Residence in India must be *bona fide* and not casual or as a traveller (*Nusserwanjee Wadi* v. *Eleanora Wadia*, 38 B 125, 20 IC 482, 15 BLR 593).

(1) Petition for Dissolution of Marriage

Domicile : As no decree for dissolution of marriage can be passed except when the parties to the marriage are domiciled in India at the time when the petition is presented (section 2), it is necessary to allege this fact in the petition. The marriage may have been solemnized anywhere and the wrong, which is the basis of the claim, may have been committed anywhere else. In the case of a foreigner, a clear intention to reside and establish himself in India without returning to his native country is necessary to be established before he can be said to have an Indian domicile. The intention is to be inferred from all the circumstances of his life, conduct, habits and so forth (*William H. Murphy* v. *H. Murphy*, 10 L 107, 115 IC 849), and a mere statement of the applicant that he intends to reside in India is not sufficient to prove domicile (*Moody* v. *Moody*, A 1938 Lah 293, 174 IC 992).

No. 101—Petition by Wife, for a Decree of Nullity of Marriage

The petition of Catherine Bray, falsely called Catherine Robinson, showeth—

1. That, on October 18, 1992, your petitioner, then a spinster, 19 years of age, was married in fact, though not in law, to Samuel Robinson, respondent, then a bachelor of 28 years of age, at Calcutta.

2. That from the said October 18, 1992, your petitioner lived with the said Samuel Robinson at diverse places and particularly at Calcutta.

The next thing to be alleged is the ground on which dissolution is claimed. (See section 10 Divorce Act; *compare* section 31 and 32, Parsi Marriage and Divorce Act; section 3, Dissolution of Muslim Marriages Act; section 13, Hindu Marriage Act). If the petitioner is the husband, adultery of the wife alone is a sufficient ground and should be alleged, with full particulars as to time, place, etc. It is not necessary to give exact dates if the same are not remembered, but the time should be clearly defined either by reference to some other well-known event, or otherwise. The petitioner can rely on adultery committed even outside India (*G.A. Clifford* v. *E. Clifford*, 45 CWN 249). The husband cannot claim dissolution of marriage on the ground of desertion (*Aluvin Singh* v. *Chandrawati*, A 1974 All 278).

If the petitioner is the wife, she must allege one or more of the seven grounds laid down in section 10, para 2, with full particulars. For instance in case of an allegation of adultery, the name of the person with whom adultery is alleged must be given; but if it is not known, it is sufficient to say so and if the person is afterwards identified in evidence, it would be sufficient (*Grant* v. *Grant*, 167 IC 743, A 1937 Pat 82). A decree *nisi* for dissolution of marriage on the ground of adultery can in no circumstance be granted when there is no evidence which the court can accept of the adultery alleged in the petition, upon which the relief is sought. Merely saying that the petitioner's wife had run away with another man whose name is not disclosed in the petition is not enough (*Ammana* v. *Mrs. Epsey Ammana*, A 1949 Mad 7). There is no provision in the Indian Divorce Act for the grant of decree of divorce on the ground of non-resumption of cohabitation for two years of separation. The anology under the Hindu Marriage Act or the Special Marriage Act cannot be applied (*Amarthala Hemalatha* v. *Dasari Babu Rajendra Veraprasad*, A 1990 AP 220 SB).

Mere allegation of adultery without giving details is not sufficient to establish the charge of adultery. (*Rajeev* v. *Baburao* A 1996 Mad 262). Although as a general rule the court would not act on an uncorroborated confession of adultery by the principal respondent, yet it is within the competence of the court to act on such admission and grant a decree for divorce (*Geyer* v. *Geyer*, A 1947 Lah 867). It would appear that mere adultery of the husband is no ground for dissolution of marriage,

3. That the said Samuel Robinson has never consummated the said pretended marriage by carnal copulation.

4. That, at the time of the celebration of your petitioner's said pretended marriage, the said Samuel Robinson was, by reason of his impotence, legally incompetent to enter into the contract of marriage.

5. (*Allegation about the petitioner being a Christian*).

6. That the said Samuel Robinson and the petitioner both reside in the city of Calcutta within the jurisdiction of this court.

7. (*Allegation of absence of collusion, etc.*).

Your petitioner, therefore, prays that this court will declare that the said marriage is null and void.

No. 102—Petition by Husband for a Decree of Nullity of Marriage

1. That, on the 15th day of July, 1990, your petitioner then a bachelor, aged thirty years, was married in fact, though not in law, to the respondent Catherine Bray, since falsely called Catherine Robinson, at the .....Church, Calcutta.

2. That from the said 15th day of July, 1990, until August 4, 1995, your petitioner lived and cohabited with the said respondent at diverse places, and particularly at No.....Ramsay Street, Dacca, and that your petitioner and the said respondent have had no issue of their said pretended marriage.

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unless it is either incestuous,or is accompained by bigamy of marriage with another woman, or is coupled with cruelty, or desertion without reasonable excuse, for two years or upwards, but even mere adultery of the husband would entitle her to claim judicial separation. A wife who has got sufficient grounds for petitioning for dissolution should carefully consider whether to apply for dissolution or for judicial separation only, because if she applies for the latter she cannot subsequently apply for the former without a fresh offence having been committed (*Manjula* v. *Janaji*, A 1940 Mad 510).

"Cruelty" does not mean merely physical cruelty and studied neglect or a course of degradation may amount to cruelty (*Stuart* v. *Stuart*, 96 IC 932, 53 C 436, A 1926 Cal 864 DB; see also *Asha* v. *Baldev*, A 1985 Del 76; *Kalpana* v. *Surendra*, A 1985 All 253; *Shanti* v. *Raghav*, A 1986 Raj 13; *Kamini* v. *Mukesh*, A 1985 Bom 221; *Sri Krishna* v. *Alok Ranjan*, A 1985 Cal 431). Dwelling with another woman in adultery in the same house has been held to be "cruelty" (*Barkat Bibi* v. *Nawab*,

3. That before the celebration of your petitioner's said pretended marriage, the said respondent had, on June 4, 1987, been married to one James Wilson of No. ..... Somerset Street, Bombay, at the .....Church at Bombay, and at the time of the celebration of your petitioner's said pretended marriage the said James Wilson was living, and the marriage of the said respondent with the said James Wilson was then in force.

4. That your petitioner was, on the said July 15, 1990, wholly unaware of the fact of the respondent's said previous marriage with the said James Wilson.

A 1938 Lah 301, 175 IC 21). Cruelty is a conduct of such type that the petitioner cannot reasonably be expected to live with the respondant (*Keshavrao* v. *Nisha*, A 1984 Bom 413, FB,—a case under section 13 Hindu Marriage Act) and it need not be proved that there is danger to life, limb or health of the petitioner; causing mental agony is enough (*Balbir Kaur* v. *Dhir Das*, A 1979 P & H 162). Cruelty includes mental cruelty. Onus lies on the spouse alleging cruelty (*Prem Prakash* v. *Sarla*, A 1989 MP 326 SB). Petition by the husband for divorce lies only on the sole ground that the wife is living in adultery, (*Anil Kumar Mahasi* v *Union of India*, (1994) 5 SCC 704, (1994) 2 KLT 399; *Prem Prakash* v. *Sarla*, A 1989 MP 326 SB). Having illicit relations with another person amounts to mental cruelty and is a ground for divorce. Where one of the spouses makes false allegations about the character of other spouse in open court with intention to injure the reputation, it amounts to cruelty (*Vimla Ladkani* v. *Chandra Prakash Lakhani*, A 1996 MP. 86). Husband administering some drug for the purpose of miscarriage and physically torturing wife amounts to cruelty, and entitles a wife to a decree for dissolution of marriage (*K.P.Y.Siddhique* v. *Amina*, A 1996 Ker 140 DB). Impotency need not be absolute; even impotency of the respondent *qua* the petitioner would be enough (*Kanthy* v. *Harry*, A 1954 Mad 316 FB; *Vincent Adolf* v. *Jeme Beatrice*, A 1985 Bom 103). For the offence of bigamy, it must be proved that the second marriage has been performed according to recognised ceremonies (*Swapna Ghosh* v. *Sadananda Ghosh*, A 1989 Cal. 1 SB).

Lastly it should be alleged in such petitions that there is no collusion or connivance between the petitioner and the other party to the marriage (section 47). The mere fact that the wife's attorney had furnished certain documents to the petitioner's attorney or that they had subpoenaed the co-respondent is a very narrow ground for infering collusion (*Linton* v. *Guberian*, 56 C 530, A 1929 Cal 599 DB). All the facts including absence of connivance should be proved by the plaintiff even if the wife does not oppose the application. If there is delay, the same should also be explained by the husband (*Hartley* v. *Hartley*, A 1930 Cal 322, 124 IC 465).

5. That, at the time of the said marriage, your petitioner and the said respondent were, and still are, Christians.

6. That your petitioner and the said respondent last resided together at Calcutta within the jurisdiction of this court. Your petitioner now resides at Hooghly in India and the said respondent resides with her father at No....., Camac Street, Calcutta.

7. That there is no collusion between your petitioner and the said respondent with respect to the subject of this suit.

Your petitioner, therefore, prays that this court will declare that the said marriage is null and void.

Defence : In addition to the usual traverse of the grounds on which the petition is based, the respondent may show any of the circumstances mentioned in the proviso to section 14 e.g., the petitioner's own adultery, cruelty or desertion, etc., but if the petitioner is driven to a life of adultery by the husband's own conduct towards her, her adultery would be no defence (*Wilson-de-Roze* v. *Wilson-de Roze*, 57 C 891; *Nalini* v. *C.H.Issac*, A 1977 MP 266). It may be shown that the petitioner had condoned the adultery complained of or has been in any manner accessary to, or conniving at, the adultery (*B.D.Charles* v. *Nora Benjamin*, A 1979 Raj 156). Full particulars as to time, place, and occasion of the alleged *condonation* should be given, and the condonation should be *after* the alleged marital offence which is made the basis of the petition. Cohabitation after knowledge of a matrimonial offence operates as condonation of that offence (*Emmanuel* v. *Mandakini*, A 1946 Nag 69). But if there is a matrimonial offence after the condonation, the condonation goes and the original offence is revived. Wherever the respondent pleads condonation and the petitioner wants to show such a reviver of the previous conduct by another offence subsequent to the alleged condonation he should at once amend his petition by alleging the reviver and the particulars of the subsequent offence annulling the condonation. The court can, however, recognize the reviver even without amendment if evidence of subsequent offence is admitted (*Prem Chand* v. *Bai Galal*, 105 IC 871, 29 BLR 1336, A 1927 Bom 594, 51 B 1026 FB). The second offence which is set up as a reviver of the condoned offence need not be the like offence but it must be an offence of which a court can take cognizance, or it may be any misconduct (*Blackmore* v. *Blackmore*, 119 IC 220, A 1929 Rang 216, 7 R 313; *Viol Duncan* v. *George Duncan*, 184 IC 801, A 1939 Rang 352). Mere familiarity with another person, therefore, will not revive a condoned offence of adultery (*G.C. Foster* v. *A.B Foster*, 107 IC 184, 1 Luck 685, A 1928 Oudh 114).

Acquiescence is also a good defence. Where the husband sued two years after the adultery and during this time the wife lived with the co-respondent and the husband lived in comfort away from her, held that the husband's conduct

No. 103—Petition by Wife for Judicial Separation on the Ground of Husband's Adultery

1 to 3. *Same as in precedent No. 100.*

4. That on diverse occasions in or about the months of March, April and May, 1995, at No.....Chowringhee Road, Calcutta, the said Samuel Robinson committed adultery with Flora Jenkins, who was then

amounted to acquiescence in the injury complained of (*King* v. *King*, 57 C 215). But mere delay is no defence except that it will affect the quantum of damages (*Felisa E. Geyer* v. *M.M.Geyer*, A 1949 Lah 34). A wife sued for divorce may show husband's own adultery, as that is a fact which court can consider and in proper cases, though not in all, may refuse relief on such ground (*Ernest* v. *Anen*, 184 IC 110, A 1939 All 522).

Parties : The other party to the marriage sought to be dissolved is the only necessary party. But to a petition by the husband, the adulterer is also a necessary party. The only grounds on which the husband can be excused from impleading the adulterer are, that the wife is leading the life of a prostitute and the petitioner knows of no particular person with whom she has committed adultery, or that the alleged adulterer could not be known inspite of due efforts, or that he is dead. The petitioner should make an application to the judge, mentioning one of these grounds, and should obtain the judge's order excusing him from impleading the adulterer. Such application should be accompanied by an affidavit showing why the petitioner has been unable to identify or trace the adulterer and what efforts he has made to do so. This order should be obtained before the hearing of the petition (*Cox* v. *Cox*, 45 C 525; *K.Kumar Raju* v. *K.Umamaheswari*, A 1995 A.P. 222 SB).

Where an adulterer is impleaded, the petitioner may add a claim for damages against him. The woman with whom the husband has committed adultery is not a necessary party to a suit by the wife.

(2) Nullity of Marriage

No decree of nullity of marriage can be passed except where the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition (section 2). These facts must, therefore, be alleged. The petition can be based on one or more of the grounds mentioned in section 19, and such ground or grounds must be clearly alleged in the petition. The court has no power to pass a decree on any other ground under the guise of equity (*H.* v. *H.*, 30 BLR 523, A 1928 Bom 279, 110 IC 266 FB). The power to annul a marriage on the ground of fraud, e.g., a Muslim husband's representation that he was a Christian, is saved by section 19 itself (*Therisia* v. *Mustafa*, ILR (1939) 2 Cal 60, A 1940 Cal 75, 186 IC 593). Marriage can be annulled on the ground of impotency as regards wife, even if the husband is not impotent as regards other woman (*ibid*). An application for nullity on the ground of impotency of husband was dismissed

living in the service of the said Samuel Robinson and your petitioner, at their said residence at No.....Chowringhee Road, Calcutta.

5. That on diverse occasions between June 1, 1995, and June 15, 1995, the said Samuel Robinson at No..... Chwringhee Road, Calcutta, committed adultery with Emma Nesfield, wife of George Nesfield a guard in the employ of the Eastern Railway, who was then staying as guest of the said Samuel Robinson and your petitioner at their said residence,

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by compromise. A second application on the same ground was held to be barred (*ibid*). Impotency means incapacity to consummate the marriage and not merely infertility (*Majula* v. *Suresh*, A 1977 Delhi 93). Impotency must exist not only at the time of the marriage but also at the time of institution of petition (*Jecronimo Francisco Sacrafamulla Eric D' Souza* v. *Florence Martha D'Souza Nee Fernandes* A 1980 Delhi 275 FB). Marriage which may be declared a nullity for contravening provisions of section 19 may be invalid, but not necessarily void *abinitio* (*Rose Simpson* v. *Binimoy Biswas*, A 1980 Cal 214). Wife is entitled to a decree for nullity of marriage, if she proves the subsisting first marriage of the husband and also proves that the husband married her by misrepresenting that he was a bachelor, (*Mrs. Veena James* v. *Kewal Kishan James*, A 1982 P&H 47 FB). A petition for declaration that the marriage is nullity on the ground that the consent of the petitioner was obtained by fraud and deceitful means is maintainable before the High Court and not District Judge (*Vijayan* v. *Bhanusundari*, A 1995 Mad. 166 SB).

It should further be alleged that there is no collusion or connivance between the husband and the wife. Where the court declares under section 19, the marriage to be null and void, only one final decree should be passed (*Joseph Conan Sow* v. *Dorothy Smow*,1940 ALJ 31).

(3) Judicial Separation

Such decree can be passed on the application of the husband or wife, on the ground of adultery, or cruelty or desertion without reasonable excuse for two years or upwards. One or more of these grounds should, therefore, be clearly alleged with full particulars. The particulars necessary in case of adultery have already been mentioned. Each act of cruelty must be mentioned with date, place, etc., but if the acts have been almost continuous during a particular period, that period alone may be mentioned, thus, "on diverse occasions in the month of February." What particulars are necessary in case of desertion are mentioned below under "Protection Order". On desertion without just cause see *Dharam Dev* v. *Raj Rani*, A 1984 Del 389; *Bipinchandra Jaisinghbai Shah* v. *Prabhavati*, A 1957 SC 176. The consequence of such a decree is a limited one, viz. the wife is, whilst so separated, considered as an unmarried woman for the purposes of contract, wrongs and injuries and suing and being sued in any civil proceeding, and with respect to property which she may acquire or inherit (sections 24 and 25). The

No.....Chowringhee Road, Calcutta.

6. That there is no collusion between your petitioner and her said husband with respect to the subject of this suit.

7. That the said Samuel Robinson and your petitioner both live in the town of Calcutta within the jurisdiction of this court.

Your petitioner, therefore, prays that this court will decree a judicial separation to your petitioner from her said husband by reason of his aforesaid adultery.

No. 104—Like Petition, on Ground of Cruelty

1. That on July 20, 1994, your petitioner was lawfully married to Henry Curtis at Bareilly.

2. That after her said marriage, your petitioner lived and cohabited with her said husband at Bareilly until December 20, 1995 when your petitioner separated from her said husband as hereafter more particularly mentioned, and that your petitioner and her said husband have had no issue of the said marriage.

3. That, since November 26, 1994, the said Henry Curtis habitually conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her and beating her with his fists and with a cane.

4. That on March 26, 1995, the said Henry Curtis abused your petitioner in the coarsest and most insulting language at the house of George Wood at No....., Civil Lines, Bareilly.

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respondent may plead the applicant's adultery, as that is sufficient legal ground for rejecting the application (*John Henry Rhine* v. *Mobel Rhine*, 33 A 500, 8 ALJ 18).

(4) Protection Order

If a husband deserts his wife without a reasonable excuse, and the wife acquires property she may require an order to protect that property from her husband or husband's creditors. She may apply for such order, and should in her petition allege (1) the fact of desertion, (2) that the same was without reasonable excuse, (3) the time of the commencement of desertion, and (4) that the petitioner is maintaining herself by her own industry and property.

The consequence of such a protection order is the same as that of a judicial separation (section 31).

5. That, on morning of April 20, 1995, at their house at Bareilly, the said Henry Curtis violently assaulted your petitioner and dragged her out of the drawing room into the verandah and kicked her.

6. That, on the evening of June 17, 1995, the said Henry Curtis, while at his dinner table, without any provocation threw a knife at your petitioner, thus inflicting a severe wound in her right hand.

7. That, on the morning of June 20, 1995, when your petitioner's brother came to see your petitioner, the said Henry abused your petitioner in the filthiest language and threatened to kill her.

8. That on the afternoon of the said December 20, 1995, your petitioner, by reason of the great and continued cruelty practised towards her by her said husband, withdrew from the house of her said husband to that of her brother, at No....., Civil Lines, Bareilly, and has after that day lived separate and apart from her said husband, and has never returned to his house nor had cohabitation with him.

9. That the said Henry Curtis and your petitioner were at the time of the marriage, and still are, Christians.

10. That the said Henry Curtis and your petitioner both live in the town of Bareilly within the jurisdiction of this court.

11. That there is no collusion between your petitioner and her said husband with respect to the subject to the present suit.

Your petitioner, therefore, prays that this court will decree a judicial separation between your petitioner and the said Henry Curtis.

No. 105—Like Petition, on Ground of Desertion

1. That on August 20, 1985, your petitioner was lawfully married to Edward Burke at the .....Church at Agra.

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(5) Restitution of Conjugal Rights

See also precedent of plaint No. 260 *ante* and notes thereunder. Either the husband or the wife can make a petition for this relief when the other party has, without reasonable excuse, withdrawn from the society of the petitioner. The petition should allege the marriage and cohabitation, and subsequent withdrawal of the respondent from cohabitation without any just cause and should also allege that the withdrawal still continues.

Defence : If marriage is admitted, the only grounds on which the respondent can defend such a suit are those on which he or she could sue for judicial separa-

2. That after her said marriage, your petitioner lived and cohabited with the said Edward Burke at Agra until November 20, 1992 and that your petitioner and her said husband have had one/an issue of their said marriage, one son, named Charles Burke, aged four years.

3. That on the said November 20, 1992, the said Edward Burke deserted your petitioner against her wish and without reasonable excuse, and from that time down of the present, being for the space of two years and upwards, has continued to desert your petitioner.

4. *Same as para 5 in the precedent No.102.*

5. That your petitioner and the said Edward Burke last resided together at Agra within the jurisdiction of this court and your petitioner still resides at Agra.

Prayer (*Same as in the previous precedent*).

No.106—Petition for Protection Order

1, 2, 3 and 5. *Same as in the last precedent.*

4. That, since the desertion by her husband, the said Edward Burke, your petitioner has maintained herself by her own industry (*or*, on her own property), and has thereby and otherwise acquired certain property, consisting of the following :

(i) A house, being premises No.....on the Drummond Road, Agra.

(ii) Half share in *khasra* No.210 measuring 6 *bighas* 2 *biswas* situated in village Shamshabad, pargana and tehsil Kiraoli in the District of Agra.

The petitioner, therefore, prays for an order for the protection of her earnings and property acquired since the said November, 20, 1992, from

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tion or for a decree, for nullity of marriage (section 33). These grounds are mentioned in section 19 and 22.

(6) Damages for Adultery

A claim by husband for such damages may be joined to one for dissolution of marriage or for judicial separation, or may be made in a separate petition. The petitioner should allege the adultery with necessary particulars. In a suit by wife for judicial separation, the husband who is respondent can include in his written statement a claim for damages against the alleged adulterer of his wife (*Mrs. Merely Norun* v. *Henry Donald Natt*, A 1948 All 326).

the said Edward Burke, and from all creditors and persons claiming under him.

No. 107—Petition by wife for Restitution of Conjugal Rights

1 and 2. *Same as in precedent No. 105.*

3. That the said Edward Burke did on the said November 20, 1992, withdrew from cohabitation with your petitioner and has ever since, without any just cause, kept and continued to keep away from her and has also refused, and still refuses, to render conjugal rights.

4 and 5. *Same as in the precedent No. 105.*

Your petitioner, therefore, prays for a decree that the said Edward Burke do take home and receive your petitioner as his wife and render to her conjugal rights.

RESPONDENT'S ANSWERS

No. 108—Respondent's Statement in answer to Petition No. 99

Catherine Robinson, the respondent, by Ahmad Karim, her advocate, in answer to the petition of Samuel Robinson, says that she denies that she had on diverse, or any, occasions, committed adultery with Henry Jackson, as alleged in para 3 of the said petition.

Wherefore the respondent prays that this court will reject the said petition.

No. 109—Co-respondent's Statement in Answer to Petition No. 99

Henry Jackson, the co-respondent, in answer to the petition filed in this court, says that he denies that he committed adultery with the said Catherine Robinson as alleged in para 3 of the said petition or at all.

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(7) Costs

An application by the wife for an order directing the husband to pay to her a sum of money in order to enable her to meet the expenses incidental to the defence of the suit for dissolution of marriage is maintainable under section 7. She is entitled to an order against her husband for payment of her costs to arrange for her defence (*Lewis* v. *Lewis*, A 1949 Mad 877).

Wherefore the said Henry Jackson prays that this court will reject the prayer of the said petitioner and order him to pay the costs of, and incident to, the said petition.

No. 110—Statement in Answer to Petition No. 103

Samuel Robinson, the respondent, by Ram Prasad, his advocate, says :

1. That he denies that he committed adultery with Flora Jenkins as alleged in para 4 of the petition or at all.

2. That the petitioner condoned the said adultery with Flora Jenkins, if any.

3. That he denies that he committed adultery with Emma Nesfield as alleged in para 5 of the petition or at all.

4. That the petitioner condoned the said adultery with the said Emma Nesfield, if any.

PETITIONS UNDER THE HINDU MARRIAGE ACT *(zz)*

No. 111—Hindu Wife's Petition for Dissolution of Marriage by Divorce (section 13)

(See precedent No. 113 also as the grounds for divorce and judicial separation are now identical excepting two additional grounds mentioned in section 13 (1-A) for divorce).

IN THE COURT OF THE DISTRICT JUDGE OF KANPUR

Smt. Champa, daughter of Prem Narain, resident of house No. 1502, Phool Bagh, Kanpur. ... ... *Petitioner*

Versus

Ram Das s/o Bhikari Das, resident of house No. 107/23, Lal Bagh, Lucknow. ... ... *Respondent*

The aforesaid petitioner respectfully submits as follows :

(zz) Proceedings in court under the Hindu Marriage Act (25 of 1955), including claims for restitution of conjugal rights (section 9) (*Vikram Singh* v.

1. That on January 4, 1982, the petitioner was married to Ram Das, respondent, at Kanpur.

2. That at the time of the marriage, the petitioner and said Ram Das were, and still are, Hindus.

3. That the parties have two issues of the said marriage, viz. Krishna Das (a son aged 14 years) and Pushpa (a daughter aged 10 years).

4. That the petitioner and respondent last resided together in February 1993 at Lal Bagh in Lucknow.

5. That the respondent has after the solemnization of the marriage, had voluntary sexual intercourse with one Smt. Ram Piari, as per particulars given below:

(*Or*, has embraced Christianity (*If this be the grounds omit in para. 2 "and still are"*)

(*Or*, has been incurable of unsound mind);

(*Or*, has been suffering from a virulent and incurable form of leprosy);

(*Or*, has been suffering from syphilis in a communicable form, the disease having been contracted from some one other than the petitioner);

(*Or*, has renounced the world and became a *sadhu*);

(*Or*, has not been heard of as being alive for over seven years by those persons who could naturally have heard of it had he been alive (*In such cases the date of last residing together should be more than seven years remote from the date of petition*);

(*Or*, has married Smt. Padmini after his marriage with the petitioner and that wife is still alive);

(*Or*, has after his marriage with the petitioner been guilty of rape (*or*, sodomy or bestiality), as per particulars given below):

Sudershan Singh, A 1961 All 150) commence, like corresponding proceedings under the Indian Divorce Act (4 of 1869), by means of petition and not by presentation of the plaint. Broadly speaking the petitions under the Hindu Marriage Act are to be drafted on the same lines as those under the Indian Divorce Act (vide notes under precedents No. 99 to 110 *ante*). The two Acts use several identical expressions, such as "cruelty", "desertion", "adultery" "cohabitation", "collusion", "condonation", "last resided together", "impotency". Hence case law on any one

(*Or*, has not resumed cohabitation for a period of over one year after decree No.713 of 1994 which the petitioner obtained against him for judicial separation);

(*Or*, has failed to comply for over one year with decree No.715 of 1994 for restitution of conjugal rights which the petitioner obtained against him).

Excepting last two grounds given above, all other grounds for divorce and of judicial separation are now common.

6. That there is no collusion between the petitioner and the respondent, and that the petitioner has neither condoned nor connived at the respondent's conduct.

The petitioner, therefore, prays that the court may be pleased to dissolve the petitioner's marriage with the respondent.

No. 112—Hindu Wife's Petition for Nullity of Marriage (section 11 and 12)

1 to 4. *Same as in precedent No.111.*

Act will be useful for proceedings under the other. Some of the points of difference are noted below. (On divorce among Muslims, see notes on plaints in suits under Mahomedan Law *ante*).

Mental Cruelty can be ground for divorce (*P.C.Mohanan* v.*K.E.Thankamani*, 1995 AIHC 2259 (Ker) DB). Wife throwing child into well, resulting in death, amounted to mental cruelty). Wild allegations imputing adulterous conduct on the other spouse without any basis would constitute cruelty. Mental cruelty is that conduct which inflicts upon the other party such mental pain and suffering as would make it difficult for that party to live with the other. Mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together (*V.Bhagat* v. *Mrs. D. Bhagat*, A 1994 SC 710, 1994 A SCW 45, (1994) 1 SC J 62; *Jayakrishna* v. *Smt. Sureka*, 1995 (3) ALT 207 (AP) DB). Making false allegations by wife in open court about the character of the husband and the family members so as to injure the reputation of the husband amounts to cruelty (*Vimla* v. *Dr. Chandra Prakash*, 1995 MPLJ 975 MP). Continuous demand of dowry from the wife in her matrimonial home amounts to 'cruelty' entitling a wife a decree for divorce (*Sobha Rani* v. *Madhukar Reddi*, A 1988 SC 121; *Pushpa Rani* v. *Vijapai Singh*, A 1994 All 216).

Petitions under the Hindu Marriage Act lie in the District Court within the local limits of whose ordinary civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together. On the meaning of "last resided together" see *Pritma* v. *Mohinder*, A 1984 P & H 305; *Saroja* v. *Ennamval*, A 1965

5. That the respondent had a wife living at the time of the marriage.

(*Or*, That the respondent is the brother of the petitioner's deceased husband and there is no custom or usage governing each of the parties permitting of a marriage between them, and as such the parties are within prohibited degrees of relationship);

(*Or*, That the respondent is the petitioner's mother's brother and there is no custom or usage governing each of the parties permitting of a marriage between them, and as such parties are *sapindas* of each other);

(*Or*, That the parties marriage has not been consummated owing to the impotence of the respondent);

(*Or*, That the respondent was at the time of marriage incapable of giving a valid consent to it in consequence of unsoundness of mind);

(*Or*, That the petitioner's consent to marriage was obtained by the respondent by putting the petitioner in fear of death as per particulars given below. The petitioner secured her release from the respondent's custody only two months ago and has not during the said period of two months lived with him as wife);

(*Or*, That the petitioner's consent to marriage was obtained by the respondent by falsely representing to her that he was a graduate. (*Particulars of fraud must always be given*) The petitioner discovered two months ago that the respondent is not even a matriculate. Since this discovery the petitioner has withdrawn herself from respondent's company and has not lived with him as his wife.

Mys 12; *Jagir Kaur* v. *Jaswant Singh*, A 1973 SC 152. But unlike the proceedings under the Indian Divorce Act, the decisions of the District Court do not stand in need of confirmation by High Court. Customary divorce without resort to court, prevalent among certain communities, does not stand abolished by the Hindu Marriage Act (*Balvinder Singh* v. *Gurpal Kaur*, (1985) 1 SCC 23).

The term 'District Court' means, in any area for which there is a city civil court, that court and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the official Gazette, as having jurisdiction in respect of the matters dealt with in the Act (In U.P., courts of Civil Judge has been empowered, and appeals from their decisions lie to the District Judge and not to the High Court).

A petition under the Act should be verified like a plaint and should contain a statement to the effect that there is no collusion between the petitioner and the other party to the marriage.

6. *Same as in precedent No.111.*

Your petitioner, therefore, prays that this court will declare that the said marriage as null and void.

No. 113—Hindu Wife's Petition for Judicial Separation (section 10)

(*See precedent No.111 also as the grounds for divorce and for Judicial separation are now common except that there are two additional grounds for divorce as indicated in that precedent*).

1-4. *Same as in precedent No.111.*

5. That the respondent has deserted the petitioner for a continuous period of over two years immediately preceding the presentation of the petition, as per particulars given below :

(*Or*, (i) That on November 5, 1994 the respondent abused the petitioner in a very filthy language at his house in the presence of guests and relations and that on the petitioner's protest the respondent kicked the petitioner and gave her a beating.

(ii) That the petitioner is since then living with her brother and has serious apprehension that she will again be beaten, abused and otherwise maltreated if she goes back to the respondent's house);

(*Or*, That the respondent has been suffering from a virulent and incurable form of leprosy);

(*Or*, That the respondent has been suffering from syphilis in

Before proceeding to grant any relief under the Act, it is the duty of the court in the first instance, in every case in which it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconcilation between the parties. In all proceedings under the Act, whether defended or not, the court should, before granting the relief, be satisfied that the petitoner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, that the petitioner has not been accessory to, and has not condoned or connived at, the other party's unchastity, has not condoned the other party's cruelty, that the petition is not collusive and that there has been no unnecessary or improper delay. The court may, and if any party so desires shall, conduct the proceedings in camera. **No petition for dissolution of marriage can normally be presented until after the expiry of one year from the solemnization of marriage.** But the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, entertain a petition for

communicable form, the disease having been contracted from some one other than the petitioner);

(*Or*, That the respondent has been suffering continuously [*or*, intermittently] from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent);

(*Or*, The respondent after his marriage with the petitioner has voluntarily had sexual intercourse with Smt. Ram Piari, a servant of the respondent, as per particulars given below :

6. *Same as in precedent No. 111.*

The petitioner prays that this court will grant judicial separation to the petitioner from the respondent.

No. 114—Hindu Wife's Petition for Restitution of Conjugal Rights (section 9)

1-4. *Same as in precedent No. 111.*

5. That in February, 1993 respondent withdrew from cohabitation from the petitioner and has ever since, without any cause, kept away from the petitioner and has not rendered conjugal obligations.

6. That there is no collusion between the parties and that the petitioner has neither condoned nor connived at the respondent's conduct.

The petitioner prays that this court will order restitution of conjugal rights to the petitioner by directing the respondent to come over to the petitioner and render marital obligations to her.

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divorce before the expiry of the aforesaid period of one year, if the case is of exceptional hardship to the petitioner or of exceptional depravity on the part of respondent. The expressions "exceptional hardship" is not limited to past hardship but includes present and future hardship as well (*Fay* v. *Fay*, (1982) 2 All ER 922). But if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

No. 115—Hindu Husband's Petition for Dissolution of Marriage (section 13)

[*This petition is to be drafted mutatis mutandis, on the lines of precedent of 111, except that 8th and 9th ground given in para 5 shall not apply*].

No. 116—Hindu Husband's Petition for Nullity of Marriage (section 11 and 12) *(aaa)*

(*This petition is to be drafted, mutatis mutandis, on the lines of precedent No.112. The following additional ground will, however, be available to the husband*).

That the respondent was pregnant at the time of marriage from some person other than the petitioner, and this fact was not known to the petitioner at that time.

That the petitioner has refrained from marital intercourse since the discovery of the fact.

When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again. Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage, at least one year has elapsed from the date of the decree in the court of the first instance (section 15). There is no bar against the divorced persons marrying each other after the expiry of the aforesaid period.

During pendency of any proceeding under the Act, the Court may under section 24 allow to the party which has no independent income sufficient for her or his support and the necessary expenses of the proceeding or such expenses and monthly maintenance for the other party as it may deem reasonable. There is conflict of judicial opinion as to whether such maintenance is allowable from the date of commencement of the original proceeding or from the date of an application under section 24.

(aaa) For husband's petition for nullity of marriage on the ground that the respondent was pregnant at the time of the marriage by some person other than the petitioner the proceedings must commence within one year from the date of the marriage.

Defence: In a husband's petition for divorce on the ground of non-resumption of cohabitation after a decree for restitution of conjugal rights the respondent wife may plead that the petitioner himself was responsible for not allowing the respondent to resume cohabitation and vide section 23 (1) (a), cannot take advantage of his own

No. 117—Hindu Husband's petition for Judicial Separation (section 10)

(This petition is to be drafted, mutatis mutandis, on the lines of precedent No. 113).

No. 118—Hindu Husband's Petition for Restitution of Conjugal Rights (section 9)

(Paras 1-4 are to be drafted mutatis mutandis on the lines of paras 1-4 of precedent No. 111).

5. That in February 1993 respondent's brother took her away from the petitioner's house by making a representation that the respondent's younger sister was to be married in the following month.

6. That the respondent has not returned to the petitioner's house notwithstanding the fact that the petitioner went several times to bring her home.

7. That without any cause the respondent is refusing to perform her marital obligations.

8. That there is no collusion between the parties and that the petitioner has neither condoned nor connived at the respondent's conduct.

"wrong" (*Manmohan* v. *Smt. Kailash Kumari*, A 1984 J & K 59). The "wrong" of the petitioner must, however, be something more than mere disinclination to agree to an offer of reunion; it must be serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled (*Saroj Rani* v. *Sudarshan*, (1984) 4 SCC 90). Wife can refuse to live with the husband, if she is able to prove that she was being treated with cruelty or there is a reasonable apprehension in her mind that it will be harmful and injurious for her to live with the husband (*Pushpa Rani* v. *Vajapai Singh*, A 1994 All 216).

In a petition for divorce or judicial separation or nullity, the defence may consist either of a denial of the allegations against the respondent or of a plea that the facts alleged do not amount to a statutory ground for the petition. A plea of desertion may be countered by a plea that the petitioner's own cruelty had compelled the respondent to live apart and that there was no *animus deserendi* (*Rukmini* v. *P.M. Srivivasa*, A 1984 Karn 131). However, if one spouse deserts, it is not the duty of the other to try to effect reconciliation; nor is it necessary that *animus deserendi* should commence simultaneously with living separately, it can commence later (*Bharat Lal* v. *Smt. Ram Kali*, A 1984 All 274). Condonation may also be a good defence, but it comprises of two things, namely, forgiveness of the offence and

This petitioner prays that the court will order restitution of conjugal rights to the petitioner by directing the respondent to come over to the petitioner's house and render marital obligation to him.

No. 119—Petition for Divorce by Mutual Consent *(bbb)*

In re :

1. Prakash Chandra son of, etc.....

and

2. Smt. Rashmi wife of Prakash Chandra, etc.....

—Petitioners.

Petitioners above named state as follows:

1. Petitioners who are Hindus were married according to Hindu rites on 10th February, 1980 at the residence of Sri Mahesh Chandra father of petitioner No.2 at 10, Civil Lines, Dehra Dun.

2. Petitioners thereafter lived as husband and wife at the residence of petitioner No.1 at Meerut within the jurisdiction of this Court for over ten years.

3. Due to certain reasons which petitioners need not set out, strains developed in the mutual relations between the petitioners, and ultimately petitioner No.2 left the house of the petitioner No.1 on 15th April 1990 and has not returned since.

4. Petitioners have thus been living separately for a period of five years and have not been able to live together during this period.

5. Considering all the circumstances including the interest and welfare

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restoration of the offending spouse to the same position as he or she occupied before (*K. Sarbadhikary* v. *A.R. Sarbadhikary*, (1985) 89 CWN 156). Delay in filing the petition may also indicate condonation of adultery or cruelty, but in cases of desertion it may merely show patience of the petitioner (*Rukmini* v. *P.M. Srinivasa* 131).

(bbb) Section 13 B, inserted by Act No. 68 of 1976, provides for divorce by mutual consent. Three grounds are required for a joint petition in this behalf, namely: (i) that the parties have been living separately for a period of one year or more, (ii) that they have not been able to live together, and (iii) that they have mutually agreed that the marriage should be dissolved. As it will be a joint agreed petition no other grounds, such as reasons for disharmony between them, need be set out. Indeed it will not be practicable to do so, for parties are likely to disagree on the same as none would agree to accept the blame for the breakdown of the marriage. In

of their children the petitioners have mutually agreed that their marriage should be dissolved.

6. Parties have agreed in regard to the custody, maintenance and education of their children as follows:

(a)

(b)

(c)

Petitioners pray for a decree for divorce declaring their marriage to be dissolved with effect from the date of the decree.

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a view of ground as (i) aforesaid it is obvious that the discretion of the court under section 14 to entertain a petition for divorce even before the expiry of one year from the marriage in case of exceptional hardship will not be available for exercise in respect of petitioner under section 13 B. If there are any children by the marriage it will be proper and expedient to incorporate some agreed provisions about their custody, maintenance and education. Unless this is done the Court will have to exercise its jurisdiction under section 26, and if the parties do not agree they may have to enter into a contest in that regard.

The mere filing of such a petition does not authorise the Court to make decree for divorce. There is a period of waiting from 6 to 18 months. This period is intended to give time and opportunity to the parties to reflect upon their move. A party to the petition can unilaterally withdraw the consent, the mutual consent spoken by the Section must continue till divorce decree is passed in the case (*Sureshta Devi* v. *Om Prakash*, A 1992 SC 1904).

The expression "have not been able to live together" indicates concept of broken down marriage and no possibility of reconciliation. The expression "living separately", connotes not living like husband and wife. It has no reference to the place of living. The parties may be living under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceeding the presentation of the petition (*Sureshta Devi* v. *Om Prakash*, A 1992 SC 1904).

CLAIMS UNDER MOTOR VEHICLES ACT, 1988.

No. 120—Form of Application for Compensation for Motor Accident Claims *(ccc)*

(*See* Rule 3 of U.P. Motor Accidents Claims Tribunals Rules)

To

The Motor Accidents Claims Tribunal,

.....

I.....son/daughter/widow of.....residing at.....having been injured in a motor vehicle accident hereby apply for the grant of compensation for the injury sustained. Necessary particulars in respect of the injury, vehicle etc., are give below :

Or

I.....widow of.....residing at..... hereby apply as a legal representative, for the grant of compensation on account of death of Sri.....son of Sri.....who died in a motor vehicle accident. Necessary particulars in respect of the deceased and the vehicle etc., are given below:

1. Name and Father's name of the person dead .
2. Full address of the person dead.
3. Age of the person dead.
4. Occupation of the person dead.
5. Name and address of the employer of the deceased, if any.
6. Monthly income of the person dead.

(ccc) Sections 165 to 176 of the Motor Vehicles Act, 1988 provide procedure for award of compensation in claims arising out of motor vehicles accidents. No formal plaint is required to be filed in the civil court. Instead an application is required to be given to the Claims Tribunal. *Ad valorem* court fee is not required: only token court fee is payable even on claims of heavy amounts. A claim petition may be filed by the claimant before the Claim Tribunal (i) within whose jurisdiction

7. Name and age of each of the dependents of the deceased indicating relationship with him, and also monthly average income of the deceased and the source of such income.

8. Does the person in respect of whom compensation is claimed pay income-tax ? If so, state the amount of income-tax (to be supported by documentary evidence).

9. Place, date and time of the accident.

10. Name and address of police station in whose jurisdiction the accident took place or was registered.

11. Was the person in respect of whom compensation is claimed travelling by the vehicle involved in the accident? If so, give the names of places of starting of journey and destination.

12. Nature of injuries sustained.

13. Name and address of the Medical Officer/Practitioner, if any, who attended on the dead.

14. Period of treatment and expenditure, if any, incurred thereon (to be supported by documentary evidence).

15. Registration number and the type of the vehicle involved in accident.

16. Name and address of the owner of the vehicle.

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the accident occured, (ii) within the local limits of whose jurisdiction claimant resides or carries on business or (iii) within the local limits of whose jurisdiction the defendant resides (Amendment Act 54 of 1994).

Although the award of the Tribunal is executable is the same manner as a decree of the court and although various provisions of the C.P.C. have also been applied to proceedings before the Claims Tribunals by various rules made by the various State Governments under section 176 of the Motor Vehicles Act, the provisions of Orders VI, VII and VIII C.P.C. have not been applied. Instead of a formal plaint, a claim in a tabular form which is prescribed by rules made by various State Governments is required to be filed before the Tribunal.

No statutory form is prescribed for a written statement. However, the written statement can also be filed with reference to different particulars mentioned in the tabular form of the claim. The admissions and denials can be recorded against item numbers of the tabular form treating each item number as if it were a paragraph of the plaint. It may thereafter be followed by "Additional Pleas" just as in the case of a written statement filed under Order VIII. While drafting a claim, the form prescribed

17. Name and address of the insurer of the vehicle.

18. Has any claim been lodged with the owner/insurer; if so, with what result.

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in a particular State or Union Territory by the Local Government concerned should be followed. The form prescribed in U.P. has been reproduced herein. The forms prescribed in other States are more or less similar with minor variations. The local rules should, however, be consulted before filing a claim so that there may be no breach or omission.

Originally, the limitation period for filing claim petitions under the Act of 1988 was six months, which on sufficient cause being shown could be extended to 12 months. In any event, this period of 12 months could not be extended in any case. By Amendment Act 54 of 1994 brought into force with effect from 14.11.1994 sub-section (3) of section 166 stands deleted and the resultant position is that after this amendment there is no limitation under the Motor Vehicles Act 1988. The Law of limitation as prevailing at the time of the institution of the claim petition should be applied and not the law prevailing at the time of the accident (*B. Venkamma* v. *D. Narisi Reddy*, 1995 (3) ALT 317 (AP).

The tribunals and courts generally take a sympathetic view so far as the case of the victims and their dependants is concerned and view the pleadings of claimants less strictly than those of defendants (*N.Siwammal* v. *Pandian Roadways Corpn.*, (1985) 1 SCC 18, para 4). However, it will not be safe for a pleader to take such sympathy for granted, and expediency demands that full and proper factual particulars, to the extent known, are given in the first instance and adequate explanation be given for any omission or for any late furnishing of particulars. Likewise, a break-up of different heads of damages, with relevant particulars pertaining thereto, should be given.

Tribunal is not only required to assess compensation and direct the payment thereof, but also is an adjudicator of social justice and required to see that the compensation is properly utilised and man suffering is not deprived of the compensation awarded and would not be spending away the same because he was getting lump sum by making proper arrangement for the amount payable (*Union of India* v. *Preetam Singh*, 1995 ALR 20 (All) (DB).

The provisions of the Fatal Accidents Act (No. 13 of 1855) and the Legal Representatives Act (No. 12 of 1855) are *mutatis mutandis* applied to these claim proceedings (see notes under precedents of plaints No. 202 and 203 for these Act). However Punjab & Haryana High Court has held that in view of section 110 A (old Act of 1939) even legal representatives and dependants other than those enumerated in section 1 of the Fatal Accidents Act can maintain such claim petition (*Parkash Chand* v. *Pal Singh*, A 1985 P & H 329, FB; distinguished, *Hari Chand* v. *M.C.D.*, A 1981 Del 71; *Ramesh Chandra* v. *MPSRTC*, A 1982 MP 165; *Pushpa* v. *State of J & K*, 1977 ACJ 375; *Motilal* v. *Gurbachan*, 1980 ACJ 462 All, and *N.I. Insurance Co.* v. *Shanti Misra*, A 1976 SC 237).

19. Name and address of the applicant.

20. Relationship with the deceased.

The principles of law of tort of negligence and of vicarious liability for tort are applied. Parliament has, however, provided for payment of a limited amount of compensation even where no negligence of the owner or driver of the motor vehicle is proved, vide sections Secs 140 to 144 of Motor Vehicles Act, 1988 (Secs. 92 A to 92E of the old Motor Vehicles Act, 1939). The insurer should also invariably be joined as defendant so that at least a limited amount (section 147) may easily be recoverable. Section 140 of the Motor Vehicles Act entitles a person to claim no fault liability amount without proof of negligence of the driver or the owner (*G.S.R.T. Corporation Ahmedabad* v. *Ramanbhai*, A 1987 SC 1690). On the death of the claimant, the claim regarding damages on account of pains, suffering and mental agony to the deceased will not survive, but the claim regarding loss to the property will survive and the legal representatives of the deceased can continue the claim petition (*Naseeban* v. *Surendra Pal*, A 1996 Raj 91).

Where the name of the insurer is not known to the claimant, interrogatories and discovery should be applied for and the transport authorities' records can also be summoned for ascertaining these particulars with reference to the registration number of the vehicle if known. Where the respondent alleges that some third person and not he is the owner of the vehicle, such third person must be made party to the claim petition (*Leelabai* v. *M.U.K. Nair*, (1989) ACC 286 MP).

In a case of accident caused by tyre burst (*Amruta Dei* v. *State of Orissa*, 1982 ACJ 24) or sudden mechanical breakdown or sudden skidding of the vehicle (*A.P.S.R.T.C.* v. *Sridhar Rao*, 1981 TAC 29; *Swarnalata* v. *Joginderpal*, 1970 ACJ 7; *Oriental Insurance Co.* v. *Satya Dev*, 1981 TAC 177; *Gobald Motor Service* v. *Veleeswami*, A 1962 SC 1). In the absence of any unexpected development, it was for the driver to have explained how the accident happened and in the absence of such explanation the principle of *res ipsa loquitur* (the thing speaks for itself) would apply (*Basthi Kasim Saheb* v. *Mysore SRT Corpn.*, A 1991 SC 487).

Vicarious Liability : If the negligence of the driver or other servant is established or presumed and the servant had acted in the course of his employment, the master is vicariously liable, even though the master may have instructed the driver to be careful, and not to be negligent (*Gobald Motor Service* v. *Veleeswami*, A 1962 SC 1; *Pushpabai Udeshi* v. *Ranjit Ginning Co.*, A 1977 SC 1735, (1977) 2 SCC 745). There is a presumption that a vehicle is driven on master's business and by his authorised agent or servant, though the presumption is rebuttable (*Mannalal* v. *State*, A 1985 MP 263). But the master will not be liable if the servant was stealthily taking the vehicle on a frolic of his own without being at all on his master's business (*Gobald*, supra) or if he was taking an unauthorised passenger in violation of the statutory regulations (*Jiwandas Roshanlal* v. *Karnail Singh*, 1980 ACJ 445; *Sivagami* v. *Mahaboob Nisa Bi*, 1981 ACJ 399, (1981) 1 MLJ 375; see also *M Kandaswami* v. *Chinn[illegible]amy*, A 1985 Mad 290). Where accident has been

21. Title to the property of the deceased.

22. Amount of compensation claimed.

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caused by the proprietor of a garage or workshop to which the car had been entrusted for repairs, such proprietor being an independant contractor and not servant, the owner of the vehicle is not liable (*Devinder Singh* v. *Mangal Singh*, 1981 ACJ 448).

Government's immunity from liability for tortious acts of its servants is confined only to those activities which are part of the sovereign functions of the State. In interpreting what are such activities the courts are now increasingly taking a view more favourable to the citizen than to government. Thus government has been held liable even when the vehicle belonged to the Border Security Force (*Union of India* v. *Abdul Rahman*, A 1981 ACJ 348 J & K ; *Commandant* v. *Pankajini*, A 1984 Cal 405); also in case of an ambulance van transporting a victim of stabbing (*State of Tamil Nadu* v. *Shamsuddin*, 1981 ACJ 244, (1981) 1 MLJ 17, 1981 TAC 520); another department's vehicle being sent to police department for urgent police duties (*Chief Secretary* v. *Chockalingam*, 1981 TAC 175); military truck carrying ration for soldiers (*Rajiv Kumar* v. *Union of India*, 1981 TAC 526). The Orissa and Andhra Pradesh High Courts have gone further and held that government is liable even where the vehicle was being used in connection with sovereign functions (*Amruta Dei* v. *State of Orissa*, 1982 ACJ 24 following *Government of A.P.* v. *Padma Rani*, ACJ 462). Vicarious liability of the State for the negligent acts of its officers, see *N.Nagendra Rao & Co.* v. *State of A.P.*, A 1994 SC 2663).

Insurer may in his defence plead and prove that the insurance policy covered only Act liability and not unlimited liability; as the terms of the policy are in its own special knowledge a presumption may be raised against it if the policy is not proved (*National Insurance Co.* v. *Narendra Kumar*, A 1980 All 397; following *Shaikhupura Transport Co.* v. *N.I.T. Insurance Co.*, A 1971 SC 1624; and distinguishing *Jayalakshmi* v. *Ruby Insurance Co.*, A 1971 Mad 143 (FB); see, however, *Concord of India* v. *Inacio*, 1980 ACJ 514 Goa). In case of comprehensive insurance the liability of the insurer is unlimited (*Oriental Insurance Co.* v. *Ganapathi*, 1981 M 299). Even where the contractual liability fixed is lesser than the statutory liability, the Insurance company is bound to pay compensation upto statutory liability (*Oriental Insurance Co. Ltd.* v. *G. Padmawati*, 1995 AIHC 3184 (Bom) (DB). For payment of no fault liability compensation, absence of negligence on the part of the person suffering injury or permanent disability or death, is not a condition precedent (*K. Nandakumar* v. *Managing Director, Thanthal Periyar Transport Corporation*, 1996 (2) SCC 736). The liability of the insurer for "any one accident", as mentioned in section 95 (2) (a) of Motor Vehicles Act of 1939 (section 147 (2) of Act of 1988) has been so interpreted that there are as many accidents as persons involved, i.e., victims (*Motor Owners Insurance Co.* v. *Jadavji K. Mode*, A 1981 SC 2059).

Insurer is not liable if the driver of the vehicle was neither the person insured nor his servant (*Shankar Rao* v. *Babulal*, A 1980 MP 154) or if he had no regular

23. Any other information that may be necessary or helpful in the disposal of the claim.

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driver's licence (*Ambujam* v. *N.I.Ins. Co.*, 1981 ACJ 175, (1980) 2 MLJ 570). There is conflict of opinion on onus regarding proof of licence (*N.I.Ins. Co.* v. *Sugantha*, 1981 ACJ 302, (1980) 2 MLJ 572: on insurer; *N.I.Ass. Co.* v. *Sushila Devi*, 1981 ACJ 119 Raj : on insurer; *Anand Ins. Co.* v. *Hasanali*. 1975 ACJ 471 MP : on claimant). Whether driver was holding valid licence, onus lies on the driver to prove (*Oriental Insurance Co. Ltd., Patiala* v. *Paro*, 1995 AIHC 2586 (P & H) overruled *New India Assurance Co. Ltd.* v. *Surender Paul*, 1990 (1) PLR 318).

Where a driver is having learner's licence, he cannot be regarded as a duly licensed driver. The Insurance Company held not liable for compensation (*New India Assurance Co. Ltd.* v. *Mandar Madhav Tambe*, A 1996 SC 1150, (1996) 2 SCC 328).

While fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money, whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. Pecuniary damages include expenses incurred by the claimant :

1. Medical attendance;
2. Loss of earning of profit upto the date of trial;
3. Other material loss.

Non-pecuniary damages may include :

(i) damages for mental and physical shocks, pain, suffering, already suffered or likely to be suffered in future;

(ii) damages to compensate for the loss of amenities of life;

(iii) damages for the loss of expectation of life;

(iv) inconvenience, hardship, discomfort, disappointment, frustration and mental strain in life.

Damages in case of injury may be claimed for pain and suffering (*K.A. Kurup* v. *Surumaran*, 1980 TAC 444; *Deepi Tewari* v. *Banwarilal*, 1966 ACJ 217) apart from compensation for medical expenses and for loss of earning (*Rajasthan S.R.T.C.* v. *Om Prakash Gupta*, 1982 TAC 34 (Raj), 1981 ACJ 332; *Ayub Yusufbhai* v. *Prabhudas*, 1981 ACJ 166 Guj; *Bhupendra Kumar* v. *O.N.G.C.*, (1981) 2 LLJ 126 Guj). In case of death the dependants mentioned in section 1 of the Fatal Accident Act, one may claim compensation for funeral expenses, loss of expectation of life, loss of estate and pecuniary loss of dependants. While calculating pecuniary loss to dependants, the amount the deceased would have earned less the amount he would have spent on himself is capitalised. Thereafter a percentage is deducted in lieu of lump sum payment which would be available for immediate investment on market rates of interest then prevalent. At the same time allowance has to be made for expected inflation in future. These general principles are laid down in the leading

I,.....solemnly declare that the particulars given above are true and correct to the best of my knowledge.

Signature or thumb-impression
of the applicant.

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cases of *Gobald Motor Service* v. *R.M.K.Velu*, A 1962 SC 1; *Sheikhupura Transport Co.* v. *N.I.T. Ins. Co.*, A 1971 SC 1624; *Manjushri Raha* v. *B.L.Gupta*, (1977) 2 SCC 174; *Municipal Committee Delhi* v. *Subhagwanti*, A 1966 SC 1750; *R.D.Hattangadi* v. *Pest Control (India) Pvt. Ltd.*, A 1995 SC 755, ALR 1995 (25) 170 (SC), 1995 A SCW 243, 1995 (1) SCC 551). Decisions on what multiplier of annual savings (i.e., income of deceased minus expenditure on himself) should be adopted while capitalising it are not uniform; the age, the health of the deceased, his future prospects in life, the average longevity in his family, the return on investment one gets at current rates, and the possibility of remarriage of widow are all relevant factors (*M.P.S.R.T.C.* v. *Sudhakar*, A 1977 SC 1189, 1977 ACJ 290, (1977) 33 SCC 64; *Manjushri Raha*, supra; *C.K.S. Iyer* v. *T.K.Nair*, A 1970 SC 376; *Mallett* v. *Mc Monagle*, 1969 ACJ 312 (HL); *Sheikhupura Transport Co.* v. *N.I.T. Ins. Co.*, A 1971 SC 1624). The amount received by the dependants from other sources such as life insurance amount, *ex gratia* payments, etc. are, according to most High Courts, not deducted even though in India no amendment to that effect has been made in the Fatal Accidents Act on the lines of the one made in Britain in 1959 [*Bhagwanti Devi* v. *Ish Kumar*, 1975 ACJ 56; *Sushila Devi* v. *Ibrahim*, 1974 ACJ 150, A 1974 MP 181; *Automobiles Transport* v. *Dewalal*, A 1977 Raj 121; *L.I.C.* v. *Kashturi*, A 1973 Guj 216; *Amarjit Kaur* v. *Vanguard Ins.*, 1981 ACJ 495; *Bhagat Singh Sohan Singh* v. *Om Sharma*, 1984 Com Cas 286 (P & H-FB), dissenting from *Orissa S.R.T.C.* v. *Shibanand*, 1979 ACJ 45 (Ori); *Parvatamma* v. *Syed Ahmad*, 1977 ACJ 72 (Karn)]. Ex gratia payment made voluntarily either by tort feasor or by any body cannot be deducted from compensation fixed for complainants (*A.P. S.R.T.C.* v. *B. Krishnaji Rao*, 1994 (2) ALT 338 AP). Family pension received by dependants is, however, to be deducted. No damages are claimable on account of solatium (*Asha Rani* v. *Union of India*, 1984 Com Cas 268; *Lachhman Singh* v. *Gurmeet Kaur*, A 1979 P & H 50 (FB); *State of H.P.* v. *Dole Ram*, 1981 ACJ 219). Damages can be claimed in respect of death of wife who performed household duties (*Sunny* v. *Darshan lal*, A 1985 P & H 343) or unmarried daughters as well (*Rupinder* v. *Jaswant*, A 1985 P & H 366). Adult sons who were not dependant of deceased father cannot, however, claim damages (*Sahyogata Devi* v. *Lalit Kumar*, A 1985 P & H 349).

The determination of compensation cannot be in a strait-jacket formula. What compensation is to be awarded depends upon the nature of injuries, status of person, effect of injury on the person in future and also the mental and physical pain that the injured has sustained (*United India Insurance Co. Ltd.* v. *Brijesh Kumar Jain*, 1995 ALJ 399 (All) (DB). Normal life expectancy should be assumed as 65 years. Where no payment was made to the widow of the deceased till the hearing

No. 121—Application for Reference to Court under Land Acquisition Act *(ddd)*

Before the Collector, Varanasi

Reference application No. of 199

A.B. .....*Petitioners*

Versus

1. State of U.P., through Collector, Varanasi,
2. C.D.

Opposite Parties

Subject : Reference under section 18, Land Acquisition Act

Ref : Award No.30 dated 30.3.95 in respect of Case No.5 of 1993

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of the appeal, the deduction for lumpsum payment was held unjustified (*Urmilla Pandey* v. *Khalil Ahmed*, A 1994 SC 2405).

The owner of vehicle was driving and driver accompanied in course of hi duty. The insurer is liable to compensate a workman driver to the extent provided under the Workmen's Compensation Act. (*New India Assurance Company Ltd.* v. *Raj Kumari*, A 1995 All 1 DB, 1995 ALJ 47 All). Compensation cannot be denied on technical grounds (*Bojja Raju* v. *The United India Insurance Co.*, 1994 (2) ALT 76 (AP).

Comprehensive policy of vehicles under section 95 (2) (b) of old Act entitles the owner to claim reimbursement of the entire amount of loss or damage suffered upto the estimated value of the vehicle. It does not mean that the limit of liability with regard to third party risk becomes unlimited or higher than the statutory liability. For this purpose, a specific agreement is necessary (*New India Assurance Company Ltd* v. *Shanti Bai*, A 1995 SC 1113, JT 1995 (2) SC 95, 1995 ALR 504 (SC).

(ddd) The Collector's award is only an offer on behalf of Government and it is the right of the claimant, if dissatisfied with it, to seek adjudication by the Court. This can be done by asking the Collector to make a reference under section 18, Land Acquisition Act. Mere recording of protest at inadequacy of amount while

Sir,

1. Land detailed in notification No.____dated _____ under section 6, Land Acquisition Act published in U.P. Gazette dated was acquired after earlier publication of notification under section 4 of the Act in Gazette dated

2. Out of the said land the petitioner is owner of land (with buildings and/or trees situated thereon) indicated by *khasra* survey Nos..... (*or*, bounded as follows).

3. The Special Land Acquisition Officer has been pleased to award a sum of Rs.....to the claimant as compensation for his share of the same, and Rs.....as compensation to CD (opposite-party No. 2) for his share.

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withdrawing it is not enough unless a request for reference is made; a valid reference is the condition precedent for the court to exercise jurisdiction (*Kana Navanna* v. *R.D.O.*, A 1955 Mad 23). The Courts have not always insisted on strictly formal compliance with this provision, and often even informal communications have been accepted as references. For instance, a letter by owner of land to the Collector saying that he would not accept the amount but would contest it in court, even though not containing a formal request for reference to court, was held a sufficient reference (*Krishnammal* v. *Collector*, A 1927 Mad 282; *In re Rangaswami*, A 1964 Mad 435) so also a receipt for the amount with endorsement asking for reference of the dispute to court (*P.M.Association* v. *Collector*, A 1964 AP 264). A request for reference without specifying any grounds was held to be an implied objection to adequacy of the amount (*P.Chandrashekhara* v. *Collector*, ILR (1966) 2 Mad 428). Want of a formal prayer for reference was held not fatal in *Kelappan* v. *State of Kerala*, 1968 Ker LT (SN) 7. The court has jurisdiction to decide whether the reference was made beyond the period prescribed by the proviso to sub-section (2) of section 18 of the Act, and of it finds that it was so made, decline to answer reference (*Md. Hasnuddin* v. *State of Maharashtra*, A 1979 SC 404, (1979) 2 SCC 572 overruled AIR 1929 All 769; AIR 1963 All 556 FB; AIR 1959 All 576 FB; AIR 1943 Mad. 327 and AIR 1958 Punj 490). Thus a mere letter to the Collector disputing sufficiency of the amount but not saying anything about reference to court was held not amounting to a reference u/s 18 (*State of Kerala* v. *C.R.Viran*, A 1984 Ker 229). The application should specifically require the Collector to make a reference and contain objections which may relate to measurement of land, amount of compensation, persons to whom payable or apportionment and also the grounds of such objections. The petitioner who received compensation without making protest against the award shall not be entitiled to make reference under section 18. Protest made after accepting the compensation under an award has no consequence.

4. The petitioner objects to the award on the grounds appearing in the following paragraphs.

5. The petitioner has been wrongly taken to be a lessee of the land and CD as lessor, whereas in fact the petitioner is full owner of the land.

(*Or*, The petitioner has wrongly been shown as owner of one-third share whereas his actual share is one half. The land originally belonged to.....who died on.....leaving the petitioner and CD as heirs. The relevant pedigree is shown below :)

Pedigree

(*Or*, The petitioner has wrongly been shown as owner of land alone whereas actually he is owner of the buildings and trees as well).

6. The area of the land acquired has been wrongly shown as.....sq. metres instead of.....sq. metres.

7. The market value of the land has been wrongly shown as Rs.....per sq. metre instead of Rs.....per sq. metre. Reliance has been wrongly placed by the Special Land Acquisition Officer on sale-deeds of dates much earlier than the date of notification under section.

The onus lies on the claimant who is in the position of plaintiff to adduce necessary and relevant evidence in proof of the objection for higher compensation (*K.Posayya* v. *Special Tahsildar*, A 1995 SC 1641). The burden lies on the claimant to prove the prevailing market value as on the date of notification under section 4 (1) of the Act (*M.V.K. Gundarao* v. *Revenue Divisional Officer*, 1996 (3) SCC 129).

In reference under section 18 of the Act, the beneficiary for whose benefit the land is being acquired is a necessary party (*Victoria Xavier* v. *Greater Cochin Development Authority*, A 1993 Ker 95 (DB); *M.P.Electricity Board* v. *Rukmanibai*, A 1992 MP 50; *Nevely Lignite Corpn. Ltd.* v. *Special Tahsildar*, A 1995 SC 1004; 1995 (I) SCC 221; *Gujarat Housing Board* v. *Nagajibai*, A 1986 Guj 81 FB), the person who have occupancy rights in the land have a right to be impleaded as party to the proceedings (*Sushila Appasaheb Mangaj* v. *Assistant Commissioner*, 1995 (2) Ker LJ 545 Kant). Every person whether a government owned company or private company for whom the land is acquired is a "person interested" and notice to it is necessary (*Steel Authority of India Ltd.* v. *State of Kerala*, A 1996 Kerala 166 DB). A person who was not a party to the proceedings before the land acquisition officer, is not a necessary party before the Civil Court in reference under section 18 of the Act (*Amar Singh Yadav* v. *Shanti Devi*, A 1987 Pat 191 FB).

Simultaneous publication of notification under S. 4 (1) and declaration under section 6 of land acquisition is not illegal (*Ghaziabad Development Authority* v.

Those sale deeds relate to much larger areas of land while smaller plots fetch much more price. Those sale deeds relate to less well situated land.

8. The value of the trees which was Rs.....has been wrongly excluded.

Jan Kalyan Samiti, Sheopuri, Ghaziabad, 1996 (2) SCC 365). In the case of reference under this Act by the Collector, the reference Court cannot go behind reference and declare that notificaition under section 4 (1) and declaration under section 6 are null and void or illegal. The duty of the Court is confined vis-a vis the provisions contained under sections 11, 18 and 20 to 23 of the Act (*Balram Chandra* v. *State of U.P.*, 1995 All LJ 1161, A 1995 SC 1552, (1995) 3 SCC 723).

On principles for determining market value, see *Deepchand* v. *State of U.P.*, (1980) 3 SCC 231; *Bangaru Narasingha Rao* v. *R.D.O.*, (1980) 1 SCC 575; *Vijay Kumar* v. *Maharashtra*, (1981) 2 SCC 719; *State of Kerala* v. *Hassan Koya*, A 1968 SC 1201; *Union of India* v. *Shanti Devi*, A 1983 SC 1190, (1983) 4 SCC 542; *Saheb Singh* v. *Amritsar Imp. Trust*, A 1982 SC 940; *Krapa Rangaish* v. *Sp. Dy. Collector*, A 1982 SC 877. Where the land acquired is large tracts of land, stray sale-deeds of small pieces of land cannot form the basis for determination of compensation. For duty of reference Court, see *K Posayya* v. *Special Tahsildcr*, (1995) 2 M.C.J. (SC) 72, A 1995 SC 1641. Land Acquisition Act expressly enjoins to omit consideration of future use of land or potentialities of the neighbouring lands on account of the acquisition in determining compensation (*State of Orissa* v. *Brij Lal Misra*, 1995 (III) C.C.C. 150 (SC).

In order to establish market value of the acquired land evidence of comparable sale transactions of the land acquired or of the lands in the neighbourhood possessed of similar potentiality or advantages has to be filed. Entry of price in the mutation record is not admissible evidence. Original or copies of sale transactions constitute admissible evidence (*Major Pakhar Singh Atwal* v. *State of Punjab*, A 1995 SC 2185). The court is not to award any amount in excess of the amount claimed (*State of Punjab* v. *Raman Rai*, (1995) 5 SCC 610).

The Collector or the Court who determines compensation for the land as well as the fruit bearing trees cannot determine them separately. The compensation is the value of the acquired land. The market value is determined on the basis of the yield. Under no circumstances the Court should allow the compensation on the basis of the nature of the land as well fruit bearing trees. When market value is determined on the baiss of the yield from the trees or plantation, 8 years' multiplier is appropriate multiplier. For agricultural land 12 years' multiplier is suitable multiplier (*State of Haryana* v. *Gurcharan Singh*, JT 1995 (2) SC 345).

A sale-deed executed after the notification under Sec. 4 (1) of the Land Acquisition with intent to inflate the market value of land cannot be taken into consideration (*K. Posayya* v. *Special Tahsildar*, A 1995 SC 1641).

The landowner who did not file appeal against the judgment delivered in a reference under Sec. 18 of the Act has no right to apply for re-determination of

9. The value of the building has been wrongly shown as Rs.....instead of Rs..... First class bricks were actually used while value of third class bricks has been calculated. Depreciation has been wrongly inflated as 50% although the building was only 15 years old and

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compensation under Sec. 28A of the Act (*G.Krishna Murthy* v. *State of Orissa*, A 1995 SC 1436; *Babia Ram* v. *State of UP*, (1994) 7 JT (SC) 377, A 1995 SCW 65). An agreement for sale does not confer any title, the purchaser in possession of the land on the basis thereof is not entitled to any compensation (*Sunil Kumar Jain* v. *Kishan*, A 1995 SC 1891, 1995 (3) CCC 108, (1995) 4 SCC 147).

The liability to pay interest on the amount of compensation determined under section 23 (1) continues to subsist until it is paid to the owner or interested person or deposited into court under section 34 read with section 31. The liability to pay interest on the excess amount of compensation determined by the civil court under section 26 over and above the compensation determined by the Collector/ Land Acquisition Officer under section 11 subsists until it is deposited into court. **The computation of the interest should be calculated from the date of taking possession till date of payment or deposit** in terms of section 28, as the case may be (*Prem Nath Kapur* v. *National Fertilizer Corpn. of India*, (1996) 2 SCC 71 at 78). An opportunity of hearing to the landowner under section 5-A (2) of the Act is mandatory (*Rambhai Lakhimbhai Bhakt* v. *State of Gujarat*, A 1995 SC 1549, 1995 (3) SCC 752).

The Court has no power to impose any condition to pay interest in excess of the rate prescribed by the statute as well as for a period anterior to the publication of section 4 (1) of the Act (*Union of India* v. *Budh Singh*, 1995 (III) CCC 292 (SC). Declaration under section 6 published within one year of last date of local publication under section 4 (1) is not invalid (*Rambhai Lakhanbhai Bhakt* v. *State of Gujarat*, A 1995 SC 1549, 1995 (3) SCC 752).

The Land Acquisition Act is a self-contained Code and it does not speak of payment of any court fee. It requires only that the application should be made within the limitation prescribed either in clause (a) or (b) of sub-section (2) of Section 18 of the Act (*Kashiram Namdeo Zambaro* v. *State of Maharashtra*, 1996 (I) SCC 289). Where a Development Authority, not being a claimant prefer an appeal seeking avoidance of amount of higher compensation awarded by the reference court, the appellant was required to pay ad valorem court fee as the provisions of Art. 11 of Schedule 2 of the Court Fees Act are not applicable (*Indore Development Authority* v. *Tarak Singh*, A 1995 SC 1828).

Limitation prescribed by the proviso to section 18 for an application for reference is (a) six weeks from the date of the award if the award was made in the presence of the claimant; (b) in other cases, six weeks of the receipt of the notice from the Collector under section 12 (2). or within six months from the date of the award whichever is earlier (*State of Punjab* v. *Qaisar Jehan*, A 1963 SC 1604). The Court cannot act on an invalid or time-barred reference (*Md. Hasnuddin* v. *State of Maharashtra*, A 1979 SC 404, (1979) 2 SCC 572). On the question whether Collector can condone the

prices have appreciated during that period.

Prayer

It is prayed that a reference be made to the Court of the District Judge for adjudication of these objections and for award of Rs.....as compensation besides solatium and interest to the petitioner.

Petitioner

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delay in the application u/s 5 Limitation Act, there is conflict of judicial opinion (Yes : *Mohan Vatsa* v. *State*, A 1985 Guj 115; No : *Prabhakar* v. *P. Y. Dehspande*, A 1983 Bom 342).